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NO. 91366-8

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IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent

v.

CHAD CURTIS CHENOWETH,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. SUMMARY OF SUPPLEMENTAL BRIEF OF RESPONDENT

Chad Chenoweth was convicted of six counts of child rape and six counts of incest for multiple acts of intercourse against his daughter. The trial court and Court of Appeals determined that the convictions for child rape and incest were not same criminal conduct. Chenoweth contends the convictions should be considered as same criminal conduct.

This Court in *State v. Bobenhouse*,¹ applying *State v. Calle*,² determined that child rape and incest do not carry the same criminal intent and the legislature intended they be punished separately. *Calle* noted the legislature intended to punish them as separate offenses.

After the decisions in *Calle* and *Bobenhouse*, the legislature did not change the child rape, incest or same criminal conduct statutes. This indicates the legislature's satisfaction with the analysis. And the criminal intent portion of the same criminal conduct analysis has not changed so as to merit revisiting the decision in *Bobenhouse*.

This Court should continue to hold that child rape and incest merit being punished separately and are not same criminal conduct.

¹ *State v. Bobenhouse*, 166 Wn.2d 881, 214 P.3d 907 (2009).

² *State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995).

II. ISSUES PRESENTED FOR REVIEW

1. Since child rape and incest are based upon different elements, do convictions based upon the same act constitute double jeopardy?
2. Are child rape and incest based upon the same acts the same criminal conduct pursuant to RCW 9.94A.589(1)(a)?
3. Do child rape and incest based upon the same acts carry the same criminal intent?
4. Did the legislature intend to punish child rape and incest separately?

III. STATEMENT OF THE CASE

Chad Chenoweth was convicted of twelve total counts consisting of six counts of Rape of a Child in the Third Degree and six counts of Incest in the First Degree of his daughter between July of 2009 and July of 2010, when his daughter was fourteen. CP 120-3, CP 152-163, 4/23/13 RP 87, 4/26/14 RP 82-87.

The trial court determined that the offenses of rape and incest were based upon the same acts, with the same victim at the same time, but that under *State v. Bobenhouse*, the acts of rape and incest may be punished separately. 10/11/13 RP 150.

The Court of Appeals affirmed finding that *State v. Bobenhouse* determined that convictions for child rape and incest based upon the same acts do not constitute same criminal conduct. *State v. Chenoweth*, COA No. 71028-1-I (February 2, 2015) at page 9.

IV. ARGUMENT

1. Since child rape and incest are separate offenses, convictions for both crimes based upon the same act do not violate double jeopardy.

Convictions for child rape and incest do not constitute double jeopardy. Incest in the First Degree and Rape of a Child both involve sexual intercourse as a necessary element. RCW 9A.64.020(1), RCW 9A.44.079. Incest requires proof of a relationship whereas Rape of a Child requires a difference in the age between defendant and the victim. These different elements result in separate offenses.

We find that all indications of legislative intent clearly support the result of the same evidence and *Blockburger* tests in this case. Under the tests set forth by this court and the United States Supreme Court, second degree rape and first degree incest are separate offenses, and the double jeopardy clause does not prevent convictions, and attendant penalties, for both offenses arising out of a single act of intercourse.

State v. Calle, 125 Wn.2d 769, 782, 888 P.2d 155 (1995). In contrast rape and rape of a child convictions would violate double jeopardy. *State v. Hughes*, 166 Wn.2d 675, 686, 292 P.3d 558 (2009).

Chenoweth did not contend at the Court of Appeals or in his petition for review that this analysis is incorrect.

Since double jeopardy is not implicated, the questions remains, did the legislature authorize multiple punishments.

2. The same criminal conduct is a separate legislative enactment which protects against double jeopardy.

RCW 9.94A.589 provides:

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That **if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.** Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. **"Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.**

RCW 9.94A.589(1)(a) (bold emphasis added).

Determinations of same criminal conduct are reviewed for abuse of discretion or misapplication of law. *State v. Aldana Graciano*, 176 Wn.2d 531, 535, 295 P.3d 219 (2013). Because a “same criminal conduct” finding favors the defendant by lowering the offender score below the presumed score, the defendant must establish the crimes constitute the same criminal conduct. *Id.* at 539.

