

81069-9

NO. 59553-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER ALVARADO,

Appellant.

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STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Steven J. Mura, Judge

BRIEF OF APPELLANT

ANELISE E. ELDRED  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of respondent/appellant/plaintiff containing a copy of the document to which this declaration is attached.

*Whatcom County Prosecutor*  
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

*Patrick Mayorsky* 8-15-2007  
Name Done in Seattle, WA Date

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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred in imposing an exceptional sentence. CP 16, 25.

2. The sentencing court erred in entering Finding of Fact 1 in support of an exceptional sentence. CP 25.<sup>1</sup>

3. The sentencing court erred in entering Conclusions of Law 1 and 2 in support of an exceptional sentence. CP 25.

4. The exceptional sentence imposed is unconstitutional.

Issues Pertaining to Assignments of Error

1. The trial court imposed an exceptional sentence under Former RCW 9.94A.535(2)(c) (2006), which authorized an exceptional sentence where a defendant's "multiple current offenses" and "high offender score results in some of the current offenses going unpunished." Where there was no evidence to support a factual finding that Appellant would have gone "unpunished" had he received a standard range sentence and such a finding is not supported by law, did the sentencing court err by relying on this factor to impose an exceptional sentence?

2. Is Former RCW 9.94A.535(2)(c) (2006), unconstitutional as applied to Appellant because the sentencing court engaged in an

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<sup>1</sup> The court's Findings of Fact and Conclusions of Law for an Exceptional Sentence is attached to this brief as Appendix A.

improper “free crimes” fact-finding, a finding required by be made by a jury under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d (2004)?

3. Is remand for a standard range sentence the remedy where the exceptional sentence is invalid and/or is unconstitutional and there is no statutory authority under Former RCW 9.94A.537(3) (2006), or RCW 9.94A.537(2), for a jury to find that a defendant’s multiple current offenses and high offender score “results in some of the current offenses going unpunished”?

B. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Alexander Alvarado was charged with two counts of residential burglary (Counts I and V); first degree theft (Count II); two counts of first degree possession of stolen property (Counts III and IV); second degree possession of stolen property (Count VI); unlawful possession of a controlled substance, less than 40 grams of marijuana (Count VII); and unlawful possession of a dangerous weapon (Count VIII), for events alleged to have occurred on September 2 and 6, 2006. CP 94; RCW 9A.52.025(1), 9A.56.020(1)(a), 9A.56.030(1)(a), 9A.56.150(1), 9A.56.160(1)(a), 69.50.4014, 9.41.250.

After a jury trial in December 2006, Alvarado was found guilty as charged. CP 37. Prior to sentencing, the State sought an exceptional sentence under Former RCW 9.94A.535(2)(c) (2006).<sup>2</sup> Supp. CP\_\_\_ (Sub no. 56, "State's Memorandum").<sup>3</sup> Under that section, a trial court may impose an exceptional sentence without a finding of fact by a jury where it finds "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." Former RCW 9.94A.535(2)(c) (2006). Alvarado's offender score was 21. CP 16. The State reasoned that, because Alvarado's offender score was greater than 9, his convictions all would carry the same presumptive sentence. Supp. CP\_\_\_ (Sub no. 56, "State's Memorandum"). The State requested that the court impose the statutory maximum of 10 years on Count I, the first residential burglary count, to run consecutively with Count V, the second residential burglary count. Supp. CP\_\_\_ (Sub no. 56, "State's Memorandum").

Following a sentencing hearing on February 7, 2007, the court imposed a top-of-the-range sentence on Counts II (57 months), III (57 months), IV (57 months), V (84 months), and VI (29 months). CP 19;

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<sup>2</sup> Current RCW 9.94A.535(2)(c), recodified in 2007, provides the same language as the 2006 version.

<sup>3</sup> The State's Memorandum Re: Sentencing will be designated as Supplemental Clerk's Papers.

