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No. 59553-9-I

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

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STATE OF WASHINGTON  
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**STATE OF WASHINGTON, Respondent,**

**v.**

**ALEXANDER HILL ALVARADO, Appellant.**

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**BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR .....1

B. ISSUES PERTAINING TO APPELLANT’S  
ASSIGNMENTS OF ERROR .....1

C. FACTS .....2

D. ARGUMENT.....4

1. The trial court’s finding that some of Alvarado’s  
current offenses would go unpunished given his  
high offender score of 21 was not clearly  
erroneous as “some current offenses go  
unpunished” when there is no penalty that  
specifically results from those offenses. .... 4

2. RCW 9.94A.535(2)(c) does not violate the Sixth  
Amendment because it does not require any  
impermissible fact finding under Blakely..... 12

3. Even if the aggravating factor of “current  
offenses going unpunished” required a “clearly  
too lenient” finding by a jury, any error was  
harmless as the evidence was overwhelming that  
Alvarado’s high offender score resulted in some  
current offenses going unpunished, and as such a  
standard range sentence would have been  
“clearly too lenient.” ..... 20

4. If the sentence must be remanded, it should be  
remanded for a jury determination regarding  
RCW 9.94A.535(2)(c), not imposition of the  
standard range. .... 22

E. CONCLUSION .....26

**TABLE OF AUTHORITIES**

**Washington State Court of Appeals**

In re Smith, 139 Wn. App. 600, 161 P.3d 483 (2007) ..... 9

In re Vasquez, 108 Wn. App. 307, 31 P.3d 16 (2001) *rev. denied*, 152  
Wn.2d 1035 (2004) ..... 6

Ronald Sewer District v. Brill, 28 Wn. App. 176, 622 P.2d 393 (1980) .. 16

State v. Alkire, 124 Wn. App. 169, 100 P.3d 837 (2004), *vacated on  
remand on other grounds*, 2005 WL 2435901 ..... 8

State v. Davis, 133 Wn. App. 415, 138 P.3d 132 (2006), *rev. granted*, 159  
P.3d 1019 (2007) (WL 1321185) ..... 25

State v. Garnica, 105 Wn. App. 762, 20 P.3d 1069 (2001) ..... 17

State v. Hudnall, 116 Wn. App. 190, 64 P.3d 687 (2003) ..... 9

State v. Rice, 116 Wn. App. 96, 64 P.3d 651 (2003) ..... 6

State v. Roy, 126 Wn. App. 124, 107 P.3d 750 (2005) ..... 16

State v. Wilson, 96 Wn. App. 382, 980 P.2d 244 (1999), *rev. denied*, 139  
Wn.2d 1018 (2000) ..... 17

**Washington Supreme Court**

Budget Rent A Car Corp. v. State, Dept. of Licensing, 144 Wn.2d 889, 31  
P.3d 1174 (2001) ..... 6, 7

In re Hopkins, 137 Wn.2d 897, 976 P.2d 616 (1999) ..... 16

Queets Band of Indians v. State, 102 Wn.2d 1, 682 P.2d 909 (1984) ..... 16

State v. Batista, 116 Wn.2d 777, 808 P.2d 1141 (1991) ..... 21

State v. Bernhard, 108 Wn.2d 527, 741 P.2d 1 (1987) ..... 9

<u>State v. Chapman</u> , 140 Wn.2d 436, 998 P.2d 282 (2000) <i>cert. denied</i> , 531 U.S. 984 (2000).....	6
<u>State v. Fisher</u> , 108 Wn.2d 419, 739 P.2d 683 (1987).....	17
<u>State v. Hill</u> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	11
<u>State v. Hughes</u> , 154 Wn.2d 118, 110 P.3d 192 (2005), <i>abrogated in part</i> by <u>Washington v. Recuenco</u> , ___ U.S. ___, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).....	passim
<u>State v. J.P.</u> , 149 Wn.2d 444, 69 P.3d 318 (2003).....	6
<u>State v. Jones</u> , 159 Wn.2d 231, 149 P.3d 636 (2006).....	14
<u>State v. Law</u> , 154 Wn.2d 85, 110 P.3d 717 (2005).....	5
<u>State v. Ose</u> , 156 Wn.2d 118, 110 P.3d 192 (2005).....	12, 15, 18
<u>State v. Pillatos</u> , 159 Wn.2d 459, 150 P.3d 1130 (2007).....	19, 23, 25
<u>State v. Roggenkamp</u> , 153 Wn.2d 614, 106 P.3d 196 (2005).....	7
<u>State v. Shove</u> , 113 Wn.2d 83, 776 P.2d 132 (1989).....	9
<u>State v. Smith</u> , 116 Wn.2d 238, 803 P.2d 319 (1991).....	9, 17, 19
<u>State v. Stephens</u> , 123 Wn.2d 51, 864 P.2d 1371 (1993).....	9, 10, 17, 21
<u>State v. Thieffault</u> , 160 Wn.2d 409, 158 P.3d 580 (2007).....	13, 14
<u>State v. Womac</u> , 160 Wn.2d 643, 160 P.3d 40 (2007).....	10
<u>Tingey v. Haisch</u> , 159 Wn.2d 652, 152 P.3d 1020 (2007).....	6

