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SUPREME COURT  
STATE OF WASHINGTON

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No. 83867-4

BY RONALD R. CARPENTER

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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**SUPPLEMENTAL BRIEF OF RESPONDENTS**

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A. ISSUE PRESENTED FOR REVIEW

Does the constitution require that a defendant convicted of a non-felony crime be given credit against his jail sentence for time he was on electronic home monitoring as a condition of pretrial release?

B. STATEMENT OF THE CASE

After petitioner was charged with Driving While License Suspended (DWLS) 3<sup>rd</sup> degree and Operating a Motor Vehicle Without a Required Ignition Interlock (IID), both misdemeanor crimes, Seattle Municipal Court released him on bail and electronic home monitoring. CP 10-12. Eighty days after being released from jail on these conditions, petitioner pled guilty to both of these charges. CP 13. At petitioner's request, sentencing was continued for 60 days, during which time he remained on electronic home monitoring. CP 13.

On the DWLS charge, petitioner was sentenced to 90 days in jail with zero days suspended and on the IID charge, to 90 days in jail with 90 days suspended; these sentences to run consecutively. CP 8-9 & 11. The Municipal Court declined to give petitioner credit

against this sentence for the 140 days he was on electronic home monitoring before his guilty plea. CP at 14.

The superior court, on a writ of habeas corpus, ordered Municipal Court to give petitioner credit against his DWLS jail sentence for time he was on electronic home monitoring as a condition of pretrial release. The City appealed.

The Court of Appeals agreed with the City that the sentencing of felons and non-felons is sufficiently different such that equal protection was not violated by denying petitioner credit against his jail sentence for the time he was on electronic home monitoring as a condition of pretrial release, even though a felon would receive such credit.<sup>1</sup> The Court of Appeals also determined that petitioner had not established that electronic home monitoring was sufficiently like incarceration such that denying him credit for electronic home monitoring violated double jeopardy.<sup>2</sup>

This court then granted review.

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<sup>1</sup> *Harris v. Charles*, 151 Wn. App. 929, 936-39, 214 P.3d 962 (2009), *review granted*, 230 P.3d (2010).

<sup>2</sup> *Harris*, 151 Wn. App. at 939-41.

C. ARGUMENT

1. The Court of Appeals correctly rejected petitioner's equal protection argument.

Petitioner contends that the Court of Appeals erred by rejecting his equal protection claim that he was entitled to credit against his jail sentence for time he was on electronic home monitoring as a condition of pretrial release. He does not contend that the Court of Appeals' use of the "rational basis" test for analyzing his claim was incorrect<sup>3</sup> nor does he deny that he bore the burden of showing that the classification was arbitrary.<sup>4</sup> Under this

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<sup>3</sup> See *In re Personal Restraint of Stanphill*, 134 Wn.2d 165, 174-75, 949 P.2d 365 (1998) (distinctions between felony defendants sentenced pursuant to the SRA and those sentenced prior to adoption of the SRA do not violate equal protection); *In re Personal Restraint of Borders*, 114 Wn.2d 171, 175-80, 786 P.2d 789 (1990) (denial of good time credit to sex offenders committed to state hospital does not violate equal protection); *State v. L.W.*, 101 Wn. App. 595, 606, 6 P.3d 596 (2000) (not awarding juvenile credit against his sentence for time spent in functional equivalent of state-contracted detention facility does not violate equal protection); see also *Westerman v. Cary*, 125 Wn.2d 277, 294-96, 892 P.2d 1067 (1994) (denying pretrial release to domestic violence arrestee pending preliminary appearance does not violate equal protection).

<sup>4</sup> See *State v. Simmons*, 152 Wn.2d 450, 458, 98 P.3d 789 (2004).

test, the state action will be upheld unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives.<sup>5</sup>

Instead, petitioner argues that pretrial electronic home monitoring is the same as pretrial *incarceration* for which a defendant must be given credit against his jail sentence. There are obvious differences, however, between incarceration and electronic home monitoring. As the court noted in *State v. Perrett*,<sup>6</sup> electronic home monitoring eliminates the hardships associated with incarceration – a defendant is free to live as he had before being charged, he is not hindered in preparing his defense and he suffers neither the stigma nor the discomfort of jail.<sup>7</sup> In addition, a defendant at home is not subject to the regimentation, surveillance and lack of privacy of a penal institution. A defendant on electronic home monitoring, while generally confined to his home, may be allowed to leave for treatment sessions or medical appointments or to

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<sup>5</sup> *State v. Osman*, 157 Wn.2d 474, 486, 139 P.3d 334 (2006).

