

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
CLERK'S OFFICE

Nov 28, 2016, 10:16 am

RECEIVED ELECTRONICALLY

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

---

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

THOMAS LEE WEATHERWAX and  
JAYME L. RODGERS,

Defendants/Appellants/Petitioners.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT  
Honorable Harold D. Clarke, III, Judge

---

SUPPLEMENTAL BRIEF OF PETITIONER JAYME L. RODGERS

---

SUSAN MARIE GASCH  
WSBA No. 16485  
Gasch Law Office  
P. O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149

Attorney for Defendant/Petitioner Jayme Rodgers

 ORIGINAL

**TABLE OF CONTENTS**

A. ISSUE RESTATEMENT.....1

B. SUPPLEMENTAL ARGUMENT.....1

    1. There is no support for Division Three’s claim that anticipatory offenses have no “seriousness level.”.....1

    2. The rule of lenity applies and requires applying the sentencing statutes in the manner most favorable to Mr. Rodgers.....2

C. CONCLUSION.....6

**TABLE OF AUTHORITIES**

<u>Cases</u>	<u>Page</u>
<i>City of Aberdeen v. Regan</i> , 170 Wn.2d 103, 116, 239 P.3d 1102 (2010)...	5
<i>State v. Breaux</i> , 167 Wn. App. 166, 168, 273 P.3d 447 (2012).....	5
<i>State v. Brown</i> , 139 Wn.2d 757, 769, 991 P.2d 615 (2000).....	5
<i>State v. Jackson</i> , 61 Wn. App. 86, 93, 809 P.2d 221 (1991).....	5
<i>State v. Mendoza</i> , 63 Wn. App. 373, 377, 819 P.2d 387 (1991), <i>review denied</i> , 841 P.2d 1232 (1992).....	2
<i>State v. Salamanca</i> , 69 Wn. App. 817, 827-28, 851 P.2d 1242, <i>review denied</i> , 122 Wn.2d 1020, 863 P.2d 1353 (1993).....	3

Statutes

RCW 9.94A.400(1)(b).....	3
RCW 9.94A.515.....	4
RCW 9.94A.510.....	2
RCW 9.94A.520.....	2
RCW 9.94A.589(1)(b).....	1, 3, 4, 5
RCW 9.94A.595.....	1, 2
RCW 9A.28 et seq.....	1, 2

Other Resources

D. Boerner, <i>Sentencing in Washington</i> §§ 5.8(b), 6.20 (1985).....	3
---	---

**A. ISSUE RESTATEMENT**

Whether under RCW 9.94A.589(1)(b), which requires the sentencing court in a prosecution for multiple serious violent offenses to apply the defendant's full offender score to the offense with the highest seriousness level and assign an offender score of zero to all other serious violent offenses, the court in a case where the defendant is convicted of three counts of first degree assault and one count of conspiracy to commit first degree assault, all serious violent offenses, must apply the full offender score to the anticipatory offense of conspiracy, the standard sentence range of which is 75 percent of the range of the completed offense.

**B. SUPPLEMENTAL ARGUMENT**

Petitioner Rodgers incorporates by reference his brief of appellant and reply brief, and provides the following additional argument.

1. There is no support for Division Three's claim that anticipatory offenses have no "seriousness level."

The text of RCW 9.94A.595, Anticipatory Offenses, provides:

For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under chapter 9A.28 RCW<sup>1</sup>, the presumptive sentence is determined by locating the sentencing grid

---

<sup>1</sup> RCW 9A.28 et seq. sets forth the requirements and felony classifications for anticipatory offenses.

sentence range defined by the appropriate offender score and the seriousness level of the crime, and multiplying the range by 75 percent.

RCW 9.94A.595 (emphasis added).

Thus, the standard range sentence for an anticipatory offense requires identifying the appropriate range on the sentencing grid, RCW 9.94A.510, and multiplying it by 75%. The appropriate range is established by intersecting the offender score with the seriousness level for "the crime." RCW 9.94A.595. "The offense seriousness level is determined by the offense of conviction." RCW 9.94A.520. The "offense of conviction" under RCW 9.94A.520, must be the same as "the crime" under RCW 9.94A.595, which logically must be the crime attempted. That is precisely what our courts have previously held: "the seriousness level of anticipatory offenses charged under RCW 9A.28 is the seriousness level of the 'completed crime' ". *State v. Mendoza*, 63 Wn. App. 373, 377, 819 P.2d 387 (1991), *review denied*, 841 P.2d 1232 (1992).

2. The rule of lenity applies and requires applying the sentencing statutes in the manner most favorable to Mr. Rodgers.

Division Three "postulates" application of the rule of lenity would conflict with the "rational, and presumably intended" legislative intent to "maximize" punishment for those offenders sentenced for commission of

multiple serious violent offenses. *Slip Opinion*, p. 7, 8, 9. The court's use of the term "maximize" is critical to its assumption, and ultimately misleading and inapplicable.

