

No. 83867-4

THE SUPREME COURT OF THE STATE OF WASHINGTON

JOSHUA HARRIS,

Petitioner,

v.

HONORABLE EDSONYA CHARLES, DIRECTOR OF KING COUNTY ADULT DETENTION and CITY OF SEATTLE,

Respondents.

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BRIEF OF AMICUS CURIAE OF THE WASHINGTON DEFENDER ASSOCIATION

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TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

ISSUES TO BE ADDRESSED BY AMICUS 1

ARGUMENT 2

 I. The dissimilar treatment of misdemeanants with respect to
 crediting time served on electronic home detention is
 arbitrary and violates equal protection 3

 II. Both statute and case law support requiring courts to credit
 electronic home detention for time served. 11

 III. Crediting electronic home detention for all misdemeanor
 sentences is an effective punishment that effectively
 rehabilitates persons and save money for the State. 14

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Harris v. Charles, 151 Wn.App. 929, 214 P.3d 962 (2009)5, 8, 14, 15

Madison v. State, 161 Wn.2d 85, 163 P.3d 757 (2007).....3

Reanier v. Smith, 83 Wn.2d 342, 517 P.2d 949 (1974).....6

State v. Anderson, 132 Wn.2d 203, 937 P.2d 691 (1997)8, 9

State v. Anderson, 151 Wn.App. 396, 212 P.3d 591, 593 (2009)10

State v. Ashbaker, 82 Wn.App. 630, 919 P.2d 619 (1996)4, 7, 11, 12

State v. Billie, 132 Wn.2d 484, 939 P.2d 691 (1997)3, 4

State v. Bowen, 51 Wn.App. 42, 751 P.2d 1226, review denied, 111
Wn.2d 1017 (1988).....6

State v. Handley, 115 Wn.2d 275, 796 P.2d 1266 (1990).....3

State v. King, 149 Wn.App. 96, 202 P.3d 351 (2009).....3

State v. L.W., 101 Wn.App. 595, 6 P.3d 596 (2000)7

State v. Speaks, 119 Wn.2d 204, 829 P.2d 1096 (1992)..... passim

STATUTES

Laws of 2005.....5

RCW 46.61.505511, 18

SMC 11.56.025..... 11

OTHER AUTHORITIES

Dorothy K. Kagehiro, Psycholegal Issues of Home Confinement, 37 St. Louis U. L.J. 647, 657 (Spring 1993).....5

Ling Song & Roxanne Lieb, et al., Washington State Institute for Public Policy, Recidivism: The Effect of Incarceration and Length of Time Served (1993)..... 15, 16, 17

Local Reform Efforts, Judicial Resource Efficiencies18

Orsagh, T. & Chen, J.R., The Effect of Time Served on Recidivism: An Interdisciplinary Theory, 4 J. Quantitative Criminology 155 (1988).....15

State of Washington Sentencing Guidelines Commission, Adult Sentencing Guidelines Manual I-vii (2008).....13

Thurston County DUI/Drug Court Program, Data and Outcomes.....18

Wheeler, S., Socialization in Correctional Communities, 26 Am. Soc. Rev. 697 (1961).....17

RULES

CrR 3.2.....6, 9

CrRLJ 3.2.....6, 9

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment.....3

Washington Constitution, Article I, section 12.....3

INTEREST OF AMICUS CURIAE

The Washington Defender Association ("WDA") is a statewide non-profit organization with 501(c)(3) status. WDA has more than a thousand members. Membership is comprised of public defender agencies, indigent defenders and those who are committed to seeing improvements in indigent defense.

One of the primary purposes of WDA is "to improve the administration of justice and to stimulate efforts to remedy inadequacies or injustice in substantive or procedural law." WDA advocates on issues of constitutional equal protection and due process under the laws of the State of Washington and the United States. WDA and its members have previously been granted leave to file amicus briefs on issues relating to these and other issues relating to criminal defense and indigency.

