

FILED  
Court of Appeals  
Division II  
State of Washington  
2/12/2018 2:20 PM  
NO. 50335-2-II

---

---

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

STATE OF WASHINGTON, RESPONDENT

v.

JULIEN BROUSSARD, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable Michael Schwartz

No. 15-1-04868-8

---

**Brief of Respondent**

---

MARK LINDQUIST  
Prosecuting Attorney

By  
JASON RUYF  
Deputy Prosecuting Attorney  
WSB # 38725

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Does defendant absurdly read the aggravating factor created to ensure offenders cannot commit free crime due to high offender scores as enabling offenders to commit one free crime, just not two or more? ..... 1

2. Did the trial court properly impose an exceptional sentence under RCW 9.94A.535(2)(c) as defendant's multiple current offenses and his high offender score would have otherwise resulted in one of his current offenses going unpunished? ..... 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT..... 4

1. COURTS REJECT INTERPRETATIONS THAT PRODUCE ABSURD RESULTS LIKE READING AN AGGRAVATOR DESIGNED TO ENSURE FELONS WITH HIGH OFFENDER SCORES EXCEEDING THE SRA'S MAXIMUM CANNOT COMMIT FREE CRIME AS VESTING THEM WITH A RIGHT TO COMMIT FREE CRIME. .... 4

2. DEFENDANT'S SENTENCE WAS PROPERLY IMPOSED UNDER RCW 9.94A.535(2)(C), FOR OTHERWISE DEFENDANT'S COMMISSION OF MULTIPLE CURRENT OFFENSES WOULD HAVE RESULTED IN ONE OF HIS OFFENSES GOING UNPUBLISHED LIKE A FREE CRIME. .... 10

D. CONCLUSION..... 11

## Table of Authorities

### State Cases

<i>Garrison v. Washington State Nursing Bd.</i> , 87 Wn.2d 195, 196, 550 P.2d 7 (1976).....	4
<i>Home Street, Inc. v. State Dept. of Revenue</i> , 166 Wn.2d 444, 451, 210 P.3d 297 (2009).....	8
<i>State v. Alvarado</i> , 164 Wn.2d 556, 561-62, 192 P.3d 345 (2008) .....	4, 6, 7
<i>State v. Brundage</i> , 126 Wn.App. 55, 66, 107 P.3d 742 (2005).....	6, 9
<i>State v. Christensen</i> , 153 Wn.2d 186, 195, 102 P.3d 789 (2004) .....	7
<i>State v. ex rel. Zempel v. Twitchell</i> , 59 Wn.2d 419, 427, 367 P.2d 985 (1962).....	5
<i>State v. France</i> . 176 Wn.App. 463, 308 P.3d 812 (2013) .....	4, 9, 10
<i>State v. Garcia</i> , 179 Wn.2d 828, 837, 318 P.3d 266 (2014) .....	8
<i>State v. Hunter</i> , 102 Wn.App. 630, 634, 9 P.3d 872 (2000).....	3
<i>State v. Moore</i> , 189 Wn.2d 680, 690, 66 P.2d 836 (1937).....	5
<i>State v. Newlun</i> , 142 Wn.App. 730, 743, 176 P.3d 529 (2008).....	6
<i>State v. Ose</i> , 156 Wn.2d 140, 146-47, 124 P.3d 635 (2005) .....	8
<i>State v. Wilson</i> , 96 Wn.App. 382, 391-92, 980 P.2d 244 (1999).....	7
<i>Wingert v. Yellow Frieght Sys.</i> , 146 Wn.2d 841, 852, 50 P.3d 256 (2002).....	9

Federal and Other Jurisdictions

*Cervo v. Am. Home Prod.*, 38 Misc. 2d 686, 687,  
237 N.Y.S.2d 164 (Sup.Ct. 1962)..... 5

*Cook v. Carmen S. Pariso, Inc.*, 734 N.Y.S.2d 753, 747,  
287 A.D.2d 208 (2001)..... 8

*Graham v. Page*, 300 Ill. 40, 44, 132 N.E. 817 (1921)..... 5

*State Farm Mut. Auto. Ins. Co. v. Khoe*, 88 F.2d 401,  
406 (9<sup>th</sup> Cir. 1989)..... 8