**Federal Authorities**

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).....	13
--	----

<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d (2004).....	passim
<u>Neder v. United States</u> , 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).....	20
<u>Washington v. Recuenco</u> , ___ U.S. ___, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).....	20

**Rules and Statutes**

CrR 6.16(b) .....	25
RCW 2.28.150 .....	24, 25
RCW 9.94A.030(44).....	8
RCW 9.94A.390 .....	10, 17
RCW 9.94A.400 .....	17
RCW 9.94A.510 .....	8
RCW 9.94A.530 .....	9
RCW 9.94A.535(2).....	passim
RCW 9.94A.535(2)(c) .....	passim
RCW 9.94A.535(2)(i).....	9, 15, 17, 18
RCW 9.94A.537 .....	1, 22, 23
RCW 9.94A.585 .....	passim
RCW 9.94A.585(1).....	8
RCW 9.94A.585(4).....	5
RCW 9.94A.589 .....	8, 14, 15

**Other Authorities**

Laws of 2005..... 15, 23

Laws of 2007..... 23, 24

**A. ASSIGNMENTS OF ERROR**

None.

**B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether the Court's finding that some of the current offenses would go unpunished under the post-Blakely aggravating factor, RCW 9.94A.535(2)(c), was clearly erroneous where the defendant had an offender score of 21 and the defendant faced the same standard range sentence of 63-84 months if he had been convicted of just one burglary or all of the six felony offenses of which he was convicted.
2. Whether the post-Blakely aggravating factor of some current offenses going unpunished given a high offender score, RCW 9.94A.535(2)(c), is unconstitutional under Blakely where Blakely does not preclude a court from making factual findings regarding prior convictions, a jury found the current multiple offenses, and the question of whether some current offenses went "unpunished" was a consequence of those facts.
3. If a "clearly too lenient" finding is required under RCW 9.94A.535(2)(c), whether any error was harmless because defendant's offender score of 21 resulted in five felony convictions going unpunished and therefore a standard range sentence would have been "clearly too lenient."
4. If the aggravating factor under RCW 9.94A.535(2)(c) included factual findings required to be made by a jury and the error wasn't harmless, whether the appropriate remedy upon remand would be impanelment of a jury under RCW 9.94A.537 to determine whether the defendant's multiple offenses involved some extraordinarily serious harm or culpability, instead of imposition of the standard range, where it would be consistent with legislative intent to do so.

**C. FACTS**

Appellant Alexander Alvarado was charged with six felonies: two counts of Residential Burglary (Count I and V), Theft in the First Degree (Count II), two counts of Possession of Stolen Property in the First Degree (Count III and IV), Possession of Stolen Property in the Second Degree (Count VI). CP 94-96. He was also charged with the gross misdemeanors of Unlawful Possession of Marijuana and Unlawful Possession of a Dangerous Weapon. Id. The jury found him guilty as charged. CP 15, 37-38.

Prior to sentencing, the prosecutor filed a memorandum setting forth Alvarado's criminal history, his offender score of 21<sup>1</sup>, and the State's request for an exceptional sentence.<sup>2</sup> CP 103-19. Defense filed a response memorandum, asserting that his offender score was 11 on the residential burglary convictions and that an exceptional sentence wasn't warranted. CP 26-28. The trial court found that Alvarado's offender score was 21,

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<sup>1</sup> Two of Alvarado's prior convictions, an Escape and Possession of Stolen Property from Idaho, washed out and therefore were not counted in his offender score. RP 4.

<sup>2</sup> The State filed a Notice of Intent to Seek Exceptional Sentence prior to trial. Supp CP \_\_\_, Sub Nom. 25.

carrying a standard range sentence of 63-84 months in prison, on the residential burglary counts. CP 16; RP 35.<sup>3</sup> The court imposed an exceptional sentence on Count I, 120 months, the statutory maximum, and standard range sentences on the remaining counts. CP 16, 19, 25. The court declined to run Count I consecutive to the remaining counts. CP 19, 25.