4RP 36.<sup>4</sup> The court further imposed 90 days on Count VII and 365 days on Count VIII. CP 19; 4RP 36. As to Count I, the court imposed an exceptional sentence of 120 months; however, it ruled that this sentence was to run concurrently with the other counts. CP 19; 4RP 37. In support of the exceptional sentence, the court found that, because Alvarado had committed multiple offenses, a standard range sentence would result in five offenses (the felony offenses) “going unpunished.” CP 25; 4RP 36. The court further found that, “in [his] 14 years on the bench [Alvarado’s was] the highest offender score [he had] seen,” and an exceptional sentence was “meant for people who[,] like [Alvarado,] indicate that anything less just doesn’t work.” 4RP 36-37. Alvarado was also ordered to pay court costs, a victim fund assessment, court appointed attorney’s fees, and a DNA fee, and the State indicated that one of the victims, Michael Kennard, would be seeking restitution for items alleged to be stolen under Count II. CP 17; 4RP 28, 36. This appeal timely follows. CP 3.

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<sup>4</sup> The verbatim report of proceedings are referred to as follows: 1RP – 12/11/06; 2RP – 12/12/06; 3RP – 12/13/06; 4RP – 2/7/06.

2. Substantive Facts

On September 3, 2006, while out of town, Michael Kennard and his wife, Betty Kennard, received information that their car was missing from their residence at 2915 Eldridge Avenue, in Bellingham, Washington. 2RP 135-36, 142, 144. Upon returning home, Mr. Kennard noticed several items missing from their residence, including a large bottle of coins; 14-carat gold chains, a diamond tennis bracelet, rings, and other jewelry; a portable DVD player; jeans and t-shirts; household decorations; the keys to his car and tractor; and several bottles of liquor. 2RP 149-51. According to Kennard, it appeared as though the intruder had showered and left a diabetes kit behind. 2RP 153-54. Kennard's elderly mother resided with the Kennards, and her caregiver, Janet Abbe, further testified that when she arrived for work at the residence on September 3, 2006, the Kennards' car was missing from the driveway and food was missing from the refrigerator. 3RP 228, 230, 232.

On September 6, 2006, Karl Hepler arrived at a home he owns but does not reside in, located at 5992 Guide Meridian Road, in Bellingham, Washington. 1RP 3. An unknown car was parked in the driveway and the front door was ajar. 1RP 6. As Hepler approached the home, he observed that the front door had been kicked in, and he saw a pile of his belongings stacked just inside the door. 1RP 6. Hepler called 9-1-1 to report the

incident and car's license number. 1RP 7. He further observed several items belonging to him inside the car parked in his driveway, including a humidor and a tent. 1RP 8. Hepler then went around the house and saw Alvarado standing in the backyard. 1RP 8, 12. Hepler informed Alvarado that he had called police, and Alvarado calmly drove away in the car. 1RP 10, 42. According to Hepler, it appeared that whomever had been inside his house had taken a shower, consumed food and drinks, and smoked marijuana. 1RP 33.

Whatcom County Sheriff's Deputy Ryan Bonsen and Sargeant Steve Cooley responded to Hepler's 9-1-1 call. 1RP 47, 49, 56. They stopped Alvarado, and Bonsen proceeded to Hepler's house. 1RP 48-49. Bonsen found an identification card belonging to someone named Jose Delatorres Rodriguez on Hepler's front porch. 1RP 55. Cooley testified that during the stop, he searched the car Alvarado had been driving because he had received information that the vehicle had been stolen. 1RP 62. Michael Kennard was the registered owner of the vehicle. 1RP 71.

Bonsen drove Hepler to the area where Alvarado had been detained. 1RP 49. Kennard also arrived at the scene. 1RP 71. Hepler claimed ownership of several items found in the car, including a tent, humidor, coin box, pistol case, hiking boots, clothing, a knife, and two pairs of sunglasses. 1RP 83-84. These items were returned to him. 1RP

83-84. According to Hepler, these items were worth over \$250. 2RP 17-22.

Additionally, items from the vehicle were claimed by and returned to Kennard, including jewelry, clothing, a Harley Davidson car blanket, a key hider, and a portable DVD player. 1RP 84. The vehicle also was returned to Kennard. 1RP 85. Kennard testified these items were worth over \$1,500. 2RP 160-69. Kennard further testified that certain items missing from his residence were never recovered, including the large bottle of coins, 14-carat gold chains, diamond tennis bracelet, rings, and other jewelry. 2RP 171-78. He valued these items at over \$1,500. 2RP 171-78.

During the search of the vehicle, officers also found blown glass smoking pipes containing marijuana residue in the glove box and an automatic spring blade knife and metal canister containing a green leafy substance on the front passenger seat. 2RP 85-86, 87-88, 89. Neither Kennard nor Hepler claimed ownership of the pipes, knife, or canister. 2RP 99. The green leafy substance field testified positive for marijuana. 2RP 208.