*Tyler v. Cain*, 533 U.S. 656, 664, 121 S.Ct. 2478 (2001) ..... 8

Statutes

RCW 1.12.050 ..... 6

RCW 9.92.080 ..... 8

RCW 9.94A.010(1)..... 9

RCW 9.94A.030..... 4

RCW 9.94A.510..... 4

RCW 9.94A.525(1)..... 4

RCW 9.94A.535(2)(c) ..... 1, 4, 6, 9, 10, 11

RCW 9.94A.730..... 8

RCW 9A.04.110(30)..... 6

Other Authorities

Alan H. Silberman, Using the Expert to Defend A Damage Claim,  
60 Antitrust L.J. 385, 388-89 (1991) ..... 6

[http:// plato. Stanford. edu / entries / Aristotle -logic](http://plato.Stanford.edu/entries/Aristotle-logic) ..... 5

[https:// testmaxprep.com/blog/bar-exam/lSAT-prep-concept-the-logical-opposite](https://testmaxprep.com/blog/bar-exam/lSAT-prep-concept-the-logical-opposite)..... 5

<https://www.stat.berkeley.edu/~stark> ..... 5

National Institute for Trial Advocacy Logic for Lawyers:  
*A Guide to Clear Legal Thinking*, 55-57 (3<sup>rd</sup> Ed. 1997) ..... 5

Webster's Third New International Dictionary 2171 (2003) ..... 5, 7

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

1. Does defendant absurdly read the aggravating factor created to ensure offenders cannot commit free crime due to high offender scores as enabling offenders to commit one free crime, just not two or more?
2. Did the trial court properly impose an exceptional sentence under RCW 9.94A.535(2)(c) as defendant's multiple current offenses and his high offender score would have otherwise resulted in one of his current offenses going unpunished?

B. STATEMENT OF THE CASE.

A detective responded to St. Joseph's Hospital after 19 year-old S.Z. disclosed that her "pimp" (later identified to be defendant) punched her in the face. CP 3. Treating medical personnel confirmed her jaw was broken in two places. *Id.* Defendant forced S.Z. into prostitution after getting her hooked on heroin. *Id.* One of S.Z.'s family members verified S.Z. was being pimped by defendant. *Id.* According to one of S.Z.'s friends, defendant bragged about S.Z. being a "gold mine" on account of the money she made for him. *Id.* Meanwhile, S.Z. feared she would be killed by defendant if she cooperated in the police investigation of him. *Id.*

Police secured a number of text messages documenting defendant's efforts to control S.Z. after breaking her jaw. CP 4. He attributed the injury to his size, boxing prowess and the fact she "pushed [his] buttuns [sic]." *Id.* Defendant threatened to put a \$5,000 hit on S.Z., stating:

most likely you will try to snich [sic] o well but I will find out an I will make u pay. [sic]

*Id.* Defendant was arrested. *Id.* He initially denied knowing S.Z., then told police S.Z.'s jaw might have been broken by some friends he sent to deal with a problem at a motel where she was located. *Id.*

Defendant pled guilty to an Amended Information that charged him with first degree promoting prostitution (*i.e.*, compelled S.Z. to engage in prostitution by threat or force) and second degree assault (*i.e.*, "punching her in the face and breaking her jaw."). CP 45-46; 56. Paragraph (h)(ii) of the plea advised him that:

The judge "may ... impose an exceptional sentence above range if [he] [is] sentenced for more than one crime and [he] ha[s] an offender score more than nine.

CP 52. His SRA score was "9+," but his actual score was "12." CP 51, 95. The court ensured he understood the exposure attending his plea. CP 56; 3RP 27-29. Sentencing was set to occur November 14, 2016. 3RP 33.

On that day the court alerted defendant a sentence under the no-free-crime aggravator was being considered. 3RP 34-36. A continuance was

granted to enable opposition to be prepared. *Id.* The hearing resumed April 7, 2017. 3RP 40. Defendant conceded the court's authority to impose an exceptional sentence. 3RP 42-43. A brief colloquy followed:

[**Court**] Okay. Mr. Broussard, you said that you wanted to take accountability for what you did. Okay I appreciate that. But tell me what it is you did with regard to S.Z. You have indicated that you have been running around and --

[**Defendant**] I would take her to do dates.

[**Court**] Okay. You understand no matter what she had in her past, you victimized her?

[**Defendant**] Yeah.

[**Court**] Everything that I read and just listen to you, that's my struggle with you is I don't think that you get the depth of the victimization you caused.