In imposing the exceptional sentence, the court remarked:

... And the only way the points come into play is in the court's analysis as to whether or not the defendant's high offender score results in some of these current offenses in effect going unpunished because of the multiple convictions that Mr. Alvarado has realized here as a result of this jury verdict.

There is no doubt that that statutory provision had to have been adopted with this type of case in mind, Mr. Olson. I mean, with his long history just over and over and over and over again. This court does find that an exceptional sentence is appropriate as a result of the defendant having committed multiple current offenses and the defendant's high offender score results in, in fact, it's probably the highest I have seen. I think in my 14 years on the bench this is the highest offender score I have seen anybody have. So you're at the top of the list. And to sentence Mr. Alvarado within the standard range would result in five of these current offenses in effect going unpunished.

...

There is no better candidate, Mr. Alvarado, and it doesn't make me feel good either to sentence you to the

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<sup>3</sup> RP refers to the verbatim report of proceedings for February 7, 2007.

maximum but the maximum is meant for people who like you indicate that anything else just doesn't work.

RP 35-37.<sup>4</sup>

**D. ARGUMENT**

- 1. The trial court's finding that some of Alvarado's current offenses would go unpunished given his high offender score of 21 was not clearly erroneous as "some current offenses go unpunished" when there is no penalty that specifically results from those offenses.**

Alvarado asserts that the trial court erred in imposing an exceptional sentence based on the post-Blakely aggravating factor under RCW 9.94A.535(2)(c) because there was no factual basis for the court's finding that some of the offenses would go unpunished. Specifically, he asserts that "unpunished" under the statute includes imprisonment imposed on any of the convictions and the fact of the conviction itself. Alvarado's interpretation of the term "unpunished" would result in an absurd reading of the statute: a court would never be able to impose an exceptional sentence under the aggravating circumstance because a defendant would already have received punishment from one of the convictions and the fact of conviction itself. Alvarado focuses on whether

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<sup>4</sup> As Alvarado has not appealed his convictions, but only his sentence, the State has not provided a summary of the trial testimony.

*he* would receive punishment, whereas the inquiry under the statutory language is whether *some of the current offenses* would go unpunished. “Unpunished” under the statute means that some of the offenses would have no penalty that results from those offenses. Given Alvarado’s high offender score of 21 and his multiple felony convictions found by the jury, there was a factual basis for the court’s conclusion that some of Alvarado’s current offenses would go unpunished.

When a defendant challenges the court’s imposition of an exceptional sentence, the court reviews the following questions:

1. Are the reasons given by the sentencing judge supported by evidence in the record? As to this, the standard of review is clearly erroneous.
2. Do the reasons justify a departure from the standard range? This question is reviewed *de novo* as a matter of law.
3. Is the sentence clearly too excessive or too lenient? The standard of review on this last question is abuse of discretion.

State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005); RCW

9.94A.585(4).

Alvarado’s contention that the record does not support the trial court’s imposition of an exceptional sentence under RCW

9.94A.535(2)(c) hinges upon his argument that the statute’s reference to

punishment includes any punishment imposed on any count and the fact of the conviction itself. The construction of a statute is a question of law that is reviewed de novo. State v. Rice, 116 Wn. App. 96, 99-100, 64 P.3d 651 (2003). The primary objective in interpreting a statute is to give effect to the intent of the legislature. In re Vasquez, 108 Wn. App. 307, 312, 31 P.3d 16 (2001) *rev. denied*, 152 Wn.2d 1035 (2004). Generally, if statutes are clear on their face, the courts give effect to the plain meaning of the language. State v. Chapman, 140 Wn.2d 436, 450, 998 P.2d 282 (2000) *cert. denied*, 531 U.S. 984 (2000). “Words in a statute are given their ordinary and common meaning absent a contrary statutory definition. ... Courts may resort ‘to dictionaries to ascertain the common meaning of statutory language.’” Budget Rent A Car Corp. v. State, Dept. of Licensing, 144 Wn.2d 889, 899, 31 P.3d 1174 (2001) (citations omitted). The outcome of a plain language analysis may be corroborated by validating the absence of an absurd result. Tingey v. Haisch, 159 Wn.2d 652, 664, 152 P.3d 1020 (2007); *see also*, State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (reading of statute that results in absurd result must be avoided because legislature would not intend an absurd result); Rice, 116 Wn. App. at 100 (statutes are construed so as to avoid strained or absurd results).

The precise language of RCW 9.94A.535 regarding this aggravating factor is:

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

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

RCW 9.94A.535(2). The word “punish” means to “impose a penalty on for a fault, offense or violation.” Merriam Webster’s Collegiate Dictionary, 10<sup>th</sup> Ed. Therefore, “some current offenses go unpunished” under RCW 9.94A.535(2)(c) where no penalty is imposed specific to those offenses.

