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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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**JOSHUA HARRIS,**  
Petitioner,

vs.

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

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**ANSWER TO BRIEF OF AMICUS CURIAE**

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A. **RESPONSE TO AMICUS CURIAE'S STATEMENT OF THE CASE**

Amicus Curiae repeats petitioner's claim that Judge Charles's decision denying petitioner credit against his jail sentence for time on pretrial electronic home monitoring was a departure from common practice.<sup>1</sup> In Seattle Municipal Court, electronic home monitoring is used primarily where, as in petitioner's situation, alcohol testing is desired. Electronic home monitoring is of limited utility where a defendant poses a risk of violence to the victim so the court relies on bail, a protection order, firearms restrictions and a phone block as conditions of pretrial release. Day reporting is the preferred condition of release for a defendant likely to fail to return to court.

Amicus's reiteration of petitioner's factual contentions or assumptions regarding the use of electronic home monitoring is not supported by the record and appears to be unfounded. Equally unsupported is the seeming suggestion that the trial court's decision was an anomaly.

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<sup>1</sup> See Brief of Amicus Curiae, at 8 n 2.

**B. ARGUMENT IN RESPONSE TO AMICUS CURIAE**

1. The rational basis test applies to petitioner's equal protection claim that he is entitled to credit against his jail sentence for time on pretrial electronic home monitoring.

Amicus acknowledges that “[e]qual protection claims not involving a suspect or semi-suspect class, or a fundamental right, are subject to a rational basis review.”<sup>2</sup> Although it makes no claim that non-felon defendants are a suspect or semi-suspect class or that there is a fundamental right to being given credit against a jail sentence for pretrial electronic home monitoring, Amicus nevertheless contends that the rational basis test is not appropriate. The logic of this argument seems somewhat wanting.

This court recently reaffirmed its equal protection analysis in *State v. Hirschfelder*,<sup>3</sup> as follows:

Equal protection under the law is guaranteed by both the Fourteenth Amendment to the United States Constitution and article 1, section 12 of the Washington Constitution. The aim of equal protection is securing equality of treatment by prohibiting undue favor or hostile discrimination. The appropriate level

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<sup>2</sup> Brief of Amicus Curiae, at 3.

<sup>3</sup> 170 Wn.2d 536, 550-51, 242 P.3d 876 (2010) (citations and quotations omitted).

of scrutiny in equal protection claims depends upon the nature of the classification or rights involved. Suspect classifications, such as race, alienage, and national origin, are subject to strict scrutiny. Strict scrutiny also applies to laws burdening fundamental rights or liberties. Intermediate scrutiny applies only if the statute implicates both an important right and a semisuspect class not accountable for its status. Absent a fundamental right or suspect class, or an important right or semi-suspect class, a law will receive rational basis review.

. . . A legislative distinction will withstand a minimum scrutiny analysis if, first, all members of the class are treated alike; second, there is a rational basis for treating differently those within and without the class; and third, the classification is rationally related to the purpose of the legislation.

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The Court of Appeals properly applied the rational basis test for evaluating appellant's claim, and this court also should apply that test.

The authorities that Amicus relies on do not support its argument that the rational basis test should not apply. Amicus erroneously contends that *State v. Blilie*<sup>4</sup> concerned the distinction between felons and non-felons when that case, instead, addressed the distinction between felony sex offenders and all other felony

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<sup>4</sup> 132 Wn.2d 484, 939 P.2d 691 (1997).

offenders.<sup>5</sup> Amicus also slightly misrepresents the holding of *State v. Ashbaker*<sup>6</sup> by failing to recognize that it concerned not electronic home monitoring prior to trial, but electronic home monitoring after conviction but before sentencing. Amicus's reliance on *State v. Anderson*,<sup>7</sup> is misplaced as that case concerned a felon on electronic home monitoring after conviction but before sentencing who was not given credit against his prison sentence whereas a felon on pretrial electronic home monitoring would be given such credit. *Anderson* thus involved a situation where one felon would receive credit for pre-sentencing electronic home monitoring and another would not. Petitioner, a non-felon, is not suggesting that other non-felons are entitled to credit against a jail sentence for pre-sentencing electronic home monitoring while he is not.

The rational basis test applies to petitioner's equal protection claim and, as discussed in respondents' other briefs, his claim fails under that test.

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<sup>5</sup> *Blilie*, 132 Wn.2d at 493-95.

<sup>6</sup> 82 Wn. App. 630, 631, 919 P.2d 619 (1996).