ISSUES TO BE ADDRESSED BY AMICUS

- I. Whether granting trial courts the discretion to deny jail credit for misdemeanants who have served time on electronic home detention ("EHD") violates equal protection when offenders charged with felonies and juveniles receive credit.
- II. Whether statute and case law require that electronic home detention be credited for all misdemeanor offenses.

- III. Whether granting credit for electronic home detention improves rehabilitative efforts and is cost effective.

STATEMENT OF THE CASE

This brief relies upon the appellant's statement of the case, which appears to be fully supported by the record of the proceedings below.

ARGUMENT

WDA asks this court to find that denying credit for electronic home detention ("EHD") for persons convicted of misdemeanors in courts of limited jurisdiction violates the 14th Amendment of the United States Constitution and Article I, § 12 of the Washington State Constitution. The decision to deny EHD is not only arbitrary, but stands in contrast to other statutes and case law, which require that time served on EHD to be credited for convicted felons and juveniles. Allowing credit for EHD upholds principles of justice, as a cost effective way to reduce recidivism. This court should find that the arbitrary denial of EHD for some persons serving time for misdemeanor offenses violates equal protection principles and should be found to be unconstitutional.

- I. The dissimilar treatment of misdemeanants with respect to crediting time served on electronic home detention is arbitrary and violates equal protection

Equal protection is guaranteed by both the Washington State and Federal Constitutions. US CONST., amend XIV; Wash. Const., art. I, § 12. The equal protection clause is violated where persons similarly situated with respect to the purpose of the law do not receive similar treatment. State v. Blilie, 132 Wn.2d 484, 495, 939 P.2d 691 (1997). Equal protection claims not involving a suspect or semi-suspect class, or a fundamental right, are subject to a rational basis review. Id. "The rational basis test requires that the challenged law (1) rest on a legitimate state interest and (2) be rationally related to achieving that interest." State v. King, 149 Wn.App. 96, 103, 202 P.3d 351 (2009) (citing Madison v. State, 161 Wn.2d 85, 103, 163 P.3d 757 (2007)). The burden is on the defendant to establish they are similarly situated to other persons. State v. Handley, 115 Wn.2d 275, 289-90, 796 P.2d 1266 (1990).

- A. People convicted of misdemeanors, felonies, and juvenile offenses should be considered part of the same class for purposes of electronic home detention.

While both parties assume Harris' case is subject to rational basis review, it is not clear that it should be. There is no principled distinction with respect to the use of EHD between people

convicted of misdemeanors and felons. They should be seen as one class, instead of merely similarly situated under the law for purposes of EHD. Unlike Billie, where the legislature made a clear distinction between felonies and misdemeanors, the legislature makes no distinction with respect to EHD. The distinction here is drawn by the courts, under the guise of sentencing discretion and departs from the rule adopted throughout the adult and juvenile criminal statutes that EHD must be credited for time served.

In support of this argument, the court should look to legislative intent, which can be seen in the Sentencing Reform Act (SRA) and Juvenile Justice Act (JJA) and the supporting case law. These affirm that EHD should be credited as time served for all convicted persons. See State v. Speaks, 119 Wn.2d 204, 829 P.2d 1096 (1992) (holding under the SRA time served on EHD must be credited); State v. Ashbaker, 82 Wn.App. 630, 919 P.2d 619 (1996) (holding under the JJA time served on EHD must be credited). There is no effective distinction between persons convicted of misdemeanors and all other convicted persons. The court should be wary of applying the rational basis analysis to differentiate between two groups of people who have both been convicted of crimes and are subject to the same EHD sentence.

- B. It is a violation of equal protection to deny misdemeanants credit for electronic home detention when all other convicted persons receive such credit.

