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Supreme Court No.93192-5
COA No. 32708-6-III
(consolidated with No. 32760-4-III)

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

STATE OF WASHINGTON, Plaintiff/Respondent

v.

THOMAS WEATHERWAX, Defendant/Petitioner.

STATE OF WASHINGTON, Plaintiff/Respondent

v.

JAYME LEE RODGERS, Defendant/Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Brian C. O'Brien
Larry D. Steinmetz
Deputy Prosecuting Attorneys
For Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

 ORIGINAL

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I. ISSUES PRESENTED

1. Does the rationale for the majority's opinion in *Weatherwax* fail because it is based upon the faulty premise that by eliminating attempted serious violent offenses from consideration as the "first serious violent offense" calculated under RCW 9.94A.589(1)(b), the resulting sentence will always be maximized?

2. Is it rational that the legislature intended attempted serious violent offenses to be scored as if they had the same seriousness level as a completed offense?

II. STATEMENT OF THE CASE

In 2012, Division I of the Court of Appeals held that RCW 9.94A.589(1)(b) was ambiguous. *State v. Breaux*, 167 Wn. App. 166, 273 P.3d 447 (2012). That statute sets forth the method for scoring multiple serious violent offenses. It states in pertinent part:

Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under this subsection (1)(b) shall be

served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

RCW 9.94A.589(1)(b).

In *Breaux*, the defendant was charged with two serious violent offenses, one an attempted first degree rape and the other a first degree rape,¹ offenses that arguably had the same seriousness level. 167 Wn. App. 166. After examining RCW 9.94A.589(1)(b) and other related statutes, the court held that under the rule of lenity, the attempted serious violent offense should count as the first scored serious violent offense – the offense that includes in its offender score the prior and present criminal history,² and that the completed first degree rape charge should count as the “other serious violent offense” which runs consecutively to the first scored serious violent offense, but is scored with an offender score of “zero.” Thereby, Breaux’s sentence was 285 months, rather than 308.25 months.³ *Id.* at 173-74.⁴

¹ The defendant also had an additional violent offense of second degree rape.

² Excluding other current serious violent offenses.

³ The State’s calculation using the completed serious violent offense as the first scored serious violent offense was 308.25 months.

⁴ In *Breaux*, the difference in the length of sentence was approximately 8%, depending on which serious violent offense was counted first. As noted in the tables below, the difference in the length of sentence depending on whether an attempt or completed crime is used as the first serious offense is

In 2016, Division III of the Court of Appeals rejected the reasoning in *Breaux*, and found RCW 9.94A.589(1)(b) unambiguous.⁵ The court pinned its holding on its premise that if they had followed *Breaux*'s reasoning, "then we will have created the *only* situation in which RCW 9.94A.589(1)(b) does not require the full offender score to be used where it will maximize the sentence. No reason is offered as to why the legislature would have intended such a result." *State v. Weatherwax*, 193 Wn. App. 667, 675, 376 P.3d 1150, *review granted*, 186 Wn.2d 1009 (2016) (emphasis added).

In her dissent, Judge Pennell noted that the legislature had amended the RCW 9.94A.589 in 2015, three years after the *Breaux* decision, but did not change the substance of section (1)(b), presumptively suggesting its acquiescence to the judicial interpretation set forth in *Breaux*. *Weatherwax*, 193 Wn. App. at 681-82. This Court accepted review of the sentencing issue.

usually under 9%. For instance, in *State v. Ronquillo*, 190 Wn. App. 765, 361 P.3d 779 (2015), the court noted that "[t]he correct calculation of Ronquillo's offender score under *Breaux* would reduce his standard range sentence [of 51.3] years by only 5.25 months if everything else that went into the determination of the sentence remained the same." *Id.* at 771.

⁵ The majority found that the legislature intended attempted serious violent felonies to not have a seriousness level under RCW 9.94A.515, and therefore, such offenses could never qualify as the "first scored offense" under the calculation in RCW 9.94A.589(1)(b).