The term “unpunished” must also be construed within the context of the statute in which it appears. Budget Rent A Car Corp, 144 Wn.2d at 900 (“When determining intent, this Court interprets the language at issue in the context of the entire statute.”). “In interpreting statutory terms, a court should ‘take into consideration the meaning naturally attaching to them from the context, and [ ] adopt the sense of the words which best harmonizes with the context.’” State v. Roggenkamp, 153 Wn.2d 614, 623, 106 P.3d 196 (2005).

The list of aggravating factors is prefaced by the following language:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

RCW 9.94A.535. Under the Sentencing Reform Act's ("SRA") "multiple offense policy" other current offenses result in a penalty by increasing the offender score, and thereby increasing the standard range, as current offenses generally run concurrently to one another. RCW 9.94A.589; State v. Alkire, 124 Wn. App. 169, 173, 100 P.3d 837 (2004), *vacated on remand on other grounds*, 2005 WL 2435901. A defendant's standard range sentence, however, is at its maximum at an offender score of 9. RCW 9.94A.510. Within the context of the SRA, then, some current offenses go unpunished where no penalty arises from those offenses, above and beyond that arising from the standard range sentence on the conviction resulting in an offender score of 9 or more.

Moreover, under the SRA "standard sentence range" is defined as "the sentencing court's discretionary range in imposing a nonappealable sentence." RCW 9.94A.030(44). Under RCW 9.94A.585, those sentences that may not be appealed are those that fall within the standard ranges set forth in RCW 9.94A.510 and .517. RCW 9.94A.585(1). RCW 9.94A.510

and .517 refer to ranges of *confinement time*. See also RCW 9.94A.530 (“All standard sentence ranges are expressed in terms of total confinement.”) Exceptional sentences typically involve increasing the term of *confinement* beyond the standard range.<sup>5</sup> State v. Bernhard, 108 Wn.2d 527, 537, 741 P.2d 1 (1987), *overruled on other grounds*, State v. Shove, 113 Wn.2d 83, 776 P.2d 132 (1989). The punishment contemplated by the exceptional sentence statute is confinement time, not merely the fact of conviction itself.

In adopting RCW 9.94A.535(2)(c), the Legislature intended to codify the “free crimes” aggravating factor as announced in State v. Stephens<sup>6</sup> and State v. Smith<sup>7</sup>. In both these cases the Washington Supreme Court held that former RCW 9.94A.535(2)(i) – “multiple offense policy results in a clearly too lenient sentence” – is automatically satisfied whenever the defendant's high offender score is combined with multiple current offenses so that a standard range sentence would result in “free crimes.” Stephens, 116 Wn.2d at 243; State v. Smith, 113 Wn.2d at 56. “Free crimes” are “crimes for which there is no additional penalty.”

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<sup>5</sup> Exceptional sentences may also be applied to the duration of community custody where community custody is authorized by statute. In re Smith, 139 Wn. App. 600, 604, 161 P.3d 483 (2007), *citing*, State v. Hudnall, 116 Wn. App. 190, 197, 64 P.3d 687 (2003).

<sup>6</sup> 116 Wn.2d 238, 803 P.2d 319 (1991).

<sup>7</sup> 123 Wn.2d 51, 864 P.2d 1371 (1993).

Stephens, 116 Wn.2d at 243; Smith, 123 Wn.2d at 56. The Stephens court explained:

... although the crimes were counted in calculating the offender score, most of them had no effect on the sentence because Stephens' score of was '9 or more' already. Thus, Stephens would not be penalized twice if the multiple crimes were considered toward an exceptional sentence. We believe that the Legislature must have intended that these additional crimes be reflected in the sentence imposed, and that this is one type of situation for which RCW 9.94A.390(2)(g) was designed.

Id. at 244. The court concluded that any other rule would mean that other counts would be free from additional punishment, which would be inconsistent with the purposes of the SRA and against public policy. Id at 245.

Alvarado argues that punishment includes the conviction itself, under State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007). However, if Alvarado's interpretation were correct, then whenever a defendant was convicted of an offense, he would be considered punished under the statute, and therefore no court could ever impose an exceptional sentence under this aggravating factor. That is surely not what the legislature intended, or they would not have included the aggravating factor in its post-Blakely exceptional sentencing scheme. Furthermore, under the language of Womac itself, it's clear that the court's construction of

punishment is limited to the case's double jeopardy context. Womac, 160 Wn.2d at 650-51.

