32248-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DONALD LEE DYSON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

SUPPLEMENTAL BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Larry Steinmetz
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I. ISSUE PRESENTED

Is the potential loss of 'earned early release' credits either 'punishment' or an 'increased sentence' within the meaning of *Blakely v. Washington* or *Alleyne v. United* States?

II. STATEMENT OF THE CASE

The appellant was found guilty of two counts of assault in the first degree under RCW 9A.36.011(1)(a). CP 53; CP 54. The jury also found the defendant was armed with a knife during the commission of the offenses. CP 55. At sentencing, the Honorable Harold Clarke of the Spokane County Superior Court ordered a total determinate sentence of 296 months and the defendant serve a minimum mandatory sentence of 60 months of "flat time" for both counts I and II under RCW 9.94A.540(1)(b).[1] CP 71. That was error.

A mandatory minimum sentence under RCW 9.94A.540(1)(b) requires either a stipulation or a finding by the fact-finder before such a sentence is imposed by the court. The jury in the present case was not provided with the means or the opportunity to do so.

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[1] The defendant received a total determinate sentence of 296 months incarceration for both counts' I and II. CP 71.

The respondent is requesting the court remand to the trial court to strike the provision in the judgment and sentence which requires the appellant serve the minimum mandatory sentence of 60 months each on counts' I and II. This would allow the appellant to receive potential earned early release credits on the entirety of his total determinate sentence of 296 months.

III. ARGUMENT

IF A DEFENDANT IS CONVICTED OF FIRST DEGREE ASSAULT UNDER RCW 9A.36.011(1)(a), THE DEFENDANT MUST EITHER STIPULATE OR THE QUESTION BE SUMMITTED TO THE FACT FINDER WHETHER HE OR SHE USED "FORCE OR MEANS LIKELY TO RESULT IN DEATH" OR AN "INTEN[T] TO KILL" BEFORE THE COURT CAN IMPOSE A MANDATORY MINIMUM SENTENCE UNDER RCW 9.94A.540(1)(b).

Until recently, minimum sentences did not implicate the rule from *Apprendi v. New Jersey,* 530 U.S. 466, 493, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). *Apprendi* held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi,* 530 U.S. at 490.

In *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the Court extended *Apprendi,* holding for the first time that the "statutory maximum" for purposes of an *Apprendi* analysis includes not only the statutory maximum for an offense, but also the top

end of a statutorily established standard range for the offense. *Blakely,* 542 U.S. at 303–04. As in *Apprendi,* however, the *Blakely* Court noted the exception for exceptional sentences based on "the fact of a prior conviction." *Id.*

In *Alleyne v. United States,* —— U.S. ——, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), the defendant was convicted by a jury of using or carrying a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A), a violation subject to a mandatory minimum five years' incarceration. *Alleyne,* 133 S.Ct. at 2156. At sentencing, and over Alleyne's objection, the judge found that Alleyne had "brandished" a firearm, raising his mandatory minimum sentence to seven years under the applicable statute. *Alleyne,* 133 S.Ct. at 2152. The trial court determined that, under *Harris v. United States,* 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002), brandishing was a sentencing factor, which the court could find without violating Alleyne's Sixth Amendment right to a jury trial.[2] *Id.* The federal court of appeals affirmed, and Alleyne petitioned

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[2] Section 924(c)(1)(A) of the United State Code provides, in relevant part, that anyone who "uses or carries a firearm" in relation to a "crime of violence" shall: (i) be sentenced to a term of imprisonment of not less than 5 years; (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

for a writ of habeas corpus, arguing that *Harris* could not be reconciled with the rule in *Apprendi*. *Alleyne,* 133 S.Ct. at 2156.

On appeal, the United States Supreme Court agreed with Alleyne, holding that any fact that increases a mandatory minimum sentence for a crime is an "element" of the crime, not a "sentencing factor," that must be found by a jury. *Alleyne,* 133 S.Ct. at 2151. In doing so, the Court overruled *Harris,* which limited *Apprendi* to facts increasing the statutory maximum. *Alleyne* concluded that mandatory minimum sentences increase the penalty for a crime, and that the facts used to enhance a sentence are offense elements "that must be submitted to the jury and found beyond a reasonable doubt" before an enhanced mandatory minimum sentence can be imposed. *Alleyne,* 133 S.Ct. at 2158. Thus, the Court held that the district court erred when it imposed a seven-year mandatory minimum sentence on Alleyne, because the jury had not found the fact—brandishing—supporting the mandatory minimum beyond a reasonable doubt.[3] *Alleyne,* 133 S.Ct. at 2163-64.