Deborah Park, a nurse at the Whatcom County Jail, testified that Alvarado reported he was diabetic when booked. 3RP 255. However, Alvarado's primary care physician informed Park that he had not treated

Alvarado for diabetes, and the Jail was not currently treating him for the condition. 3RP 254. Officers attempted but were unable to contact or find Jose Delatorres Rodriguez. 2RP 120. There was no testimony that anyone had observed Alvarado inside either the Kennard or Hepler homes. 1RP 46; 2RP 185.

C. ARGUMENT

1. ALVARADO WAS DENIED DUE PROCESS OF LAW WHEN THE TRIAL COURT RELIED ON UNSUPPORTED FACTS AND ERRONEOUS LEGAL CONCLUSIONS TO IMPOSE AN EXCEPTIONAL SENTENCE UPWARD.

Under the Sentencing Reform Act (SRA), the court generally must impose a sentence within the standard sentence range established by the legislature. RCW 9.94A.505. The range is determined for each current offense, first by identifying the statutory seriousness level for that offense, and then by calculating the defendant's offender score, a number based primarily on criminal history. RCW 9.94A.535. The court then determines the standard sentence range for each offense by consulting the statutory sentencing grid and finding the intersection of the offender score and the offense seriousness level. RCW 9.94A.510. This is ordinarily the sentence authorized by the verdict alone. *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

A sentencing court may impose a sentence outside the standard range, however, if “there are substantial and compelling reasons justifying an exceptional sentence.” Former RCW 9.94A.535 (2006). The *Blakely* decision did not alter pre-*Blakely* standards for reviewing an exceptional sentence. *State v. Van Buren*, 123 Wn. App. 634, 653, 98 P.3d 1235 (2004).

An exceptional sentence should be reversed where: (1) the reasons supplied by the sentencing court are not supported by the record; (2) those reasons do not justify a sentence outside the standard range for the offense; or (3) the length of the sentence was clearly excessive. *State v. Fisher*, 108 Wn.2d 419, 423, 739 P.2d 1117 (1987). The first issue is a question of fact reviewed under a clearly erroneous standard. *Fisher*, 108 Wn.2d at 423. The latter two issues are questions of law and should be independently reviewed by this Court. *Fisher*, 108 Wn.2d at 423. Here, the court found an exceptional sentence was justified under Former RCW 9.94A.535(2)(c) (2006), because Alvarado’s high offender score resulted in some of his current offenses “going unpunished.” CP 25. This finding is not supported by the record or the law and cannot be used to justify an exceptional sentence.

First, the court’s finding that Alvarado would have gone unpunished for some of his offenses had he received a standard range

sentence is clearly erroneous. Alvarado was sentenced on each offense, and would have been sentenced had he received a top standard range sentence of 84 months on Count I, to 57 months on Counts II, III, and IV, 84 months on Count V, 29 months on Count VI, 90 days on Count VII, and 365 days on Count VIII. CP 19. Alvarado was also ordered, for all of his offenses, to pay court costs, a victim fund assessment, court appointed attorney's fees, and a DNA fee. CP 17. These costs and fees would have been imposed if Alvarado had received a standard range sentence. Moreover, the judgment and sentence indicates that he must pay restitution to Michael Kennard for the theft of items not recovered, an amount likely to come to thousands of dollars. CP 17; 2RP 171-78. The theft of items was charged in Count II; restitution for those items would have been ordered had Alvarado received a standard range sentence on Count I. CP 56, 92. In sum, Alvarado would have received incarceration, restitution, fines and penalties had he received a standard range sentence. It is difficult to conceive how, then, the court found he would have "gone unpunished" under a standard range sentence. Alvarado very clearly would have been punished for all of his offenses.

The State may argue that, while Alvarado might not have gone entirely unpunished had he received a standard range sentence, he would not have received the *full* amount of incarceration on Counts II through VI

he would have received had his offender score been lower than 9. Supp. CP\_\_\_ (Sub no. 56, “State’s Memorandum”). But the statute is not so specific. It simply authorizes an exceptional sentence where a defendant’s high offender score results in “some of the current offenses going unpunished.” Former RCW 9.94A.535(2)(c) (2006) (emphasis added).