If the court does apply the rational basis test, the court should find that this procedure violates equal protection. A defendant serving time on EHD is similarly situated to all other defendants serving time on EHD. This is the true regardless of the nature of the charge, be it felony, misdemeanor, or juvenile. EHD, when court imposed on *any* defendant, is a significant restriction on individual liberty and freedom. See Dorothy K. Kagehiro, Psycholegal Issues of Home Confinement, 37 ST. LOUIS U. L.J. 647, 657 (Spring 1993) ("Not only might electronic home monitoring in effect convert the home from a primary territory into a public territory, but it might also convert the home into a Skinner box."). EHD is a deprivation of individual liberty that "[t]he legislature believes . . . , as an alternative to incarceration, is a proper and cost effective method of punishment and supervision for *many* criminal offenders." Harris v. Charles, 151 Wn.App. 929, 938 n. 4, 214 P.3d 962, 967 n.4 (2009) (emphasis added) (quoting Laws of 2005, ch. 435, § 1).

A defendant, whether charged with a misdemeanor or felony, is subject to the same standards for being placed on EHD.

CrR 3.2(b)(6); CrRLJ 3.2(b)(6). Similarly, due process and equal protection require that defendants, whether convicted of a felony or misdemeanor, receive credit for pretrial detention. Reanier v. Smith, 83 Wn.2d 342, 349, 517 P.2d 949 (1974). For purposes of pretrial confinement, to include EHD, felons and misdemeanants are more than similarly situated. The two groups are treated the same, and are for all intents and purposes one class. However, they continue to be treated dissimilarly with respect to crediting EHD as time served.

The focus on the policy behind sentencing by the respondents and the Court of Appeals is misplaced. This case does not focus on the issue of appropriate sentences, but on whether a person who has a sentence imposed upon them has the right to receive credit for EHD only when they have been convicted of a felony or juvenile offense. While there are "policy reasons for distinguishing between felony sentencing and sentencing for gross misdemeanors," these policy reasons have no bearing on whether EHD time should be credited toward a sentence once that sentence has been imposed. State v. Bowen, 51 Wn.App. 42, 47, 751 P.2d 1226, review denied, 111 Wn.2d 1017 (1988). The issue in this case is not sentencing. The issue is whether credit should be

afforded for time already served on EHD only when a person has been convicted of a felony or juvenile offense.

Focusing on sentencing differences between misdemeanants and felons and the policies reasons for those differences confuses the issue. In so doing they fail to articulate a rational basis for the trial court's distinction between misdemeanants and *all* other convicted criminals in not following statutory and case precedent requiring EHD to be credited as time served.¹ What remains is an arbitrary and capricious distinction between misdemeanants and *all* other convicted persons. The dissimilar treatment of misdemeanants, as compared to all other criminals, with respect to crediting EHD time served is arbitrary, and violates equal protection by creating uncertainty in whether time served on EHD will be credited towards a sentence and double punishment for those who are denied credit for time already served on EHD. The court should find that denying credit for EHD

¹ To be sure, sentencing differences, and policies therefore, also exist between the juvenile and felony systems. See State v. L.W., 101 Wn.App. 595, 601, 6 P.3d 596 (2000) ("While the goals of the [SRA] are overwhelmingly punitive, the goals of the JJA . . . reflect[] an intent to protect community safety while also responding to the needs of the juvenile offenders.") However, these two groups are treated similarly for purposes of crediting EHD as time served. See Ashbaker, 82 Wn.App. at 633 (citing Speaks).

time served to misdemeanants violates equal protection with respect to felons and juveniles.

- C. It is a violation of equal protection for trial courts to credit electronic home detention as time served for some misdemeanants and not others.

This court should also find that due process is violated by leaving it to the discretion of the trial court to determine which misdemeanants are to be granted credit for EHD. There should be no arbitrary distinction as to whether a person will be afforded credit.² If upheld, this decision will lead to similarly situated misdemeanants being treated dissimilarly under the law. And where two defendants in the same group are treated differently with respect to the law there is a violation of equal protection. State v. Anderson, 132 Wn.2d 203, 209, 213, 937 P.2d 691 (1997) (citing Speaks).