III. ARGUMENT

A. THE RATIONALE FOR THE MAJORITY'S OPINION IN *WEATHERWAX* FAILS BECAUSE IT IS BASED UPON THE FAULTY PREMISE THAT BY ELIMINATING ATTEMPTED SERIOUS VIOLENT OFFENSES FROM CONSIDERATION AS THE "FIRST SERIOUS VIOLENT OFFENSE" CALCULATED UNDER RCW 9.94A.589(1)(B), THE RESULTING SENTENCE WILL ALWAYS BE MAXIMIZED.

The crux of the *Weatherwax* opinion is its holding regarding RCW 9.94A.515, which sets forth the seriousness level for the vast majority of crimes, but does not list anticipatory offenses such as attempts within any seriousness level. Strictly construing the statute, the majority held:

We can postulate why the legislature might intend a literal meaning in this case: limiting the choice of "the offense with the highest seriousness level under RCW 9.94A.515" to those that actually *have* a seriousness level under that statute, **ensures that the full offender score is used where it will maximize the sentence. It avoids an anomalous exception for anticipatory offenses.**

Weatherwax, 193 Wn. App. at 676 (italics in original; bold emphasis added).

The above mathematical premise – that if an anticipatory serious violent offense is never used as the first scored offense under RCW 9.94A.589(1)(b), then it will *always* "maximize the sentence" – is, respectfully, incorrect. As shown below, in the highlighted sentencing results of hypothetical current serious violent offenses, the premise offered by the majority fails in real world applications. In the following situations (in bold), *using the anticipatory offense first* maximizes the sentence.

O.S. 9 = Offender score of nine.

Hypothetical Sentencing Results:	<i>Weatherwax</i>	<i>Breaux</i>	Difference in Months	Percentage Difference
<i>O.S. 9 Attempted Murder I + Kidnapping</i>	329-438	359-479	30-41	-10%
<i>O.S.9 Kidnap + Attempted Murder I</i>	261-363	274-366	3-13	-3%
<i>O.S. 9 Kidnap + Attempted Rape</i>	219-290	231-307	12-17	-6%
<i>O.S. 9 Kidnap + Attempted Manslaughter</i>	207-274	214-278	4-7	-2%
O.S. 9 Manslaughter + Attempted Murder I	390-520	386-513	4-7	+1%
O.S. 9 Manslaughter + Attempted Murder II	322-445	301-400	21-45	+9%
O.S.9 Manslaughter + Attempted Rape	280-372	258-341	22-31	+9%
O.S. 9 Rape + Attempted Murder II	352-483	316-421	36-62	+12%
O.S. 9 Rape + Attempted Murder I	420-558	401-531	19-27	+5%

Hypothetical Sentencing Results:	<i>Weatherwax</i>	<i>Breaux</i>	Difference in Months	Percentage Difference
O.S. 9 Murder II + Attempted Murder I	478-637	431-631	6-47	+4%
O.S. 9 Attempted Rape I + Rape I	310-410	273-362	37-42	+12%
O.S. 9 Attempted Murder I + Murder I	591-788	548-731	43-57	+8%
<i>O.S. 9 Attempted Murder I + Kidnapping (4 cts)</i>	<i>482-642</i>	<i>512-683</i>	<i>30-41</i>	<i>-5%</i>
O.S. 9 Kidnap + Attempted Kidnap	187-249	163-217	24-32	+15%

O.S. 4 = Offender score of 4.