Alvarado was convicted of the following felony offenses: two counts of residential burglary, theft in the first degree, two counts of first degree possession of stolen property, and second degree possession of stolen property. Given his prior criminal history, Alvarado had an offender score of 21 on the count I burglary.<sup>8</sup> If Alvarado had just been convicted of one of the residential burglaries, he would have had an offender score of 15. Therefore, if a standard range sentence had been imposed, he would have received no punishment on five of the felonies because they didn't increase the standard sentence range he faced on the one count. The record does support the trial court's conclusion that given his high offender score, some of Alvarado's current offenses would have gone unpunished if a standard range sentence had been imposed.

Alvarado argues that "it is difficult to conceive how ... the court found he would have "gone unpunished" under a standard range sentence." Appellant's Brief at 10. However, Alvarado confuses the issue of whether *he* would have gone unpunished with the factor's requirement that *some*

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<sup>8</sup> Alvarado does not contest the judge's finding regarding his offender score on appeal and therefore it is a verity. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

*current offenses* would go unpunished. While Alvarado received punishment - a sentence including confinement time, financial obligations, etc. - on the count I residential burglary, his other offenses carried no punishment or penalty that arose from those offenses. The trial court's imposition of an exceptional sentence based on RCW 9.94A.535(2)(c) was not clearly erroneous.

**2. RCW 9.94A.535(2)(c) does not violate the Sixth Amendment because it does not require any impermissible fact finding under Blakely.**

Alvarado argues that RCW 9.94.535(2)(c) violates Blakely because such an aggravating factor requires a finding that the sentence is “clearly too lenient,” and under State v. Hughes<sup>9</sup> and State v. Ose<sup>10</sup> that requires factual findings that must be made by a jury. Specifically he asserts that the “clearly too lenient” language from the pre-Blakely<sup>11</sup> aggravating factor under RCW 9.94A.535(2)(i) – “multiple offense policy results in a presumptive sentence that is clearly too lenient” – should be imported into this post-Blakely aggravating factor. The Legislature specifically did not include the “clearly too lenient” language in the new aggravating factor,

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<sup>9</sup> 154 Wn.2d 118, 110 P.3d 192 (2005), *abrogated in part by* Washington v. Recuenco, U.S. \_\_\_, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

<sup>10</sup> 156 Wn.2d 118, 110 P.3d 192 (2005).

<sup>11</sup> Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d (2004).

and under the current language the trial court does not need to engage in any fact finding impermissible under Blakely in order to conclude that there is a basis for imposition of an exceptional sentence.

Blakely does not preclude a judge from finding the facts necessary to support RCW 9.94A.535(2)(c). “*Other 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 v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (emphasis added). Under the “prior conviction” exception, the trial court may make factual findings concerning a defendant's criminal history that result in an increase of the maximum penalty that the defendant faces. “This court has repeatedly...held that Apprendi and its progeny do not require the State to submit a defendant's prior convictions to a jury and prove them beyond a reasonable doubt.” State v. Thiefaul, 160 Wn.2d 409, 418, 158 P.3d 580 (2007).

Here, under the “prior conviction” exception, Alvarado did not have a Sixth Amendment right to have a jury find the aggravating circumstance set forth in RCW 9.94A.535(2)(c). That statutory aggravating circumstance requires only three findings: (1) the defendant

has committed multiple current offenses, (2) the defendant has a high offender score, and (3) that high offender score results in some of the current offenses going unpunished. RCW 9.94A.535(2)(c). The first finding arises directly from the jury's verdict and therefore does not involve any impermissible fact-finding under Blakely. To the extent that it requires any factual findings aside from the verdict, they would relate to criminal history and therefore would not implicate Blakely. The second finding – the high offender score – concerns only criminal history as well. The third finding is simply a legal consequence of the first two findings, flowing from the provisions of RCW 9.94A.589 regarding concurrent sentences and the SRA's multiple offense policy. Because any required findings under RCW 9.94A.535(2)(c) clearly fall under the "prior conviction" exception, Alvarado had no Sixth Amendment right to a jury finding on the aggravating circumstance. *See, Thiefault*, 160 Wn.2d at 418-19 (no right to have jury determine comparability of foreign convictions); *State v. Jones*, 159 Wn.2d 231, 234, 149 P.3d 636 (2006) (no right to have jury make finding that defendants were on community placement at the time they committed their current crimes).