In construing a statute, this Court must assume the Legislature “means exactly what it says.” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003) (quoting *Davis v. Dep’t of Licensing*, 137 Wn.2d 857, 964, 977 P.2d 554 (1999)). Courts must give criminal statutes a literal and strict interpretation and may not “add words or clauses ... when the legislature has chosen not to include that language.” *Delgado*, 148 Wn.2d at 727. Accordingly, this Court should not re-write Former RCW 9.94A.535(2)(c) (2006), to read: “...the defendant’s high offender score results in some of the current offenses [not receiving additional incarceration time].” Rather, any inconsistency based this provision must be addressed by the Legislature. *See Delgado*, 148 Wn.2d at 731.

Former RCW 9.94A.535(2)(c) (2006) is not ambiguous. It simply states that a court may impose an exceptional sentence where some of a defendant’s current offenses have gone unpunished. *See State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005) (if a statute is clear and unambiguous on its face, its meaning must be ascertained solely

from the statutory language). Alvarado did receive would have received punishment for each of his offenses had he received a standard range sentence. As such, the court's factual basis for his exceptional sentence is not supported by the record and is clearly erroneous.

Additionally, the court's finding that Alvarado would have "[gone] unpunished" had he received a standard range sentence on Count I flies in the face of well-settled law. In *State v. Womac*, \_\_\_ Wn.2d \_\_\_, 160 P.3d 40 (2007), our Supreme Court reiterated that a conviction, and not merely the imposition of a sentence, constitutes "punishment." *Womac*, 160 P.3d at 47 (citing *State v. Calle*, 125 Wn.2d 769, 775, 888 P.2d 155 (1995); *State v. Gohl*, 109 Wn. App. 817, 822, 37 P.3d 293 (2001)).

Womac was convicted of homicide by abuse, second degree felony murder, and first degree assault. *Womac*, 160 P.2d at 43. The trial court entered judgment on all counts but imposed only an exceptional sentence on the homicide by abuse count. *Womac*, 160 P.2d at 43. Urging the court to find that Womac's sentence did not violate double jeopardy, the State argued that he was sentenced only for homicide by abuse. *Womac*, 160 P.2d at 47. The court rejected this claim, finding that Womac's convictions, not merely his sentence, constituted "punishment" for double jeopardy purposes. *Womac*, 160 P.2d at 47. The court emphasized the

punitive consequences for each of Womac's convictions, reasoning that they would count in his offender score, could delay his eligibility for parole or result in an increased sentence under a recidivist statute for a future offense, and could be used to impeach his credibility. *Womac*, 160 P.2d at 47. Moreover, the convictions "carry the societal stigma accompanying any criminal conviction." *Womac*, 160 P.2d at 47.

*Womac* conclusively shows that Alvarado received "punishment" for his offenses, regardless of the sentence imposed for each count, because judgment was entered on each offense. Under *Calle* and *Womac*, a defendant's "punishment" is not only the incarceration time he or she receives, but also the mere fact of conviction. Thus, the sentence court here erred as a matter of law when it found that Alavarado would not have "[gone] unpunished" had he received a standard range sentence. Accordingly, as there is no factual or legal basis supporting the exceptional sentence of 120 months, the sentence should be vacated and remanded for resentencing within the standard range. *See State v. Gronnert*, 122 Wn. App. 214, 226, 93 P.3d 200 (2004) (where the trial court's reasons for an exceptional sentence are invalid, the remedy is to remand for a standard range sentence).

2. THE TRIAL COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE IN VIOLATION OF *BLAKELY V. WASHINGTON*, AND ALVARADO MUST BE RESENTENCED WITHIN THE STANDARD RANGE.

A sentencing court's authority to impose an exceptional sentence is a question of law reviewed de novo. *State v. Saltz*, 137 Wn. App. 576, 580, 154 P.3d 282 (2007) (citing *State v. Hughes*, 154 Wn.2d 118, 132, 110 P.3d 192 (2005)). In *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the United States Supreme Court 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." In *Blakely*, 542 U.S. at 303, the Court explained that the "statutory maximum" is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In other words, the "statutory maximum" is the maximum that a judge may impose without any additional findings. *Blakely*, 542 U.S. at 304.