Like Anderson, where felons were treated differently based solely on whether they served EHD pre-conviction or post-conviction and this court held that granting credit for EHD served

² In Seattle Municipal Court, it is common practice for judges to grant misdemeanants credit for time served on EHD. "Judge Charles' denial of credit for the time Harris served on pretrial EHD was a departure from this practice and from the law." Petition for Review, at 4, Harris v. Charles, No. 83867-4 (filed Nov. 8, 2009). The appellate court held that "misdemeanor courts retain discretion to give credit for time served pretrial on electronic home monitoring, but they are not obliged to do so." Harris, 151 Wn.App. at 939.

pre-conviction and not granting credit for EHD served post-conviction violated the equal protection clause, this court should find that the distinction violates due process. In finding that the reasons for subjecting a felon to EHD were the same whether the EHD occurred pre-conviction or post-conviction this court held that felons must receive credit for EHD under the equal protection clause regardless of when the EHD occurs. Here, in the case of misdemeanants, the situation is analogous. Granting trial courts the discretion to choose to grant misdemeanants credit for EHD, on a case by case basis, violates the equal protection clause as it subjects similarly situated defendants in the misdemeanor class to dissimilar treatment. Such a result is arbitrary and capricious under the equal protection clauses of both the State and Federal Constitutions.

EHD requirements are the same for all misdemeanants. CrR 3.2(b)(6); CrRLJ 3.2(b)(6). All misdemeanants serving time on EHD do so because they meet the specific requirements. "[T]he condition of each [misdemeanant] subject to electronic home detention-is identical. Additionally, the reasons for placing a defendant . . . under electronic detention are indistinguishable." Anderson, 132 Wn.2d at 213. Allowing the trial court discretion to

determine on a case by case basis which misdemeanor will be credited for EHD time served would allow for disparate punishments for individuals in the exact same class. Under the appellate court's decision, two defendants could be charged and convicted of the same misdemeanor, both having been granted and successfully completed EHD but depending upon the judge one of them may have to serve additional jail time while the other receives credit for EHD. This unfair result would allow one person to resume life without further deprivation of liberty, while the other would be subject to further deprivation of liberty in jail. Surely such a result is a violation of equal protection as such dissimilar treatment is nothing more than arbitrary.

Requiring trial courts to credit time served for EHD would not limit the "great discretion" courts have in sentencing misdemeanants. State v. Anderson, 151 Wn.App. 396, 402, 212 P.3d 591, 593 (2009). To the contrary, trial courts should retain "their historical discretion [to] convert[] all or part of a term of imprisonment to EHM." Id. at 405. A trial court should retain the discretion, unless otherwise mandated by the legislature, to allow a defendant to serve time on EHD, before and after conviction. A trial court should not, however, be able to treat misdemeanants already

placed on EHD dissimilarly once they have been convicted of a crime. This distinction is nothing other than arbitrary and a violation of equal protection.

- II. Both statute and case law support requiring courts to credit electronic home detention for time served.
 - A. The legislature recognizes electronic home detention as an alternative to imprisonment and requires electronic home detention be credited as time served.

EHD is used in many statutes as a substitute for imprisonment. See RCW 46.61.5055(1)(a)(i); SMC 11.56.025(A)(1). Through these types of statutes the legislature has continued to recognize EHD as a proper "alternative to incarceration." See Harris, 151 Wn.App. at 938, n.4. In recognizing that EHD is a substitute for imprisonment the legislature has required courts credit defendants with time served for time spent on EHD. See Speaks, 119 Wn.2d at 207.

There is no legislative authority that directly addresses the issue of whether misdemeanants should be credited time served for EHD. Where that is the case, the SRA and other similar statutes can assist in determining legislative intent. See Ashbaker, 82 Wn.App. at 632 ("We may use decisions interpreting the SRA in cases under the JJA when no contrary intent or authority exists.").

In fact, there are many statutes that recognize EHD as a valid way to serve a jail sentence. The legislature has continually treated all persons similarly when addressing EHD and has also continually considered EHD a form of incarceration. At the very least, the legislature has implicitly spoken to the issue at hand. Under the precedents of Speaks and Ashbaker, the legislative intention becomes even more clear. The legislative intention has been to continually treat EHD as a form of incarceration and therefore credit EHD as time served. This implicitly is the case whether the individual defendant is charged with, and ultimately found guilty of, a felony, misdemeanor, or juvenile crime.