3RP 49-50. The court observed his score of nine plus exceeded the highest calculated in the Sentencing Reform Act. 3RP 51. A standard sentence was compared to granting him a free crime. *Id.* To avoid that outcome, a 120 month prison term was imposed on count I with a low-end 63 month term on count II to run consecutively. 3RP 51-52; CP 79-80, 94. A notice of appeal was timely filed. CP 97.<sup>1</sup>

---

<sup>1</sup> A challenge to a court's sentencing authority may be raised for the first time on appeal. *State v. Hunter*, 102 Wn.App. 630, 634, 9 P.3d 872 (2000).

C. ARGUMENT.

1. COURTS REJECT INTERPRETATIONS THAT PRODUCE ABSURD RESULTS LIKE READING AN AGGRAVATOR DESIGNED TO ENSURE FELONS WITH HIGH OFFENDER SCORES EXCEEDING THE SRA'S MAXIMUM CANNOT COMMIT FREE CRIME AS VESTING THEM WITH A RIGHT TO COMMIT FREE CRIME.

An offender score is based on prior and current convictions. RCW 9.94A.525(1); *State v. France*. 176 Wn.App. 463, 308 P.3d 812 (2013).

Standard range sentences cannot capture offender scores above nine. RCW 9.94A.510. Accountability for scores greater than nine is possible if:

[t]he defendant has committed multiple current offenses and [his or her] high offender score results in some of the current offenses going unpunished.

RCW 9.94A.535(2)(c).

This appeal requires interpretation of RCW 9.94A.535(2)(c)'s use of the word "some." Interpretation is reviewed *de novo*. *State v. Alvarado*, 164 Wn.2d 556, 561-62, 192 P.3d 345 (2008). Enforcement of legislative intent is the aim. *Id.* Effect is given to plain meaning. *Id.* Commonsense informs the analysis to avoid absurd results. *Id.* The SRA does not define "some." RCW 9.94A.030. Ordinary meaning should control absent ambiguity or a statutory definition. *Garrison v. Washington State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976). "Some" ordinarily means:

**1:** being one unknown, undetermined, or unspecified unit or being or thing ... sometimes used as a correlative to another or other .... **2:** being one, a part, or an unspecified number of something (as a class, group, species, collection, or range of possibilities) named or contextually implied: being an unspecified or ill-defined individual, kind, or example of something... **3:** worthy of notice or consideration .... **4:** being one of, one kind of, or an undetermined portion of: **being always at least one but often a few and sometimes all of**—used as a sign of particularity to indicate that the logical proposition in which it occurs is asserted only of a subclass or certain existent members of the class denoted by the term which it modifies.

Webster's Third New International Dictionary 2171 (2003). The latter usage of "some" to signify "at least one" is standard to denote qualified-categorical descriptions common to law and logic. *Id.*<sup>2</sup> "Some" also means:

**1:** some one: one person or thing among a number .... **2:** one indeterminate part of something .... **3:** some more: an indefinite additional amount or degree....

*Id.*; e.g., *State v. ex rel. Zempel v. Twitchell*, 59 Wn.2d 419, 427, 367 P.2d 985 (1962); *State v. Moore*, 189 Wn.2d 680, 690, 66 P.2d 836 (1937); *Cervo v. Am. Home Prod.*, 38 Misc. 2d 686, 687, 237 N.Y.S.2d 164 (Sup.Ct. 1962) ("some, at least one, of which was...."). "Some" is further defined as:

---

<sup>2</sup> E.g., National Institute for Trial Advocacy Logic for Lawyers: *A Guide to Clear Legal Thinking*, 55-57 (3<sup>rd</sup> Ed. 1997) ("Particular Affirmative Proposition[.] Some S[subject] is P[redicate]: Some members (at least one) of the first class are also members of the second class.... Particular Negative Proposition[.] Some S is not P: Some members (at least) of the first class are not members of the second class."); <https://www.stat.berkeley.edu/~stark/SticiGui/Text/categoricalLogic.htm>; <http://plato.stanford.edu/entries/Aristotle-logic/> ("All, Some, and None"); <https://testmaxprep.com/blog/bar-exam/lSAT-prep-concept-the-logical-opposite/> ("All quantifier sentences will fall under two categories: 'some' and 'most.' Any quantifiers that means 'at least one' will fall under the 'some' category."); *Graham v. Page*, 300 Ill. 40, 44, 132 N.E. 817 (1921) ("Some, or at least one, of the courts....").

being of an unspecified but appreciable or not inconsiderable quantity, amount, extent, or degree: more than a little: being in number at least or often more than a few ... **1:** ABOUT ... used before a numeral.... **2:** in some degree or extent: SOMEWHAT .... Characterized by a (specified) thing, quality, state, or action.... One, a certain one, some, one of a group of (so many) members (in such expressions as *syxa sum* one of a group of six members) ...: group of (so many) members and esp. persons ....