In response to *Blakely*, the 2005 Washington Legislature amended the SRA. See Laws of 2005, ch. 68, § 1 (effective Apr. 15, 2005). Prior to the amendments, Former RCW 9.94A.535(2)(i) (2004), authorized a sentencing court to impose an exceptional sentence where "[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive

sentence that is clearly too lenient in light of the purpose of this chapter...” In *Hughes*, 154 Wn.2d at 140, our Supreme Court held that the “clearly too lenient” conclusion is a factual determination, rather than a legal one, which cannot be made by a trial court following *Blakely*. See also *In re the Personal Restraint Petition of VanDelft*, 158 Wn.2d 731, 742-43, 147 P.3d 573 (2006). In so holding, the *Hughes* Court examined the history of multiple offense policy cases and observed that this aggravating factor required a trial court to find an additional fact: that a standard range sentence would clearly be too lenient because of (1) free crimes; (2) the egregious effects of multiple offenses; or (3) the level of culpability arising from multiple offenses. *Saltz*, 137 Wn. App. at 582 (citing *Hughes*, 154 Wn.2d at 136-37).

Notably, the “*Blakely* fix” legislation was passed before *Hughes* was decided. *Saltz*, 137 Wn. App. at 581. Presumably, the Legislature assumed the State would prevail on the “clearly too lenient” argument in *Hughes* because it again put the old “clearly too lenient” and “multiple offense policy” findings in the category of “court-found” factors.<sup>5</sup> Former RCW 9.94A.535(2)(a)-(d) (2006). It did not authorize a jury to find these

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<sup>5</sup> The *Saltz* Court found that Former RCW 9.94A.535(2)(b) (2006), which authorizes an exceptional sentence where a defendant’s prior unscored misdemeanors or foreign criminal history results in a presumptive sentence that is “clearly too lenient,” was unconstitutional as applied to *Saltz* because the court engaged in improper fact-finding. *Saltz*, 137 Wn. App. at 583-84.

facts. Former RCW 9.94A.537(3) (2006).<sup>6</sup> Here, the sentencing court relied on Former RCW 9.94A.535(2)(c) (2006), which authorized it to impose an exceptional sentence where the “defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished.”

These new factors were tweaked a little, no doubt in an effort to make them appear more like simple “prior convictions” rather than the “multiple offense policy” and “clearly too lenient” factors addressed in *Hughes*. But a close examination of Former RCW 9.94A.535(2)(c) reveals that it really is no different from the “clearly too lenient” finding, which *Hughes* mandates be found by a jury.

In *State v. Ose*, 156 Wn.2d 140, 149, 124 P.3d 635 (2005), the defendant, who was sentenced under the pre-*Blakely* SRA, received an exceptional sentence under the “clearly too lenient” grounds in part because she would otherwise be given “free crimes” because her standard range would not change once she reached an offender score of 9. The court rejected this aggravating factor, reiterating its holding in *Hughes* that the “free crimes” factor does not fit within the “prior convictions” exception to *Blakely* and that this factor requires a factual determination

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<sup>6</sup> The current statute, RCW 9.94A.537(2) also does not authorize a jury to find the “clearly too lenient” and “multiple offense policy” findings in the category of “court-found” factors. It authorizes the State to empanel a jury only to consider the aggravating circumstances in RCW 9.94A.535(3).

by a jury. *Ose*, 156 Wn.2d at 149. Thus, the “free crimes” factor found here under the applicable statute, Former RCW 9.94A.535(2)(C) (2006), likewise was required to be found by a jury and not the sentencing court.

The mere removal of the “clearly too lenient” language from the multiple offense aggravator in Former RCW 9.94A.535(2)(c) (2006), does not alter the fact that the statute nevertheless required the court to engage in the same “free crimes” analysis improperly made by courts under the pre-*Blakely* statute. The point is this. Under the pre “*Blakely* fix” “clearly too lenient” and “multiple offense policy” findings, courts improperly found that a standard range sentence would be clearly too lenient because the defendant would receive “free crimes.” *Saltz*, 137 Wn. App. at 582 (citing *Hughes*, 154 Wn.2d at 136-37). The fact-finding process and exercise of subjective judgment in determining whether a person is receiving “free crimes” is the same whether the ultimate finding is labeled “clearly too lenient” or “going unpunished.” In addition to finding the existence of multiple current offenses and a high offender score, which are objective determinations, the court here also found Alvarado essentially would be receiving “free crimes” if he received a standard range sentence because his offender score was greater than 9. Our Supreme Court has held that a “free crimes” finding does not fit within the “prior conviction”

exception and must be found by a jury. *Hughes*, 154 Wn.2d at 138-40; *Ose*, 156 Wn.2d at 149.