<sup>7</sup> 132 Wn.2d 203, 937 P.2d 581 (1997).

2. The absence of any statute governing petitioner's situation demonstrates that the Legislature did not intend a non-felon to receive credit against his jail sentence for time on pretrial electronic home monitoring.

Amicus makes no concerted effort to apply the rational basis test to petitioner's claim, but makes several arguments why this test should not be applied at all. Amicus argues that the legislature intended that a non-felon be treated the same as a felon with respect to electronic home monitoring because the Sentencing Reform Act (SRA) and the Juvenile Justice Act (JJA) give credit against a jail sentence for time on pretrial electronic home monitoring.

Legislative intent regarding felons and juveniles tells us nothing, however, about what was intended for adult non-felons. The SRA, of course, does not apply to sentencing in courts of limited jurisdiction.<sup>8</sup> Moreover, that the legislature has expressly defined "confinement" to include electronic home monitoring under the SRA<sup>9</sup> and under the JJA<sup>10</sup> and has not done so with respect to non-

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<sup>8</sup> *Bremerton v. Bradshaw*, 121 Wn. App. 410, 413, 88 P.3d 438 (2004), *review denied*, 153 Wn.2d 1012 (2005).

<sup>9</sup> *See* RCW 9.94A.030(8) ("confinement" means total or partial confinement), RCW 9.94A.030(32) ("partial confinement" includes work

felons in courts of limited jurisdiction rather strongly suggests that the legislature did not intend similar treatment.<sup>11</sup>

Perhaps in recognition that that rational relationship test is the most relaxed and tolerant form of judicial scrutiny under the equal protection clause,<sup>12</sup> Amicus seeks to avoid this scrutiny altogether by claiming that no classification exists – all defendants who have been on pretrial electronic home monitoring are in the same class. This claim ignores, however, the statutory definitions of “confinement,” which plainly do not apply to defendants outside the SRA and JJA.

Amicus also erroneously contends that the sentencing principles of the SRA should apply to non-felons. The SRA is a

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release, home detention, work crew, and a combination of work crew and home detention) & RCW 9.94A.030(27) (“home detention” means a program of partial confinement available to offenders wherein the offender is confined in a private residence subject to electronic surveillance).

<sup>10</sup> See RCW 13.40.020(5) (“confinement” means physical custody in a detention facility) & RCW 13.40.020(9) (“detention facility” includes county group homes, inpatient substance abuse treatment programs, juvenile basic training camps, and electronic monitoring).

<sup>11</sup> See *State v. Gonzales Flores*, 164 Wn.2d 1, 14, 186 P.3d 1038 (2008) (when the legislature uses different words in statutes relating to a similar subject matter, it intends different meanings); see also *State v. Cooper*, 156 Wn.2d 475, 480, 128 P.3d 1234 (2006) (where the legislature omits language from a statute, intentionally or inadvertently, this court will not read into the statute the language that it believes was omitted).

<sup>12</sup> *State v. Heiskell*, 129 Wn.2d 113, 124, 916 P.2d 366 (1996).

rather intricate (and some would say convoluted) statutory scheme involving more than 150 statutes governing every aspect of felony sentencing.<sup>13</sup> The statutory sentencing authority applicable to petitioner is found in one (admittedly long) sentence of one statute.<sup>14</sup> The rather obvious difference in the detail and complexity of the respective sentencing systems suggest that they are not analogous. Contrary to the suggestion of Amicus, the Legislature's silence on giving credit for pretrial electronic home monitoring in a court of limited jurisdiction does not establish any legislative intent to do so.

3. A trial court's discretion to give a non-felon credit against his jail sentence for time on pretrial electronic home monitoring does not violate equal protection.

Amicus also contends that a court of limited jurisdiction having discretion to grant credit against a jail sentence for time on

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<sup>13</sup> See RCW Chapter 9.94A.

<sup>14</sup> RCW 35.20.255(1) provides, in pertinent part:

Judges of the municipal court, in their discretion, shall have the power in all criminal proceedings within their jurisdiction including violations of city ordinances, to defer imposition of any sentence, suspend all or part of any sentence including installment payment of fines, fix the terms of any such deferral or suspension, and provide for such probation as in their opinion is reasonable and necessary under the circumstances of the case, but in no case shall it extend for more than five years from the date of conviction for a defendant to be sentenced for a domestic violence

pretrial electronic home monitoring violates equal protection.<sup>15</sup>

Equal protection does not require that all persons be dealt with identically,<sup>16</sup> and is not intended to provide complete equality among individuals or classes but equal application of the laws.<sup>17</sup>

Discretion in fixing sentences furthers the goal of retaining some flexibility and individualized treatment at the punishment stage. Judges need flexibility in order to punish defendants based on specific circumstances. The defendant's particular situation, then, furnishes a rational basis for varying the sentence and resultant punishment that each defendant receives.<sup>18</sup>

Although sentencing disparity among *codefendants* who commit the same crimes implicates equal protection, the imposition of different sentences on defendants convicted under similar

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offense or under RCW 46.61.5055 and two years from the date of conviction for all other offenses.