In order for separate offenses to "encompass the same criminal conduct" under the statute, three elements must therefore be present: (1) same criminal intent, (2) same time and place, and (3) same victim. The absence of any one of these prongs prevents a finding of same criminal conduct. *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

As initially enacted the statute now codified as RCW 9.94A.589(1)(a) contained language which provided consecutive confinement for those offenses which “arise of out of separate and distinct criminal transactions...” Laws of 1983, ch. 115, § 11. The legislature amended the statute to provide that offenses which “encompass the same criminal conduct, then those offenses shall be counted as one crime.” Laws of 1986, ch. 257, §28. In *State v. Edwards*, 45 Wn. App. 378, 725 P.2d 442 (1986)³, the Court of Appeals applied the prior statute holding

³ Overruled by *State v. Dunaway*, 109 Wn.2d 207, 743 P.2d 1237 (1987).

that assault in the second degree and kidnapping of different individuals were the same transaction. Subsequently the legislature amended the statute to provide the specific definition of same criminal conduct which is the current language of the statute. Laws of 1987, ch. 456, § 5; RCW 9.94A.589(1)(a).

The Supreme Court in *State v. Dunaway* interpreted the term same criminal conduct language in the statute prior to the legislature's enactment to provide for same criminal conduct when the crimes pertain to the same criminal objective. *State v. Dunaway*, 109 Wn.2d at 214-5. The Court in *Dunaway* noted that the rule adopted as similar to the legislation enacted in 1987, but was not given retroactive effect to that case. *Id.* at 216.

Despite using the legislature language "same criminal intent" in the statute, Washington Courts have continued to apply an "objective intent" analysis to evaluate the defendant's actions to determine if "a defendant's criminal intent, as objectively viewed, changed from one crime to the next." *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992), citing *State v. Collicott (Collicott II)*, 118 Wn.2d 649, 667-68, 827 P.2d 263 (1992); *Dunaway*.

However the statute is continued to be applied sparingly.

Although the statute is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act, there is one clear category of cases where two crimes will encompass the same criminal conduct -- "the repeated commission of the *same crime* against the same victim over a short period of time."

State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997) (emphasis in original), *citing* 13A Seth Aaron Fine, Washington Practice § 2810, at 112 (Supp. 1996).

This case presents the question of whether the commission of *different* crimes against the same individual over the same period of time should be considered as same criminal conduct.

The State contends the legislature's enactment and their decision not to change the statute following the decisions in *Calle* and *Bobenhouse*, support the position that punishment for multiple different crimes is permitted where available after a double jeopardy analysis.

3. Child rape and incest committed during the same act both merit punishment.

In *Calle*, the issue before this Court was whether convictions for second degree rape and first degree incest violated double jeopardy. This Court ruled the legislature intended the two offenses to be punished separately for *double jeopardy* purposes. *State v. Calle*, 125 Wn.2d at 781.

Calle had been convicted of first degree incest and second degree

rape of his minor stepchild for a single act of sexual intercourse and was ordered to serve concurrent sentences. *Id.* at 771-2. The trial court determined the offenses encompassed the same criminal conduct and imposed concurrent sentences. *Id.* at 772. There is no indication the State challenged the same criminal conduct determination of the trial court.

This Court in *Calle*, went on to evaluate whether the Legislature intended to authorize multiple punishments for violations of the rape and incest statutes. *Id.* at 776.

Thus, while we regard the *Blockburger* and same evidence tests as significant indicators of legislative intent, we recognize that these tests are not always dispositive of the question whether two offenses are the same. As stated earlier, however, the presumption accorded to statutes by these rules should be overcome only by clear evidence of contrary intent.

In examining the legislative history of the rape and incest statutes we see no such evidence. Rather, we find only support for our conclusion that the Legislature intended to punish incest and rape as separate offenses, even though committed by a single act.

State v. Calle, 125 Wn.2d 769, 780, 888 P.2d 155, (1995). This Court in *Calle* noted that differing purposes served by incest and rape statutes and their differing locations in the criminal code are indications the legislature intended to punish them separately.

Incest and rape have been regarded as separate crimes in Washington since before statehood. *See* Laws of 1873, ch. 7, § 127, p. 209 (grouping incest with offenses such as

seduction, adultery, polygamy, and lewdness). Today, the offenses are defined in two separate sections of the criminal code. Incest and bigamy now constitute RCW 9A.64, Family Offenses, while second degree rape is defined in RCW 9A.44, Sex Offenses.