<sup>6</sup> 86 Wn. App. 312, 318-19, 936 P.2d 426, *review denied*, 133 Wn.2d 1019 (1997) (defendant on electronic home detention was not “detained” for purposes of the time for trial rule).

<sup>7</sup> *Perrett*, 86 Wn. App. at 318-19.

go to work.<sup>8</sup> Petitioner presented no evidence regarding the exact nature or restrictions of his electronic home monitoring.

Courts in other states have rejected the argument that pre-adjudication electronic home monitoring is sufficiently like incarceration such that credit must be given for that electronic home monitoring against a jail sentence.<sup>9</sup> In *In re Lorenzo L.*,<sup>10</sup> the court held that equal protection does not entitle a juvenile to credit against his jail sentence for predisposition time on electronic home monitoring as it is not physical confinement. In *United States v.*

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<sup>8</sup> See <http://www.ci.seattle.wa.us/courts/comjust/EHM.htm> (outlining electronic home monitoring offered by Seattle Municipal Court).

<sup>9</sup> *Matthew v. State*, 152 P.3d 469, 472-73 (Alaska App. 2007); *James v. State*, 872 N.E.2d 669, 672 (Ind. App. 2007); *People v. Anaya*, 158 Cal.App.4<sup>th</sup> 608, 70 Cal.Rptr.3d 47, 50 (2007), *review denied* (2008); *Commonwealth v. Morasse*, 446 Mass. 113, 842 N.E.2d 909 (2006); *People v. Chavez*, 122 P.3d 1036, *review denied* (Colo.App. 2005); *State v. Higgins*, 357 S.C. 382, 593 S.E.2d 180, 181-82 (S.C. App. 2004); *Licata v. State*, 788 So.2d 1063 (Fla.App. 2001); *State v. Rauch*, 94 Hawai'i 315, 13 P.3d 324, 334-37 (2000); *Bush v. State*, 338 Ark. 772, 2 S.W.3d 761 (1999); *Tagorda v. State*, 977 S.W.2d 632 (Tex. App. 1998); *State v. Climer*, 127 Idaho 20, 896 P.2d 346 (1995); *State v. Wilkinson*, 539 N.W.2d 249, 251-53 (Minn.App. 1995); *State v. Faulkner*, 102 Ohio App.3d 602, 657 N.E.2d 602 (1995); *State v. Muratella*, 240 Neb. 567, 483 N.W.2d 128, 128-30 (1992); *Kupec v. State*, 835 P.2d 359, 363-65 (Wyo. 1992); *Balderston v. State*, 93 Md.App. 364, 612 A.2d 335 (1992).

<sup>10</sup> 163 Cal.App.4<sup>th</sup> 1076, 78 Cal.Rptr.3d 150, 152-53, *review denied* (2008).

*Edwards*,<sup>11</sup> the court held that denial of credit against a jail sentence for time on pretrial electronic home monitoring does not violate equal protection. Noting that the purpose of pretrial conditions of release is to secure the appearance of the defendant to answer the charge rather than to punish,<sup>12</sup> the court in *State v. Hughes*<sup>13</sup> rejected an equal protection challenge to denial of credit against a jail sentence for time the defendant was on pretrial home monitoring. Electronic home monitoring simply is not the same as incarceration.

Petitioner also argues that that the sentencing of felons and non-felons is indistinguishable for equal protection purposes. In *State v. Bowen*<sup>14</sup> the court rejected an equal protection challenge to an SRA sentence and noted various factors that differentiate the sentencing of felons and non-felons. "The policy reasons for distinguishing between felony sentencing and sentencing for gross

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<sup>11</sup> 960 F.2d 278, 283-84 (2<sup>nd</sup> Cir. 1992), *overruled on other grounds in United States v. Wilson*, 503 U.S. 329, 112 S.Ct. 1351, 117 L.Ed.2d 593 (1992).

<sup>12</sup> See *State ex rel. Wallen v. Judges Noe, Towne, Johnson*, 78 Wn.2d 484, 487, 475 P.2d 787 (1979) (purpose of bail is to free defendant from imprisonment and secure his presence before court at appointed time).

<sup>13</sup> 197 W. Va. 518, 476 S.E.2d 189, 198-99 (1996).

misdemeanors are apparent from the different treatment and consequences which flow from conviction.”<sup>15</sup>

As discussed in the City’s opening brief, there are other significant distinctions between felony and non-felony sentencing besides those noted in *Bowen*. Perhaps the most important distinction between sentencing of felons and nonfelons is that the SRA represents a significant limitation on judicial discretion and permits none of the sentencing flexibility available in courts of limited jurisdiction.<sup>16</sup> As the Court of Appeals recently stated:

Our trial courts have great discretion in imposing sentences within the statutory limits for misdemeanors and gross misdemeanors. . . . While the Sentencing Reform Act of 1981(SRA) places substantial constraints on this historical discretion in felony sentencing, no similar legislation restricts the trial courts discretion in sentencing for misdemeanors or gross misdemeanors.<sup>17</sup>

In holding that a juvenile offender was not entitled to credit against his sentence for time spent in the functional equivalent of a

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<sup>14</sup> 51 Wn. App. 42, 47, 751 P.2d 1226, *review denied*, 111 Wn.2d 1017 (1988).