*Id.*; see also RCW 9A.04.110(30) ("Words ... in the singular shall include the plural; and in the plural shall include the singular."); RCW 1.12.050<sup>3</sup>

Our Supreme Court clarified "determination of whether an offense goes unpunished under RCW 9.94A.535(2)(c) requires simply objective mathematical application of [the] sentencing grid to ... current offenses...."

*Alvarado*, 164 Wn.2d at 565. Under that scheme:

If the number of current offenses, when applied to the sentencing grid, results in the legal conclusion that the defendant's presumptive sentence is identical to that which it would be imposed if the defendant had committed fewer current offenses, then an exceptional sentence may be imposed.

*Id.* at 565-66; *State v. Newlun*, 142 Wn.App. 730, 743, 176 P.3d 529 (2008).

The aggravator fills the gap created by the standard sentencing where scores capped at nine serve as the vehicle for accountability on each offense. *State v. Brundage*, 126 Wn.App. 55, 66, 107 P.3d 742 (2005). Appreciation for

---

<sup>3</sup> Alan H. Silberman, Using the Expert to Defend A Damage Claim, 60 Antitrust L.J. 385, 388-89 (1991) ("But that means that **some other firm—one or more** other firms ....") (emphasis added).

its availability if one or more current offense would go unpunished is plain. *Alvarado*, 164 Wn.2d at 565; *see also e.g., State v. Wilson*, 96 Wn.App. 382, 391-92, 980 P.2d 244 (1999) ("a free crime").

Defendant would have this Court oddly interpret "some" to mean "at least two" (two or more) to the end of absurdly construing a no-free-crime aggravator as entitling felons to one free current offense. According to his logic, the aggravator enabling courts to hold high-score felons accountable for each crime is not available until a felon achieves an offender score of at least eleven that includes two unscored offenses. His reading is based on an incomplete definition of "some" plucked from an online dictionary with undue emphasis placed on its use of the word "a few" to denote a small number, which to him necessarily means more than one. App.Br. at 5.

Our Legislature is far more likely to have relied on the complete definition in Webster's Third New International Dictionary, for it is referred to by courts tasked with interpretation. *State v. Christensen*, 153 Wn.2d 186, 195, 102 P.3d 789 (2004) ("the preferred definition should include alternative definitions from *Webster's Third International Dictionary....*"). Review of a complete definition of "some" reveals "few" to be a sufficient but not a necessary condition for proper use. Webster's Third International Dictionary 2171 ("being always at least one but often a few....").

Defendant next argues that "some" should be interpreted to entitle convicted felons to a free crime since statutes elsewhere use the phrase "one or more" to signify one as enough. App.Br. at 5 (RCW 9.94A.730). Yet statutes elsewhere use the phrase "two or more" to signify one is not enough. *E.g.*, RCW 9.92.080 ("two or more convictions ...."). Legislatures may use synonyms to address discrete classes of things like offenses. *E.g.*, *Tyler v. Cain*, 533 U.S. 656, 664, 121 S.Ct. 2478 (2001); *State v. Ose*, 156 Wn.2d 140, 146-47, 124 P.3d 635 (2005) ("a" as "any [] one of a class"); *Cook v. Carmen S. Pariso, Inc.*, 734 N.Y.S.2d 753, 747, 287 A.D.2d 208 (2001).

Another problem with defendant's strained interpretation of "some" is that statutes are not made ambiguous because differing interpretations are conceivable. *Home Street, Inc. v. State Dept. of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). Courts will "not strain for interpretations to create ambiguities where none exist." *State Farm Mut. Auto. Ins. Co. v. Khoe*, 88 F.2d 401, 406 (9<sup>th</sup> Cir. 1989). A definition of "some" that captures "at least one" or "one or more" falls within the main of the word's core meaning. The statute is not made ambiguous by the word's capacity for plural connotation, for courts "refrain from using possible but strained interpretations." *State v. Garcia*, 179 Wn.2d 828, 837, 318 P.3d 266 (2014).