Alvarado argues that despite the Legislature's amendment of the statute regarding aggravating factors, in which it eliminated the "multiple

offense policy” aggravating circumstance and added the current circumstance of “current offenses going unpunished,” the trial court would still need to make a “clearly too lenient” factual finding in order to justify an exceptional sentence under the aggravating circumstance. Alvarado relies on Hughes and Ose, cases involving former RCW 9.94A.535(2)(i), a related, but differently worded, aggravating circumstance that expressly required a “clearly too lenient” finding. The specific language of that aggravating circumstance was: “The 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, as expressed in RCW 9.94A.010.” RCW 9.94A.535(2)(i)(2004).

After the United States Supreme Court issued its opinion in Blakely, the legislature amended the exceptional sentence procedures in order to bring Washington law into compliance with that decision. Laws of 2005, Ch. 68. In doing so, the legislature eliminated the former RCW 9.94A.535(2)(i) aggravating circumstance. The post-Blakely aggravating circumstance under RCW 9.94A.535(2)(c) contains no such “clearly too lenient language.” While the two aggravating circumstances both involve circumstances related to the multiple offense policy of the SRA, it was not the intent of the legislature to import the “clearly too lenient” language

into the aggravating circumstance under RCW 9.94A.585(2)(c). *See, State v. Roy*, 126 Wn. App. 124, 128, 107 P.3d 750 (2005) (where legislature amends statute and makes material change in the wording, the legislature is presumed to have meant to change the law); Ronald Sewer District v. Brill, 28 Wn. App. 176, 178, 622 P.2d 393 (1980).

Significantly, at the same time, the legislature enacted several other aggravating circumstances where such a finding was required. *See, RCW 9.94A.535(2)(b) and (d)*. Under the principle *expressio unius est exclusio alterius*, “[w]here a statute specifically designates the things upon which it operates, there is an inference that the Legislature intended all omissions.” In re Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999) (*quoting, Queets Band of Indians v. State*, 102 Wn.2d 1, 5, 682 P.2d 909 (1984)). The inference required by this principle is that the legislature intentionally omitted the “clearly too lenient” language in RCW 9.94A.535(2)(c).

Moreover, the history of the “multiple offense policy” aggravating circumstance under RCW 9.94A.535(2)(i) does not support importing the “clearly too lenient” language into the post-Blakely aggravating circumstance in RCW 9.94A.535(2)(c). Over several decades, caselaw concerning the “multiple offense policy” aggravating circumstance approved its use in a variety of different factual circumstances. This Court

summarized the caselaw that developed around former RCW

9.94A.535(2)(i) as follows:

A sentencing court may impose an exceptional sentence upward if “[t]he operation of the multiple offense policy of RCW 9.94A.400 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.” RCW 9.94A.390(2)(i). “It is proper to rely on this aggravating factor when there is some extraordinarily serious harm or culpability resulting from multiple offenses which would not otherwise be accounted for in determining the presumptive range.” State v. Fisher, 108 Wn.2d 419, 428, 739 P.2d 683 (1987), quoted in State v. Smith, 123 Wn.2d 51, 56, 864 P.2d 1371 (1993). “This inquiry is automatically satisfied whenever ‘the defendant’s high offender score is combined with multiple current offenses so that a standard sentence would result in “free” crimes- crimes for which there is no additional penalty [.]’” Smith, 123 Wn.2d at 56, 864 P.2d 1371 (quoting State v. Stephens, 116 Wn.2d 238, 243, 803 P.2d 319 (1991)). But a sentencing court “may properly conclude that the sentence is clearly too lenient where the presumptive sentence does not adequately account for all crimes, even if the defendant does not receive a ‘free crime.’” [Citations omitted].

State v. Wilson, 96 Wn. App. 382, 391, 980 P.2d 244 (1999), *rev. denied*,

139 Wn.2d 1018 (2000); *see also*, State v. Garnica, 105 Wn. App. 762,

774, 20 P.3d 1069 (2001) (even if defendant does not receive a “free

crime,” court can apply aggravating factors under former RCW

9.94A.390(2)(i) if “the multiple offense policy would result in too lenient

a sentence in light of the SRA’s stated purpose of ensuring proportionate

punishment and protection for the public”). The “free crimes” aggravating

circumstance was not the equivalent of the “multiple offense policy” aggravating factor.

The cases relied on by Alvarado, Hughes and Ose, do not interpret RCW 9.94A.535(2)(c), but rather former RCW 9.94A.535(2)(i). In Hughes, the court held that former RCW 9.94A.535(2)(i) required a “clearly too lenient” determination, and under the Sixth Amendment a jury was required to make the underlying factual findings of extraordinary serious harm or culpability. Hughes, 154 Wn.2d at 140. “The conclusion that allowing a current offense to go unpunished *is clearly too lenient* is a factual determination that cannot be made by the trial court following Blakely.” Id. (emphasis added). Here, under RCW 9.94A.585(2)(c) the Legislature has removed that factual inquiry and determined that where current offenses go unpunished is an aggravating circumstance per se. In Ose the defendant was sentenced to an exceptional sentence prior to the Blakely decision, and in addressing the former “free crimes” aggravating circumstance, the court merely applied the same rationale as in Hughes. Ose, 156 Wn.2d at 149.