In the absence of contrary legislative intention or authority, this court should follow Speaks and Ashbaker. The judiciary's own authority has determined that both the SRA and JJA require credit be given to defendants for EHD. The absence of legislative intention or authority calling for the opposite result for misdemeanors, when in fact the legislative authority calls for credit to be given for EHD, combined with court precedent requiring credit for EHD creates an obvious answer for this case. Credit for EHD should be required for all criminal convictions, regardless of

whether they are felonies or misdemeanors or which judge imposed the sentence.

- B. Washington state sentencing principles compel the conclusion that electronic home detention must be credited as time served for misdemeanors.

“The goal of Washington’s sentencing system . . . is to ensure that offenders who commit similar crimes and have similar histories receive equivalent sentences.” State of Washington Sentencing Guidelines Commission, Adult Sentencing Guidelines Manual I-vii (2008). It is important that “sentences . . . apply equally to offenders . . . without discrimination as to any element that does not relate to the crime or to a defendant’s previous criminal record.” Id. While the SRA covers felony sentencing, its guiding principles transcend criminal classifications.

Whether a defendant is charged and ultimately convicted of a felony, misdemeanor, or juvenile crime that defendant should be subject to the same or similar penalty as those charged with a similar crime. In a system that grants the trial court discretion to determine whether each individual misdemeanant should be credited time served for EHD there runs a significant risk that similarly situated misdemeanants will serve dissimilar sentences and punishments for the same crime. Where one misdemeanant is

credited time served for EHD and the other is not, the result will be that the latter misdemeanor will be subject to greater punishment for the same crime. This result is clearly contrary to the sentencing principles of fairness and equal protection. These principles demand that *all* defendants receive equal credit for the time they serve, either in EHD or some other form of incarceration.

- III. Crediting electronic home detention for all misdemeanor sentences is an effective punishment that effectively rehabilitates persons and save money for the State.
 - A. Electronic home detention is effective at punishing and rehabilitating misdemeanants and therefore social policy is benefited by requiring courts to credit misdemeanants for time served on electronic home detention.

Rehabilitation is a policy goal of misdemeanor sentencing.

See Petition for Review at 19-20, Harris v. Charles, No. 83867-4 (filed Nov. 8, 2009), 2009 WL 6859028, at *19-20. Recidivism is a reflection of how well our justice system is rehabilitating convicted criminals. Where one form of punishment, in this case probation or EHD, results in a lower recidivism rate than another form of punishment, jail sentences, the former can be said to rehabilitate offenders more effectively. Probation and EHD are superior at rehabilitating offenders, and therefore reducing recidivism, because neither requires a defendant to be "removed from 'outside'

society[.]”³ By removing a defendant from “outside” society the justice system severs a defendant's social bonds.⁴ “These bonds include interpersonal, familial, work place, and economic relationships. Weakened social bonds resulting from incarceration are likely to increase an offender’s propensity to commit new crimes after release.”⁵

The legislature has also recognized the effectiveness of EHD as a form of incarceration and punishment. It has recognized the cost-effectiveness of EHD as well as its redeeming punishment and supervision capabilities.⁶ Likewise, a 1993 report by the Washington State Institute for Public Policy summarizing the theories and empirical studies on the effect prison and jail sentences have on recidivism rates suggests that community based sentences can help reduce recidivism. Ling Song & Roxanne Lieb, et al., Washington State Institute for Public Policy, Recidivism: The Effect of Incarceration and Length of Time Served (1993). The study summarized that this was particularly true for

³ Song & Lieb, at 3 (citing Orsagh, T. & Chen, J.R., The Effect of Time Served on Recidivism: An Interdisciplinary Theory, 4 J. Quantitative Criminology 155, 155-71 (1988)).

⁴ Id.

⁵ Id.

⁶ See Harris v. Charles, 151 Wn.App. at 930, n.4, for a concise summary of this point.

misdemeanants.⁷ This study has positive implications for the use of EHD. Not only does it suggest increased use of EHD, as EHD appears to be superior to jail in reducing recidivism, it also suggests that requiring EHD to be credited as time served will produce social policy benefits.