As the Court of Appeals recognized, the two offenses also serve different purposes. One commentary states that the preservation of family security is the primary purpose behind the incest legislation. Sex Crimes, *Washington's New Criminal Code Liberalizes Consensual Noncommercial Sex*, 12 Gonz. L. Rev. 575, 582 (1977). The Court of Appeals more expansively observed that incest is punished not only to prevent mutated birth but also to promote and protect family harmony, to protect children from the abuse of parental authority, and "because society cannot function in an orderly manner when age distinctions, generations, sentiments and roles in families are in conflict". *State v. Kaiser*, 34 Wn. App. 559, 566, 663 P.2d 839, *review denied*, 100 Wn.2d 1004 (1983).

In contrast, the primary intent of RCW 9A.44 is to prohibit acts of unlawful sexual intercourse, with punishment dependent on the accompanying circumstances. *Birgen*, at 9. One commentary states that Washington's rape laws recognize that while rape is a crime with diverse implications, it is most often a crime of aggression, power, and violence. The focus of the crime is not simply sexual violation, but also the fear, degradation and physical injury accompanying that act. Helen G. Tutt, Comment, *Washington's Attempt To View Sexual Assault as More Than a "Violation" of the Moral Woman -- The Revision of the Rape Laws*, 11 Gonz. L. Rev. 145, 155 (1975). We find it apparent that the rape and incest statutes are "directed to separate evils" and thus constitute separate offenses. See *Albernaz*, at 343.

State v. Calle, 125 Wn.2d 769, 780-81, 888 P.2d 155 (1995).

Thus, while the trial court in *Calle* had determined the offenses to be same criminal conduct, the analysis conducted by this Court demonstrated the legislative intent was for separate punishment.

And, the same criminal conduct analysis is a matter of the legislature's exercise in setting punishment for offenses.

Following *Calle*, this Court had a chance to evaluate the same criminal conduct issue raised in *State v. Bobenhouse*, 166 Wn.2d 881, 885-6, 224 P.3d 907 (2009). In *Bobenhouse*, the defendant was convicted of three counts of first degree rape of a child and two counts of incest. One rape count was for engaging in sexual intercourse with his son, while the other two counts were for having his two minor children engage in intercourse with each other. *Id.* at 885-6. One incest conviction was based upon one act of sexual intercourse committed against his son as reflected in the rape count and while the other was for the acts which involved the rape counts involving his children as he directed. *Id.*

The trial court refused to find counts of first degree incest and first degree child rape constituted the same criminal conduct. This Court did not find there was an abuse of discretion.

Bobenhouse further argues the trial court abused its discretion when it did not find that the underlying rape and incest charges (stemming from forcing the children to have sexual intercourse with each other) constituted the "same

criminal conduct” for purposes of sentencing. **Bobenhouse would have this court hold that first degree child rape and first degree incest involve the same criminal intent: sexual intercourse. But this argument has no merit. We have previously held that “the Legislature intended to punish incest and rape as separate offenses, even though committed by a single act.”** *State v. Calle*, 125 Wn.2d 769, 780, 888 P.2d 155 (1995). Bobenhouse's argument must fail in light of the precedent set by our decision in *Calle*.

State v. Bobenhouse, 166 Wn.2d 881, 896, 214 P.3d 907 (2009) (bold emphasis added).

Thus, this Court has specifically held that rape and incest charges stemming from the same act may be determined by the trial court not to constitute same criminal conduct.

4. There has been no expansion of the “same criminal intent” portion of the same criminal conduct analysis following *Bobenhouse*.

As recently as last year the Court of Appeals continued to refer to the objective intent analysis, in furtherance of test and same scheme or plan test which were all available to this Court at the time of the decision in *Bobenhouse*. *State v. Kloeppe*r, 179 Wn. App. 343, 357, 317 P.3d 1088 (2014), *citing State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990), *Dunaway*, 109 Wn.2d at 215 (furtherance test), *State v. Lewis*, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990) (same scheme or plan).

Although these analyses may be of assistance where the offenses are part of the same statutory framework, they are of little benefit when the offenses are contained in entirely different chapters.

5. The Legislature has not changed the statutes following this Court's prior decisions.

Bobenhouse rather definitely provided that child rape and incest may be found to be separate criminal conduct. The Court of Appeals in this case agreed that was the case. *State v. Chenoweth*, COA No. 71028-1-I (February 2, 2015) at page 9. This followed the decision of *Calle* that found the offenses are separate crimes for the purposes of double jeopardy and merit separate punishment.