Hughes cannot be read as requiring the court to import a “clearly too lenient” finding into the aggravating circumstance set out in RCW 9.94A.535(2)(c). At the time Hughes was decided, the court was not

aware that the Legislature intended to codify the court's earlier holding in Smith that an aggravating circumstance was automatically satisfied whenever the defendant's high offender score is combined with multiple current offenses so that a standard sentence would result in "free crimes." As the Washington Supreme Court has previously noted, Hughes was decided the same day the legislature enacted the "Blakely fix" statute and the Legislature had no way of anticipating the court's ruling. *See, State v. Pillatos*, 159 Wn.2d 459, 473, 150 P.3d 1130 (2007).

The trial court had the authority to make all of the findings necessary to establish the "current offenses going unpunished" aggravating circumstance. Alvarado appears to argue that whether a defendant is receiving "free crimes" is a subjective determination to be made by a jury. See Appellant's Brief at 17, 18. It is the objection determination, the fact finding, that under Blakely generally must be made by a jury. The subjective determination, whether an exceptional sentence is warranted given the objective aggravating factor, still rests with the sentencing judge post-Blakely. The judge here appropriately made the discretionary decision that the aggravating circumstance was a *substantial and compelling reason* to impose the exceptional sentence based on objective facts that did not need to be found by a jury.

3. **Even if the aggravating factor of “current offenses going unpunished” required a “clearly too lenient” finding by a jury, any error was harmless as the evidence was overwhelming that Alvarado’s high offender score resulted in some current offenses going unpunished, and as such a standard range sentence would have been “clearly too lenient.”**

Even if the aggravating factor under RCW 9.94A.585(2)(c) required a “clearly too lenient” finding by a jury, that error was harmless. The U.S. Supreme Court has held that harmless error analysis *can* be applied when a jury fails to determine a fact relevant to sentencing. Washington v. Recuenco, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). The court applied the standard set out in Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Under Neder, when an element has been omitted from jury instructions, the test for harmlessness is “whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.” Id. at 19. Under Hughes, deciding whether a sentence would be “clearly too lenient” requires both factual determinations by the jury, namely a finding of either some extraordinarily serious harm or culpability resulting

from the multiple offenses,<sup>12</sup> and legal conclusions by the judge. Hughes, 154 Wn.2d at 140. If a “clearly too lenient” finding was required, the jury’s job was not to decide what punishment was sufficient, but only to decide whether there was some extraordinary harm or culpability arising from his multiple current offenses.

If, as Alvarado claims, a factual finding that a standard range sentence was “clearly too lenient” was necessary to satisfy the aggravating circumstance under RCW 9.94A.535(2)(c), that was clearly met in this case where Alvarado’s offender score was 21 and resulted in five felony counts not being punished. *Cf.*, Stephens, 116 Wn.2d at 244-45 (“clearly too lenient” finding automatically satisfied by defendant’s offender score of 19 where six of the eight burglaries would be free from additional punishment under the presumptive sentence). As was noted by the court, the exceptional sentence provision was meant for defendants like Alvarado, whose offender score was the highest the judge had seen in his 14 years on the bench and whose criminal history indicated that anything

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<sup>12</sup> The Hughes court relied upon State v. Batista, 116 Wn.2d 777, 808 P.2d 1141 (1991) in making this conclusion. Batista describes the factual findings as either (1) “egregious effects of defendant’s multiple offenses,” or (2) “the level of defendant’s culpability resulting from the multiple offenses.” Batista, 116 Wn.2d at 787-88.

less wouldn't work. Alvarado's criminal history combined with his multiple current offenses clearly shows a level of extraordinary culpability.

**4. If the sentence must be remanded, it should be remanded for a jury determination regarding RCW 9.94A.535(2)(c), not imposition of the standard range.**

Alvarado argues that this Court should remand the matter for imposition of the standard range. Alvarado asserts that the exceptional sentencing provision within RCW 9.94A.537, permitting impanelment of a jury upon remand in those cases in which an exceptional sentence was originally imposed would not apply because the current exceptional sentencing scheme requires that the aggravating factor under RCW 9.94A.535(2)(c) be made by a judge. It is counterintuitive to argue a statute is defective because it permits a court, instead of a jury, to make the factual findings to support an aggravating circumstance and then to turn around and argue that those very factual findings can't be made by a jury because the statute assigns them to a judge. The Legislature has clearly indicated its intent that the aggravating circumstances within RCW 9.94A.535 provide a basis for exceptional sentences, whether found by a jury or a judge. The trial courts have the authority upon remand to supply the necessary stopgap procedures to meet the Legislature's statutory intent, as well as constitutional mandates.