By placing a defendant on EHD, the justice system helps to rehabilitate that person. The defendant is able to maintain strong social ties in the community and continue as a productive member of society by staying in the workforce. Discouraging the use of EHD by persons who may not wish to enter a program that is subject to arbitrary discretion takes away the positive rehabilitative effects gained by EHD.

Further, a defendant who is denied credit for time already served on EHD is likely to feel he is suffering multiple punishments for the same crime and may lose respect and confidence in the justice system. Such a person is also likely to fall prey to the

⁷ Song & Lieb, at 5 (With respect to misdemeanor offenders "researchers found that probation was superior to fines and jail sentences in terms of recidivism.") (citing Wheeler, G.R & Hissong, R.V., A Survival Time Analysis of Criminal Sanctions For Misdemeanor Offenders: A Case for Alternatives to Incarceration, 12Evaluation Rev. 510, 510-27 (1987)).

"prisonization model[.]"⁸ The prisonization model is the "internalization of a criminal value system" and helps explain offender recidivism.⁹ It also leads to adjustment difficulties once offenders are back on the "outside."¹⁰

Courts reduce recidivism by offering alternatives to jail. By providing EHD as an alternative, the court encourages rehabilitation and societal reintegration. Placing a person back in jail after denying credit for EHD could have the effect of losing any successful reintegration that the defendant has already achieved and leave them feeling as if they have been punished twice for the same crime. A jail sentence after successful EHD could reverse any rehabilitation already achieved by subjecting misdemeanants to the prisonization model, increasing their likelihood of reoffending once back on the "outside."¹¹

⁸ Song & Lieb, at 3 (citing Wheeler, S., Socialization in Correctional Communities, 26 Am. Soc. Rev. 697, 697-712 (1961)).

⁹ Id.

¹⁰ Id.

¹¹ Id.

- B. It is economically advantageous and prudent to require that misdemeanants be credited time served on electronic home detention.

EHD helps keep jail costs down.¹² In fact, EHD may save up to \$90 a day over incarceration. See Thurston County DUI/Drug Court Program, Data and Outcomes, (obtained at the Thurston County Courts' Open House on Jan. 5, 2011) (estimating 2010 per day cost of holding an inmate in jail at \$87.39). In addition, most defendants pay for EHD resulting in minimal, if any, out of pocket expenses for the state. See RCW 46.61.5055 (1)(a)(i). Where a defendant is subsequently required to serve jail time after serving time on EHD the state fails to realize the cost savings of EHD. Instead, the advantages of EHD are nullified.

¹² See Appendix A Local Reform Efforts, Judicial Resource Efficiencies, http://www.courts.wa.gov/programs_orgs/pos_bja/index.cfm?fa=pos_bja.display&fileid=cftf/AppendA (last visited Jan. 7, 2011) (Discussing different jurisdictions "use of . . . electronic home monitoring to keep jail costs down.").

CONCLUSION

In accordance with the equal protection clauses of the federal and state constitutions, legislative and case precedent, and the clear rehabilitative and economic benefits, WDA respectfully asks that this court find that all misdemeanor defendants should be granted credit for time served on EHD.

DATED this __ day of January, 2011

Respectfully submitted,



Travis Stearns, WSBA # 29335
Benjamin Mayer, Law Clerk

Washington Defender Association

2011 JAN 13 PM 3:30

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOSHUA HARRIS,)	
)	
PETITIONER,)	
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v.)	NO. 83867-4
)	
HONORABLE EDSONYA CHARLES,)	
DIRECTOR OF KING COUNTY ADULT)	
DETENTION and CITY OF SEATTLE,)	
)	
RESPONDENT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, ALCIA DELMORE, STATE THAT ON THE 13th DAY OF JANUARY, 2010, I CAUSED THE ORIGINAL **BRIEF OF AMICUS CURIAE** TO BE FILED IN THE **SUPREME COURT OF THE STATE OF WASHINGTON** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF JANUARY, 2011.

x 