Sentencing Scheme:	<i>Weatherwax</i>	<i>Breaux</i>	Difference	Percentage
<i>O.S.4 Kidnap + Attempted Murder I</i>	<i>247-369</i>	<i>254-338</i>	<i>-7-31</i>	<i>-6%</i>
<i>O.S.4 Kidnap + Attempted Murder II</i>	<i>159-254</i>	<i>166-258</i>	<i>- 4-7</i>	<i>-3%</i>
<i>O.S.4 Kidnap + Attempted Rape</i>	<i>137-181</i>	<i>141-188</i>	<i>- 4-7</i>	<i>-4%</i>

Sentencing Scheme:	<i>Weatherwax</i>	<i>Breaux</i>	Difference	Percentage
<i>O.S. 4 Kidnap + Attempted Manslaughter</i>	115-166	127-170	- 4-7	-5%
O.S. 4 Manslaughter + Attempted Murder I	282-376	281-372	+ 1-4	+1%
O.S. 4 Manslaughter + Attempted Murder II	194-301	193-292	+ 1-9	+2%
O.S.4 Manslaughter + Attempted Rape	172-228	168-222	+ 4-6	+2.5%
O.S. 4 Rape + Attempted Murder II	212-325	208-313	+4-12	+3%
O.S.4 Rape + Attempted Murder I	300-400	296-393	+ 4-7	+1.5%
O.S.4 Murder II + Attempted Murder I	334-494	326-490	+ 4-8	+1.5%

Clearly, the above highlighted sentencing hypotheticals establish that the premise offered by the *Weatherwax* majority fails in real world applications.

These are not the only sentencing anomalies arising under the construction given RCW 9.94.A.589(1)(b) by the *Weatherwax* majority. As discussed in Seth A. Fine and Douglas J. Ende, *Washington Practice*:

Criminal Law I, 13B Wash. Prac., Criminal Law § 3511 (2016-2017 ed. Nov. 2016 update), “[t]his procedure [RCW 9.94A.589(1)(b)] usually results in an increased standard range, but this is not always the case.” In footnote nine, a common sentencing situation is set forth wherein the sentence is longer under normal sentencing rules than it is under the special scoring procedure set forth in RCW 9.94A.589. *Id.*

Additionally, the *Weatherwax* decision does not consider the situation when two [or more] of the serious violent offenses are anticipatory offenses. Consider the situation where two serious violent attempted crimes are scored for an offender having an offender score of nine (9) from prior convictions. Under the holding in *Weatherwax*, *neither* anticipatory offense would have a seriousness level under RCW 9.94A.515, and therefore, *neither* could be used as the first scored serious violent offense under RCW 9.94A.589(1)(b), which uses the offender’s prior criminal history in its offender score calculation under RCW 9.94A.589(1)(b). For example, consider a defendant charged with attempted first degree murder and attempted first degree assault. This offender has an offender score of nine (9) from prior offenses. If the attempted crime has a seriousness level commensurate with the completed crime (*Breaux*), the attempted first degree murder would be scored as a nine, with a mid-point range of 359.6 months (75% of 479.5), and the attempted first degree assault would have a

mid-point range of 81 months (75% of 108 months with an offender score of zero) for a total sentence of 440.6 months. (359.6 months + 81 months). However, under the rationale of *Weatherwax*, the sentence would be 291 months,⁶ a windfall savings for the defendant of over 12 years (440.6 – 291 = 149.6 months). This windfall is eliminated under the *Breaux* calculation, which assumes that the legislature intended the attempted crimes to have the same seriousness level as the completed offense.

The above scenarios provide anomalous results under the reasoning of the *Weatherwax* majority, which based its entire decision upon the faulty premise that its interpretation of the statutes would avoid anomalous results, and would always ensure that the full offender score is used where it will maximize the sentence.

B. BY EXAMINING THE LEGISLATIVE AND CASE HISTORY SURROUNDING RCW 9.94A.589(B) AND THE LANGUAGE OF OTHER SENTENCING STATUTES IT SEEMS RATIONAL THAT THE LEGISLATURE INTENDED ATTEMPTED SERIOUS VIOLENT OFFENSES TO BE SCORED AS IF THEY HAD THE SAME SERIOUSNESS LEVEL AS A COMPLETED OFFENSE.

In *Breaux*, the Court reviewed its prior decision in *State v. Mendoza*, 63 Wn. App. 373, 819 P.2d 387 (1991). Of import here, the court in

⁶ The attempted first degree murder would be scored at a zero, the midpoint of the range is 280 months. 280 months x .75 (attempt) = 210 months. The attempted first assault midpoint (at zero) is 108 months. 108 months x .75 (attempt) = 81 months. 210 months + 81 months = 291 months.