<sup>15</sup> *Bowen*, 51 Wn. App. at 47.

<sup>16</sup> *Wahleithner v. Thompson*, 134 Wn. App. 931, 941, 143 P.3d 321 (2006).

detention facility, the court in *State v. L. W.*<sup>18</sup> noted the difference between the punitive sentencing purposes of the SRA and the rehabilitative purposes of the Juvenile Justice Act (JJA).

If a juvenile gets credit for time spent in predisposition release, the trial court's postdisposition options will be too limited because most of the short detention time authorized by the JJA will be consumed by predisposition credit, even though it is not spent in detention.<sup>19</sup>

Similarly, giving a defendant convicted of a misdemeanor, such as petitioner, credit for time spent on pretrial electronic home monitoring would consume most of his 90-day maximum sentence and leave the sentencing court with limited options.<sup>20</sup> Felons and non-felons are not similarly situated, much less indistinguishable, for purposes of sentencing. The Court of Appeals correctly rejected petitioner's equal protection argument.

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<sup>17</sup> *State v. Anderson*, 151 Wn. App. 396, 402, 212 P.3d 591 (2009).

<sup>18</sup> 101 Wn. App. at 602 & 606.

<sup>19</sup> *L. W.*, 101 Wn. App. at 602.

<sup>20</sup> If pretrial electronic home monitoring is deemed identical to incarceration, then a defendant on such monitoring presumably would be entitled to one-third good time credit under RCW 9.92.151.

2. The Court of Appeals correctly rejected petitioner's double jeopardy claim.

Although petitioner did not raise a double jeopardy claim in Application for Writ of Habeas Corpus<sup>21</sup> nor did the superior court decide such a claim,<sup>22</sup> the Court of Appeals nevertheless considered and rejected petitioner's argument, agreeing with the City that pretrial electronic home monitoring is not punishment.<sup>23</sup>

In the multiple punishment context, the double jeopardy clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.<sup>24</sup> Inasmuch as conditions of pretrial release are not intended as punishment,<sup>25</sup> those conditions would not limit a trial court's decision regarding the appropriate punishment to impose. The sentencing court was not required to credit time spent on pretrial

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<sup>21</sup> See CP at 1-16.

<sup>22</sup> See CP at 38-39.

<sup>23</sup> *Harris*, 151 Wn. App. at 939-41.

<sup>24</sup> *State v. Sulaymen*, 97 Wn. App. 185, 190, 983 P.2d 672 (1999) (not giving a defendant credit against his jail sentence for nondetention probation time does not violate double jeopardy); *State v. Jones*, 151 Wn. App. 186, 194-95, 210 P.3d 1068 (2009), *review granted*, 167 Wn.2d 1017 (2010) (double jeopardy does not require that defendant be given credit against his community custody term for time in jail served in excess of revised sentence).

electronic home monitoring against the punishment it imposed on petitioner. Also, double jeopardy is not violated by multiple punishments that serve separate purposes.<sup>26</sup> As neither the purpose nor the effect of electronic home monitoring prior to trial is punitive,<sup>27</sup> it serves a different purpose from the punishment that follows conviction. The Court of Appeals correctly rejected petitioner's double jeopardy claim.

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<sup>25</sup> *State v. Heslin*, 63 Wn.2d 957, 960, 389 P.2d 892 (1964) (bail).

<sup>26</sup> *See State v. Calle*, 125 Wn.2d 769, 780, 888 P.2d 155 (1995) (punishment for Incest 1<sup>st</sup> degree and Rape 2<sup>nd</sup> degree arising out of single act does not violate double jeopardy as two offenses serve different purposes).

<sup>27</sup> *See State v. Jarman*, 140 N.C. App. 198, 535 S.E.2d 875, 879-82 (2000) (denying a defendant credit against his jail sentence for time on pretrial home detention does not violate double jeopardy).

D. CONCLUSION

Based on the foregoing argument, the Court of Appeals decision reversing the superior court order that Seattle Municipal Court must give petitioner credit against his DWLS 3<sup>rd</sup> degree jail sentence for the time he was on electronic home monitoring before sentencing should be affirmed.

Respectfully submitted this 28th day of June, 2010.

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