If one assumed ambiguity arose from "some's" capacity to bear a plural meaning, the analysis would bend back to enabling courts to impose exceptional sentences when at least one offense would go unpunished to give effect to legislative intent. *Wingert v. Yellow Frieght Sys.*, 146 Wn.2d 841, 852, 50 P.3d 256 (2002). It is plainly absurd to assume our Legislature intended current offenses amounting to a defendant's tenth felony to always exist beyond the reach of a court's sentencing authority; that the Legislature only sought to prevent felons from benefitting from two or more free crimes.

In *France*, a meaning keeping with legislative intent was applied. *France*, 176 Wn.App. at 472. The court noted exceptional sentences can be based on RCW 9.94A.535(2)(c) if they stop offenders from receiving "a free crime." *Id.* That case looked to *Brundage*, where "one current offense going unpunished justified an exceptional sentence...." *Id.*; *Brundage*, 126 Wn.App. at 67, 69. The result meets legislature intent to ensure punishment is proportionate to a crime's seriousness and an offender's history. *Id.*; RCW 9.94A.010(1). The unambiguous language of and legislative intent for RCW 9.94A.535(2)(c) leads to the same place—sentencing authority to ensure felons cannot commit crime with impunity.

2. DEFENDANT'S SENTENCE WAS PROPERLY IMPOSED UNDER RCW 9.94A.535(2)(C), FOR OTHERWISE DEFENDANT'S COMMISSION OF MULTIPLE CURRENT OFFENSES WOULD HAVE RESULTED IN ONE OF HIS OFFENSES GOING UNPUBLISHED LIKE A FREE CRIME.

"The trial court has all but unbridled discretion in fashioning the structure and length of an exceptional sentence." *France*, 176 Wn.App. at 470. An exceptional sentence will not be reversed unless a reviewing court finds (1) under a clearly erroneous standard, there is insufficient evidence in the record to support the reasons for imposing the sentence; (2) under a de novo standard, the reasons supplied by the sentencing court do not justify a departure of the standard range; or (3) under an abuse of discretion standard, the sentence is clearly excessive or too lenient. *Id* at 469.

Defendant only claims RCW 9.94A.535(2)(c) did not empower the trial court to prevent him from receiving *just* one free crime. That argument fails with his misinterpretation of the statute. The trial court was confronted with a thirty eight year old recidivist who admittedly forced a 19 year old women into prostitution, then broke her jaw. He was before the court to be sentenced for those two offenses with a score of 12. Despite his claim of remorse, his discerned lack of appreciation for the severity of those crimes and his high score moved the court to impose an exceptional sentence that accounted for both crimes. That lawful decision should be affirmed.

D. CONCLUSION.

RCW 9.94A.535(2)(c)'s aggravating factor was enacted to prevent convicted felons from being able to commit free crime by giving courts a tool to hold them accountable for each current offense. Because defendant's score of 9+ meant one of his current offenses would go unpunished under a standard sentence, the exceptional sentence imposed to account for it was authorized by statute and should be affirmed.

RESPECTFULLY SUBMITTED: February 12, 2018.

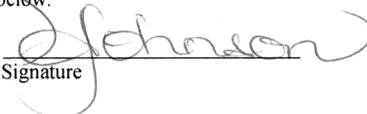
MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



JASON RUYF  
Deputy Prosecuting Attorney  
WSB # 38725

Certificate of Service:

The undersigned certifies that on this day she delivered by <sup>efile</sup> ~~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.

2/12/18   
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**February 12, 2018 - 2:20 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 50335-2  
**Appellate Court Case Title:** State of Washington, Respondent v. Julien Broussard, Appellant  
**Superior Court Case Number:** 15-1-04868-8

**The following documents have been uploaded:**

- 503352\_Briefs\_20180212142003D2871475\_5751.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Broussard Response Brief.pdf*

**A copy of the uploaded files will be sent to:**

- jennifer@stutzerlaw.com
- jenstutzer@yahoo.com

**Comments:**

---

Sender Name: Heather Johnson - Email: hjohns2@co.pierce.wa.us

**Filing on Behalf of:** Jason Ruyf - Email: jruyf@co.pierce.wa.us (Alternate Email: PCpatcecf@co.pierce.wa.us)

Address:  
930 Tacoma Ave S, Rm 946  
Tacoma, WA, 98402  
Phone: (253) 798-7875

**Note: The Filing Id is 20180212142003D2871475**