The legislature has not taken the opportunity to address these holdings if they were erroneous.

The law is well settled that the legislature is deemed to acquiesce in the court's interpretation of a statute if no change is made for a substantial time after the decision. *See Buchanan v. Int'l Bhd. of Teamsters*, 94 Wn.2d 508, 511, 617 P.2d 1004 (1980). In addition, "[i]t is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it." *Johnson v. Morris*, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976).

In re Pers. Restraint of Reed, 136 Wn. App. 352, 361, 149 P.3d 415, 419 (2006).

Given this Court's decision in *Bobenhouse* and the legislature's acquiescence in the decision, this Court should continue to adhere to the determination that rape and incest may be determined by a trial court not to be same criminal conduct.

6. As applied in the present case there would be no effect on the underlying sentence given the twelve total counts for which Chenoweth was convicted.
 - i. For four or more counts of child rape and incest, there would be no effect on the sentence.

When same criminal conduct is found, the offenses shall be counted as one crime. RCW 9.94A.589(1)(a).

Thus, Chenoweth's standard range would not be affected by the scoring of both the rape and incest. Chenoweth was convicted of six counts of each. CP 153-163. The incest convictions triple score and upon a sentence of six counts, Chenoweth's offender score would still be fifteen and his range 77 to 102. RCW 9.94A.525(17), RCW 9.94A.030(46)(a)(ii), RCW 9.94A.515 - (VI), RCW 9.94A.510 - (VI).

- ii. For fewer acts, there would be an effect on the standard sentence.

There are situations where there could be an effect on the standard range for convictions involving child rape, rape or indecent liberties and incest. A defendant's offender score would increase due to triple scoring

under RCW 9.94A.525(17) if there were convictions for three or fewer acts involving incest and some other felony sexual offense based upon the same act. As explained above, *Bobenhouse* actually involved three acts. Despite that fact, the determination by this Court in that case was that the trial court did not err in holding the offenses were not same criminal conduct.

7. Given the offense against a parent's child, punishment for incest and the underlying sexual offense are merited.

Although incest can be committed against a child of a parent at any age, incest against a child above age sixteen would not automatically include another sexual offense such as indecent liberties or rape in the first, second or third degrees. However, incest⁴ against a child under age sixteen would always amount to rape of a child or child molestation.

If this Court were to require the same criminal conduct analysis to be applied to an act constituting incest and another sexual offense, such as rape of a child, the effect would be to remove the greater punishment which would flow from a parent committing a few acts of incest against the defendant's minor child. Under such a sentencing scheme, a rape or

⁴ Incest in the first degree requires sexual intercourse. RCW 9A.64.020(1)(a). Incest in the second degree requires sexual contact. RCW 9A.64.020(2)(a).

child rape in the first, second or third degrees committed against the parent's own child, would be treated the same as an offense by a stranger.

A scheme which provided for the enhanced punishment flowing from a parent's abuse of a position of trust would be consistent with legislative intent.

Decisions from other jurisdictions support the position that punishment for rape and incest from the same act are appropriate. *State v. Johnson*, 860 N.W.2d 235, 249 (S.D. 2015) (affirming imposition of multiple punishments for rape and incest were offenses were always separate under South Dakota law and legislative intent is clear); *Drinkard v. Walker*, 281 Ga. 211, 217, 636 S.E.2d 530, 535 (Ga. 2006) (crimes of statutory rape and incest in this case were intended by legislature to be punished separately).

As this Court in *Calle* recognized, separate punishment for rape and incest for this situation are merited because of the protecting children from abuse of parental authority, promote and protect family harmony and to prevent mutated births. *State v. Calle*, 125 Wn.2d at 781.

V. CONCLUSION

For the reasons set forth above, this Court should adhere to the decisions of *Calle* and *Bobenhouse* and affirm the Court of Appeals

determination that rape and incest do not constitute same criminal conduct under RCW 9.94A.589(1)(a).

DATED this 12th day of October, 2015.

Respectfully submitted,



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DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Thomas M. Kummerow, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 12th day of October, 2015.



KAREN R. WALLACE, DECLARANT

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Good afternoon. Attached is the State's Supplemental Brief of Respondent for filing.