<sup>15</sup> The basis for Amicus's argument is somewhat difficult to follow – it seems to be relying on equal protection, but twice states that such sentencing discretion violates “due process.” See Brief of Amicus Curiae, at 8 & 9.

<sup>16</sup> *In re Detention of Thorell*, 149 Wn.2d 724, 745, 72 P.3d 708 (2003), *cert. denied*, 541 U.S. 990 (2004).

<sup>17</sup> *State v. Simmons*, 152 Wn.2d 450, 458, 98 P.3d 789 (2004).

<sup>18</sup> *State v. King*, 149 Wn. App. 96, 103, 202 P.3d 351, *review denied*, 166 Wn.2d 1026 (2009) (rejecting contention that trial court's discretion to order sentence for current offense to run consecutively to sentence defendant already serving, rather than concurrently, violates equal protection) (citations omitted).

circumstances in other cases does not implicate equal protection.<sup>19</sup> Inasmuch as petitioner has no codefendant, he does not have any equal protection objection to the sentence he received. Even with respect to codefendants, relevant distinctions need not pertain only to the codefendants' relative culpability or to the pleas to which they agreed, but may pertain to anything which provides a rational basis for the disparate sentences; in addition to relative culpability, courts compare factors such as criminal record, rehabilitation potential, cooperation with law enforcement and differences in pleas.<sup>20</sup> That a judge in a court of limited jurisdiction might choose to give one defendant credit against his jail sentence for time on pretrial electronic home monitoring and make a different choice for another defendant does not violate equal protection.

4. Any public policy arguments for giving a non-felon credit against his jail sentence for time on pretrial electronic home monitoring should be directed to the Legislature.

Amicus also argues that electronic home monitoring is such a beneficial criminal justice tool that all court of limited jurisdiction

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<sup>19</sup> *State v. Amos*, 147 Wn. App. 217, 231, 195 P.3d 564 (2008).

judges should be required to give credit for it against a jail sentence. Amicus's reliance on a 1993 Washington State Institute for Public Policy report<sup>21</sup> for the proposition that electronic home monitoring reduces recidivism is curious, to say the least, inasmuch as that report includes not a single word about electronic home monitoring. Moreover, other, more recent, reports from that Institute indicate that electronic home monitoring does not reduce recidivism.<sup>22</sup>

Amicus may well have legitimate policy arguments that felons and non-felons ought to be treated the same with respect to being given credit for pretrial electronic home monitoring. But, Amicus

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<sup>20</sup> *State v. Handley*, 115 Wn.2d 275, 292, 796 P.2d 1266 (1990).

<sup>21</sup> L. Song & R. Lieb, *Recidivism: The Effect of Incarceration and Length of Time Served*, Washington State Institute for Public Policy (September 1993).

<sup>22</sup> See E. Drake, S. Aos & M. Miller, *Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State*, Victims and Offenders 4, at 193 (2009) <http://www.wsipp.wa.gov/rptfiles/09-00-1201.pdf>; *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates*, at 11, Washington State Institute for Public Policy (October 2006) <http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf>.

should present those arguments to the Legislature – the branch of government vested with authority over criminal sentencing.<sup>23</sup>

**C. CONCLUSION**

Based on the foregoing argument, this court should affirm the decision of the Court of Appeals.

Respectfully submitted this 7<sup>th</sup> day of February, 2011.

*Richard Greene*

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<sup>23</sup> *State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996); *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937) (fixing of penalties or punishments for criminal offenses is a legislative function); *State v. Ammon*, 105 Wn.2d 175, 180, 713 P.2d 719, *cert. denied*, 479 U.S. 930 (1986) (Legislature, not the judiciary, has the authority to determine the sentencing process; *In re Personal Restraint of Knapp*, 102 Wn.2d 466, 471, 687 P.2d 1145 (1984) (credit for nonjail probation time is properly a matter for the Legislature).

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Attached is respondents' Answer to Brief of Amicus Curiae.



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