That the court engaged in the same exercise of subjective judgment as it would have under the old SRA is evidenced by the record. In finding that Alvarado would have “[gone] unpunished” had he received a standard range sentence on Count I, the court found “in [his] 14 years on the bench [Alvarado’s was] the highest offender score [he had] seen,” and an exceptional sentence was “meant for people who[,] like [Alvarado,] indicate that anything less just doesn’t work.” 4RP 36-37. Although the facts supporting Alvarado’s offender score may have been proved beyond a reasonable doubt, the State never proved to a jury that Alvarado would receive “free crimes” or go “unpunished” had he received a standard range sentence. No jury considered this subjective question or entered this factual finding; rather, the trial court entered this factual finding for the first time at sentencing.

In addition, well-settled law supports a determination that the sentencing court here engaged in improper fact-finding. As discussed, the fact of conviction, not merely the imposition of a sentence, constitutes a defendant’s “punishment.” *Womac*, 160 P.2d at 47 (Citing *Calle*, 125 Wn.2d at 775; *Gohl*, 109 Wn. App. at 822). Accordingly, as a matter of law, Alvarado was “punished” for each of his offenses when the court

entered judgment on each of them. Furthermore, the court imposed a sentence, fines, and costs for each of Alvarado's offenses, as well as restitution. Thus, the court had to engage in some subjective determination of "going unpunished," as the term is used in Former RCW 9.94A.535(2)(c) (2006), or a "free crimes" analysis, which is simply no different than if it had determined Alvarado's sentence would be "clearly too lenient" in light of his multiple offenses.

In conclusion, Former RCW 9.94A.535(2)(c) (2006) is unconstitutional as applied to Alvarado, violating his due process and Sixth Amendment rights. Because the aggravating factor here was not admitted by Alvarado and was not, and cannot be, proved to a jury, his sentence must be vacated and remanded for resentencing within the standard range. Former RCW 9.94A.537(3) (2006); RCW 9.94A.537(2) (authorizing a court to empanel a jury in any case where an exceptional sentence was imposed to consider the aggravating circumstances listed only in RCW 9.94A.535(3)); Former RCW 9.94A.535(2) (2006) ("court-found" factors); RCW 9.94A.535(2) ("court-found" factors); *Ose*, 156 Wn.2d at 149. Furthermore, because neither judge nor jury has the authority to make the "unpunished" factual finding required to impose an exceptional sentence against Alvarado, the error is not harmless.

D. CONCLUSION

Based on the foregoing facts and law as set forth above, Alvarado respectfully requests this Court vacate his sentence and remand for resentencing within the standard range.

DATED this 15<sup>th</sup> day of August, 2007.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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ANELISE E. ELDRED

WSBA No. 35207

Office ID No. 91051

Attorneys for Appellant

# **Appendix A**

IN THE SUPERIOR COURT OF WASHINGTON  
FOR WHATCOM COUNTY

STATE OF WASHINGTON,  
Plaintiff,

vs.  
ALEXANDER HILL ALVARADO,  
Defendant.

No. 06-1-01271-5

FINDINGS OF FACT AND CONCLUSIONS OF  
LAW FOR AN EXCEPTIONAL SENTENCE

APPENDIX 2.4 JUDGMENT AND SENTENCE  
(FNFCL)

An exceptional sentence [XX] above the standard range should be imposed based upon the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

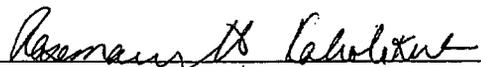
II. CONCLUSIONS OF LAW

1. Substantial and compelling reasons justify an exceptional sentence.
2. An exceptional sentence of 120 months incarceration on Count I is imposed.
3. ~~Count I shall run consecutively with Count V.~~

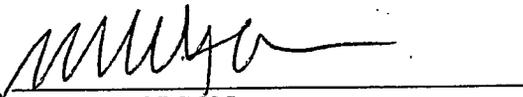
Dated: February 7, 2007.

  
JUDGE

Presented by:

  
Rosemary H. Kaholokula  
Deputy Prosecuting Attorney  
WSBA # 25026

Approved by *to form*

  
ROBERT OLSON  
Attorney for Defendant  
WSBA # 91001