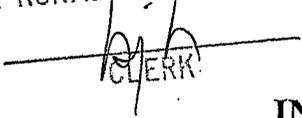


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**IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON**

STATE OF WASHINGTON, Respondent,

v.

ALEXANDER HILL ALVARADO, Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

**DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By HILARY A. THOMAS
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #21210**

**Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784**

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A. SUPPLEMENTAL BRIEF ISSUE

This Court has requested the parties to address the applicability of State v. Newlun, __ Wn. App. __, 2008 WL 171221, COA No. 58762-5 to this case.

B. SUMMARY ANSWER

The opinion issued in State v. Newlun is consistent with the State's position in this case and reinforces the State's argument that the aggravating factor of "current offenses going unpunished" under RCW 9.94A.535(2)(c) does not require any fact finding impermissible under Blakely v. Washington.¹ The fact finding that occurs under the aggravating factor relates solely to criminal history and the convictions themselves. Reliance on prior convictions does not offend Apprendi² or Blakely because those convictions were already subject to a jury determination beyond a reasonable doubt. Under Newlun, RCW 9.94A.535(2)(c) does not implicate Blakely because the factual basis for the imposition of the exceptional sentence is a defendant's criminal convictions.

¹ Blakely v. Washington, 542 U.S. 296, 1245 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

² Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

C. ARGUMENT

Alvarado has asserted the same argument as was presented in State v. Newlun, that RCW 9.94A.535(2)(c) (2006) violates a defendant's Sixth Amendment rights because determining whether the aggravating factor of "current offenses going unpunished" applies requires fact finding that would need to be submitted to a jury under Blakely. Both Alvarado and the defendant in Newlun rely upon cases addressing former RCW 9.94A.535, the statute in effect prior to 2005 amendments to that provision of the Sentencing Reform Act ("SRA"). Newlun distinguishes two of the cases, In re Personal Restraint of Van Delft³ and State v. Hughes,⁴ on the basis that those cases addressed former RCW 9.94A.535(2)(i), an aggravating factor whose statutory language specifically required a "clearly too lenient" finding. Ultimately Newlun rejects the argument Alvarado advances because the judicial fact finding required under the plain language of RCW 9.94A.535(2)(c) relates only to criminal history, and exceptional sentences based on such findings are consistent with the requirements of the Sixth Amendment. Newlun, 2008 WL 171221 at ¶1, 3.

³ In re Personal Restraint of Van Delft, 158 Wn.2d 731, 147 P.3d 573 (2006), *cert. den.*, ___ U.S. ___, 127 S.Ct. 2876 (2007).

⁴ State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), *abrogated in part by Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

In Newlun, the defendant pled guilty to eleven charges, under three separate cause numbers, including one count of first degree identity theft upon which he faced a standard range sentence of 84 months.⁵ Id. at ¶4. The prosecutor recommended the top of the standard range on all counts, to run concurrently, for a total of 84 months confinement. Id. At sentencing, the judge imposed standard range sentences on two of the cause numbers, but imposed an exceptional sentence on the third cause number involving the first degree identity theft conviction, running the standard range time on the first degree identity theft consecutively to the other two cause numbers. As a basis for the exceptional sentence, the judge found that there would be no additional penalty for the other six counts under the third cause number over the other two cause numbers and that the identity theft conviction would result in only an additional 27 months of confinement. Id at ¶7.⁶

Noting that the language of the aggravating factor of “current offenses going unpunished” differed significantly from the “clearly too lenient” language of former RCW 9.94A. 535(2)(i) that Hughes and Van

⁵ The other charges were five counts of forgery, two counts of second degree identity theft and two counts of unlawful possession of personal identification device. Id. at ¶4.

⁶ The court originally based the exceptional sentence on another factor as well, major economic offense, but modified its decision limiting it to RCW 9.94A.535(2)(c) at a subsequent hearing. Id. at ¶8.

Delft found violated Blakely, the court found that RCW 9.94A.535(2)(c) does not require a factual finding that the sentence is “clearly too lenient.”

Id. at ¶18. The court reasoned the current aggravating factor

... allows for a departure from the standard sentence range solely on the basis of the number of criminal offenses of which the defendant has been convicted as they are computed under existing principles of the SRA.

Id.