RCW 9.94A.537 provides:

In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating factors listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

RCW 9.94A.537(2). Although the provision refers only to those aggravating factors listed under subsection three of RCW 9.94A.535, if this Court invalidates RCW 9.94A.535(2)(c) as a judge-determined aggravating circumstance, clearly the intent of the Legislature that that aggravating circumstance be a permissible basis upon which to impose an exceptional sentence should control. Under the Laws of 2007, Chapter 205, the Legislature included the following statement of intent:

In [Pillatos], the Washington supreme court held that the changes made to the sentencing reform act concerning exceptional sentences in chapter 68, Laws of 2005 do not apply to cases where the trials had already begun or guilty pleas had already been entered prior to the effective date of the act on April 15, 2004. *The legislature intends that the superior courts shall have the authority to impanel juries to find aggravating circumstances in all cases that come before the courts for trial or sentencing, regardless of the date of the original trial or sentencing.*

Laws of 2007, Ch. 205, §1 (emphasis added). Substantively RCW 9.94A.535(2)(c) is a valid aggravating circumstance; Alvarado's complaint is only with the procedure by which it can be found.

Impanelment of a jury on remand to hear the evidence concerning the aggravating circumstance under RCW 9.94A.535(2)(c) would be consistent with legislative intent. The court would not be "creat[ing] ... a procedure out of whole cloth," the concern in Hughes that led to the Supreme Court remanding in that case for imposition of the standard range. It would be applying a procedure created by the Legislature, albeit on a factor the Legislature had determined could be decided by a judge. Nor would the court be "usurp[ing] the power of the Legislature." The Legislature has now made it clear that it wishes to have exceptional sentences considered via constitutionally proper procedures, rather than allowing defendants to escape such sentences due to the absence of such a procedure.

In Hughes, the court recognized that it could "fill a minor gap in a statute" by "extrapolat[ing] from its general design details that were inadvertently omitted." Hughes, 154 Wn.2d at 150-51. RCW 2.28.150 provides that "if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which

may appear most conformable to the spirit of the laws.” *See also*, CrR 6.16(b) (court may submit to “the jury forms for such special findings which may be required or authorized by law.”); State v. Davis, 133 Wn. App. 415, 138 P.3d 132 (2006), *rev. granted*, 159 P.3d 1019 (2007) (WL 1321185), (trial courts have authority under RCW 2.28.150 and CrR 6.16(b) to submit special interrogatories regarding sentencing aggravating factors to a jury impaneled to hear a trial). In his concurring opinion in Pillatos,<sup>13</sup> Justice Chambers, citing RCW 2.28.150 and CrR 6.16(b), stated:

Similarly, our criminal rules authorize juries to make special findings. ... Blakely has largely rendered the “course[s] of proceeding” “specifically pointed out by statute” unconstitutional to apply in many cases. I believe that in such a circumstance, courts can refer such questions to juries.

*Id.* at 485-86 (citations and footnotes omitted). In concurring he stated that the courts did have the “inherent power to discharge constitutional requirements and to implement legislative intent.” *Id.* at 485.

If Alvarado is correct in asserting that RCW 9.94A.535(2)(c) is an aggravating circumstance that cannot be found by a judge, the exceptional

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<sup>13</sup> Justice Chambers’ concurring opinion was joined in by Justice J. Johnson and Justice Bridge.

sentence statute contains a “minor gap” that, under Hughes, the court has the authority to fill. The Legislature has enacted a procedure for jury determination of aggravating factors. It has made it clear that this procedure can be used on remand, after appellate reversal of findings that were improperly made by judges. This court can and should fill this gap by authorizing a sentencing procedure that is consistent with the statute and protects the defendant’s constitutional rights.

**E. CONCLUSION**

For the reasons set forth above, the State respectfully requests that this court affirm Alvarado’s exceptional sentence or in the alternative remand for a hearing by jury to determine if facts support a finding under RCW 9.94A.535(2)(c).

Respectfully submitted this 8<sup>th</sup> day of November,

2007.



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CERTIFICATE

I certify that on this date I placed in the mail with proper postage thereon, or caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, Casey Grannis, addressed as follows:

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Date

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