Mendoza reasoned, “those statutes⁷ demonstrate that *the seriousness level of anticipatory offenses charged under RCW 9A.28 is the seriousness level of the ‘completed crime’...*” *Breaux*, 167 Wn. App. at 177, quoting *Mendoza*, 63 Wn. App. at 377 (emphasis the court’s). It is apparent that RCW 9.94A.595 presumes that the attempted crime has a seriousness level, because one establishes its offender score by using the sentencing range for the seriousness level of *the crime under consideration*. This construction is reasonable and supports the court’s reasoning in *Breaux*.

The language of RCW 9.94A.595 and 9.94A.525(6) remained virtually unchanged from the time *Mendoza* was decided in 1991, through the *Breaux* opinion in 2012. As noted in Judge Pennell’s dissenting opinion in *Weatherwax*,⁸ the legislature amended RCW 9.94A.589 in 2015, after the

⁷ **RCW 9.94A.595 [formerly 9.94A.410]**
Anticipatory offenses.

For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under chapter 9A.28 RCW, the presumptive sentence is determined by locating the sentencing grid sentence range defined by the appropriate offender score and *the seriousness level of the crime*, and multiplying the range by 75 percent.

(Emphasis added).

⁸ “The legislature can amend RCW 9.94A.589 if it disagrees with the construction set out in *Breaux*. Despite Division One’s interpretation of RCW 9.94A.589(1)(b), the legislature has not changed the statute’s language.” 193 Wn. App. 692.

publication of the decision in *Breaux*, but did not change the substance of subsection (1)(b).

In *State v. Kier*, 164 Wn.2d 798, 805, 194 P.3d 212 (2008), this Court found controlling the presumption of legislative acquiescence in judicial interpretation where the assault statute was amended following the Court's decision three years earlier in *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005). There, as here, the statute was amended *without taking any action* on the relevant portions subject to the earlier decision.⁹ That principle of statutory construction should control this case.

The rule of lenity requires the court adopt an interpretation most favorable to a criminal defendant. *State v. Hornaday*, 105 Wn.2d 120, 127, 713 P.2d 71 (1986). This rule applies to the SRA. *State v. Roberts*, 117 Wn.2d 576, 586, 817 P.2d 855 (1991). It is apparent that RCW 9.94A.589 is susceptible of two or more interpretations because the two appellate courts have reached opposite conclusions on its application.

⁹ This Court stated:

Moreover, we are persuaded that *Freeman* correctly analyzed the robbery and assault statutes at issue to conclude that second degree assault merges into first degree robbery, while first degree assault, which carries a much larger penalty, does not. *Freeman*, 153 Wn.2d at 773–78, 108 P.3d 753.

Kier, 164 Wn.2d at 805.

Additionally, as noted in the examples above, the *Breaux* decision results in fewer sentencing anomalies than does the *Weatherwax* analysis. Neither application is perfect, but both are supportable. If that is the case, then the rule of lenity should apply to Mr. Weatherwax's and Mr. Rodgers' cases upon resentencing.

IV. CONCLUSION

The State respectfully requests this Court find that attempted serious violent offense have a seriousness level commensurate with the completed crime for the purposes of RCW 9.94A.589(1)(b).

Dated this 28 day of November, 2016.

LAWRENCE H. HASKELL
Prosecuting Attorney



Brian C. O'Brien #14921
Deputy Prosecuting Attorney



Larry Steinmetz #20635
Deputy Prosecuting Attorney
Attorney for Respondent

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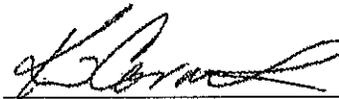
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Dennis W. Morgan
nodblspk@rcabletv.com

Susan Marie Gasch
gaschlaw@msn.com

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SPOKANE COUNTY PROSECUTOR

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