In concluding that the core concern of Blakely is not implicated by this aggravating factor, the court explained that the offender score is computed based on current and prior convictions, noting that under the SRA current convictions are to be treated as “prior convictions.” Id. at ¶19; RCW 9.94A.589(1)(a). The standard range is then derived by applying that offender score to the seriousness level of the offense on the sentencing grid Id. at ¶19; RCW 9.94A.530. The court then explained, the only other step necessary to impose an exceptional sentence under RCW 9.94A.535(2)(c) involves a legal conclusion based on application of the SRA’s sentencing grid to the current offenses. Id. at ¶20. If the number of current offenses, as applied to the sentencing grid, results in the same presumptive sentence as that which would be imposed if the defendant had committed fewer offenses, then some offenses go unpunished under RCW 9.94A.535(2)(c). Id. Under the SRA then, the only facts a judge needs to

rely upon in order to impose an exceptional sentence under the “current offenses going unpunished” factor are the convictions themselves, convictions for which the defendant already had a right to be tried by jury and to be convicted based on proof beyond a reasonable doubt. *Id.* at ¶19; *cf.*, State v. Jones, 159 Wn.2d 231, 242, 149 P.3d 636 (2006) (community placement conclusion does not implicate any Blakely concern because determination does not involve a finding related to the present offense conduct and/or elements for the crimes).

This is the same analysis that the State has argued applies in this case, that the fact of the current convictions arises directly from the jury’s verdict, that the fact of the high offender score relates only to criminal history and therefore does not violate Blakely, and that the finding regarding “offenses going unpunished” is simply a legal consequence of the previous two factual findings resulting from the statutory scheme of the SRA.

In arriving at its conclusion, the court in Newlun distinguished the cases of Hughes and Van Delft, relied upon by Alvarado, that found application of a former, related aggravating factor violated Blakely. In Van Delft an exceptional sentence was imposed under RCW

9.94A.535(2)(i) (2002), based on the sentencing court's finding that a concurrent, standard range sentence "would fail to hold the defendant accountable for all of the crimes for which he was convicted" and therefore would "clearly be too lenient." In re Van Delft, 158 Wn.2d 731, 735-36, 147 P.3d 573 (2006). The court in Newlun distinguished the Van Delft decision on the basis that the language of RCW 9.94A.535(2)(c) (2006) does not contain the "clearly too lenient" language under former RCW 9.94A.535(2)(i) that the judge in Van Delft specifically used to support the exceptional sentence. Id. at ¶16, 19. As RCW 9.94A.535(2)(c) (2006) does not require a finding that the presumptive sentence would be clearly too lenient, Newlun found that Blakely was not implicated. Id. at ¶18, 19.

In determining that the language in Hughes did not apply to RCW 9.94A.535(2)(c) (2006), the court in Newlun emphasized that the legislature had amended RCW 9.94A.535 expressly to address the Sixth Amendment concerns announced in Blakely and amended it specifically to allow a judge to impose an exceptional sentence solely on the basis of criminal history, where that criminal history results in some of the current

offenses going unpunished. Id. at ¶¶22-23.⁷ In reaching this conclusion, the court characterized the statutory language of RCW 9.94A.535(2)(c) (2006) as clear and unequivocal, and indicated that the statute should be applied as written. Id. at ¶22.

The analysis in Newlun is reflected in the judge's comments here at sentencing:

... 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.

RP 35. The judge understood that under this factor the factual findings he was to consider, and did consider, solely concerned Alvarado's criminal history and the jury's verdict as to the current convictions. The judge then applied those facts to the provisions of the SRA in order to determine if some of the current offenses would go unpunished. The judge determined that five of Alvarado's current offenses would go unpunished, and made

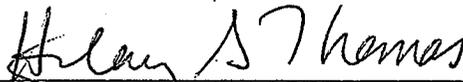
⁷ See also, State v. Jones, 159 Wn.2d 231, 242, 149 P.3d 636 (2006) ("Since the Sentencing Reform Act of 1981, ..., was enacted, sentencing courts have permissibly engaged in judicial fact finding about a defendant's recidivism when arriving at a legal conclusion about the appropriate punishment to be imposed for the current crime.").

the appropriate, discretionary decision to impose an exceptional sentence based on that aggravating factor. RP 56.

D. CONCLUSION

Newlun supports the State's position that the aggravating factor of "current offenses going unpunished," RCW 9.94A.525(2)(c) (2006), does not involve any fact finding unrelated to criminal history or current convictions. Therefore, Blakely is not implicated and a judge may consider, and make findings regarding, this aggravating factor in deciding whether or not to impose an exceptional sentence.

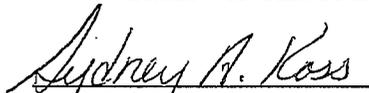
Respectfully submitted this 6th day of March, 2008.


HILARY A. THOMAS, WSBA
Appellate Deputy Prosecutor
Attorney for Respondent

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:

Casey Grannis
Nielsen Broman & Koch, PLLC
1908 E. Madison St.
Seattle WA 98122-2842


Legal Assistant

3/6/2008
Date

**FILED AS ATTACHMENT
TO E-MAIL**