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[3] In *State v. McChristian* 158 Wn. App. 392, 241 P.3d 468, 475 (2010), Division Two of this court, relying in part on *State v. Clarke,* 156 Wn.2d 880, 884, 134 P.3d 188 (2006), *cert. denied,* 404 552 U.S. 885, (2007), held that a determination by the trial court, rather than by jury, of whether the defendant's actions met the statutory requirements for imposition of the mandatory minimum sentence for conviction for first-degree assault did not violate defendant's right to trial by jury. However,

In the present case, the appellant was charged with two counts of assault in the first degree under RCW 9A.36.011(1)(a). CP7. That statute reads, in pertinent part:

> 1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
>
> (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

RCW 9A.36.011(1)(a).

After conviction, the trial court ordered the defendant to serve a five year mandatory minimum sentence each for counts' I and II of the judgment and sentence under RCW 9.94A.540(1)(b). CP 71. This statute states:

> 1) Except to the extent provided in subsection (3) of this section, the following minimum terms of total confinement are mandatory and shall not be varied or modified under RCW 9.94A.535:
>
> b) An offender convicted of the crime of assault in the first degree or assault of a child in the first degree where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years.

RCW 9.94A.540(1)(b).

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this decision predates the United States Supreme Court decision in *Alleyne*.

The court did not submit special interrogatories under counts' I and II asking the jury to determine if the defendant used force or means likely to result in death or intended to kill the victim(s).

In *In re Pers. Restraint of Tran,* 154 Wn.2d 323, 111 P.3d 1168 (2005), the Supreme Court held that the DOC had improperly determined that two petitioners convicted of first degree assault involving the use of weapons must serve five years of "flat time"; *i.e.,* time during which an offender is ineligible for earned early release credit, for their first degree assault convictions *in addition* to the "flat time" the petitioners were required to serve for their respective weapons enhancements. *Tran,* 154 Wn.2d at 328–332. The court found that "[R]CW 9A.36.011(1)(a) alone does not *necessarily* satisfy either of these two conditions [of RCW 9.94A.540(1)(b) implicating a mandatory minimum sentence]." *Tran,* 154 Wn.2d at 329. The court further found that not every first degree assault conviction includes an "'intent to kill the victim" as is required to impose a mandatory minimum sentence under the statute. *Tran,* 154 Wn.2d at 329.

The *Tran* court ultimately found there was nothing in the judgment and sentence implicating the mandatory minimum sentence. *Tran,* 154 Wn.2d at 329. As noted by the court:

> If the legislature had intended every violation of the first degree assault statute to result in a five-year mandatory minimum, it would not have limited former RCW 9.94A.120(4) to assaults characterized by "force or means likely to result in death" or an "inten[t] to kill." Therefore, DOC is neither required nor permitted to infer that a comparison of the statutory language subjects every prisoner with a first degree assault conviction, along with a firearm or other deadly weapon enhancement, to the five-year mandatory minimum.

Tran, 154 Wn.2d at 332.

Here, the State would have had to prove at least one of the above referenced conditions i.e., "force or means likely to result in death" or an "inten[t] to kill" to the jury under *Alleyne* and *Tran* in order to obtain a mandatory minimum sentence of five years with loss of good time for counts' I and II.[4] It did not.

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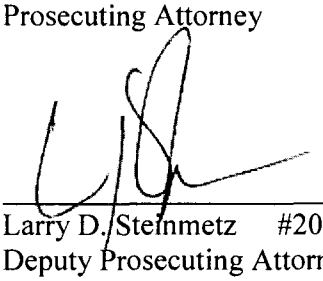
[4]The federal Constitution does not guarantee either parole or good-time credit for satisfactory behavior. *In re Lain,* 179 Wn.2d 1, 15, 315 P.3d 455 (2013); *Greenholtz v. Inmates of Neb. Penal & Corr. Complex,* 442 U.S. 1, 14, 99 S.Ct. 2100, 2107, 60 L.Ed.2d 668 (1979), *abrogated on other grounds, Sandin v. Conner,* 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995) *overruled on other grounds, Edwards v. Balisok,* 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997).

IV. CONCLUSION

The respondent is requesting this court remand to the trial court to strike the provision in the judgment and sentence ordering the appellant serve the minimum mandatory sentence of 60 months for both counts' I and II. This will allow the appellant the opportunity to earn early release credits for the entirety of his total determinate sentence of 296 months.

Dated this 9th day of April, 2015.

LAWRENCE H. HASKELL
Prosecuting Attorney



Larry D. Steinmetz #20635
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON, Respondent, v. DONLAD L. DYSON, JR., Appellant,	NO. 32248-3-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on April 9, 2015, I e-mailed a copy of the Supplemental Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Mick Woynarowski
wapofficemail@washapp.org

and mailed a copy to:

Donald Lee Dyson, Jr., DOC #758970
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

4/9/2015	Spokane, WA	Crystal McNees
(Date)	**(Place)**	**(Signature)**