In discussing the predecessor to RCW 9.94A.589(1)(b) in an earlier case, Division Three instead noted the legislative intent was to "increase" (not "maximize") punishment for those convicted of multiple serious violent offenses:

Under RCW 9.94A.400(1)(b), prior convictions and other current convictions that are not violent offenses are used to calculate the offender score and sentence range for only one of the serious violent offenses, while the sentence ranges for the other serious violent offenses are calculated by using an offender score of zero. Thus, the sentence ranges of the extra serious violent offenses are shorter than would ordinarily be the case, but the term of incarceration is longer because the sentences are served consecutively instead of concurrently. This scheme avoids double counting of convictions while ensuring increased punishment for multiple violent offenses, a clearly intended result which is consistent with the purposes of the Sentencing Reform Act of 1981. D. Boerner, *Sentencing in Washington* §§ 5.8(b), 6.20 (1985).

*State v. Salamanca*, 69 Wn. App. 817, 827-28, 851 P.2d 1242, *review denied*, 122 Wn.2d 1020, 863 P.2d 1353 (1993) (emphasis added).

The wording of RCW 9.94A.589(1)(b) reveals the Legislature intended to eliminate the 'windfall' offenders who commit multiple serious violent offenses would get if the concurrent sentence presumption applied; their overall sentence would only be as long as the longest sentence

imposed. Allowing for consecutive sentences for multiple serious violent offenses eliminates this windfall.

As structured, however, the statutory scheme enacted by the Legislature does not "maximize" the sentences imposed. Rather, it provides for a standard range sentence based on the offender's criminal history for the serious violent offense with the highest seriousness level, and then provides for imposition of consecutive sentences for the remaining serious violent offenses that reflect the lowest standard range for that offense on the sentencing grid, i.e., based on an offender score of zero. RCW 9.94A.589(1)(b). Had the Legislature intended to "maximize" sentences for multiple serious violent offenders it would not have provided for the sentence range for an offender's other serious violent offenses to be calculated based on an offender score of zero.

Division Three is correct in noting "[RCW 9.94A.589(b)(1)] plainly states the offense that is to be sentenced using the full offender score is 'the offense with the highest seriousness level under RCW 9.94A.515' " and "[c]onspiracy to commit first degree assault has no seriousness level under RCW 9.94A.515." *Slip Opinion*, p. 9. The court reasons adopting the literal meaning that "limit[s] 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” fulfills legislative intent by “ensur[ing] that the full offender score is used where it will maximize the sentence” and thereby “avoids an anomalous exception for anticipatory offenses.” *Slip Opinion*, p. 9 (emphasis in original). This reasoning fails where it instead appears to create a wholesale exception for anticipatory offenses because the court did not consider how to apply the statute when all of the serious violent offenses are anticipatory.

Left unclear under RCW 9.94A.589(l)(b) is what to do in the rare circumstance, as exists here, where there are two or more serious violent offenses with the same seriousness level but with different standard ranges. The policy underlying the rule of lenity is “to place the burden squarely on the Legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are.” *State v. Jackson*, 61 Wn. App. 86, 93, 809 P.2d 221 (1991). Because there is no basis to conclude what the Legislature intended under these circumstances, the rule of lenity requires it be construed strictly against the State and in favor of Mr. Rogers. *State v. Breaux*, 167 Wn. App. 166, 168, 273 P.3d 447 (2012); *City of Aberdeen v. Regan*, 170 Wn.2d 103, 116, 239 P.3d 1102 (2010); *State v. Brown*, 139 Wn.2d 757, 769, 991 P.2d 615 (2000).

**D. CONCLUSION**

For the reasons stated here and in prior briefing, this Court should reverse and remand for resentencing based on a correct offender score and standard range sentence calculation.

Respectfully submitted on November 28, 2016.

---

s/Susan Marie Gasch, WSBA #16485  
Attorney for Mr. Rodgers  
Gasch Law Office  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
FAX: None  
gaschlaw@msn.com

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on November 28, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of supplemental brief of appellant:

Jayne Lee Rodgers (#376149)  
Washington Correctional Complex-WSR  
P. O. Box 777  
Monroe WA 98272-0777

**E-mail:**  
SCPAAppeals@spokanecounty.org  
Brian Clayton O'Brien/Larry D. Steinmetz  
Deputy Prosecuting Attorneys  
1100 West Mallon Avenue  
Spokane WA 99260-2043

**E-mail:** nodblspk@rcabletv.com  
Dennis Morgan, Attorney at Law  
P. O. Box 1019  
Republic WA, 99166-1019

---

s/Susan Marie Gasch, WSBA #16485

## OFFICE RECEPTIONIST, CLERK

---

**From:** OFFICE RECEPTIONIST, CLERK  
**Sent:** Monday, November 28, 2016 10:18 AM  
**To:** 'David/Susan'  
**Cc:** Dennis Morgan; Larry Stienmetz; Larry Stienmetz  
**Subject:** RE: Supplemental Brief of Jayme Rodgers in State v. Thomas Weatherwax (consolidated), Supreme Court No. 93192-5

Received 11-28-16.

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

Questions about the Supreme Court Clerk's Office? Check out our website:

[http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/clerks/](http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/)

Looking for the Rules of Appellate Procedure? Here's a link to them:

[http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.list&group=app&set=RAP](http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=app&set=RAP)

Searching for information about a case? Case search options can be found here:

<http://dw.courts.wa.gov/>

---

**From:** David/Susan [mailto:GASCHLAW@msn.com]  
**Sent:** Monday, November 28, 2016 10:06 AM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Cc:** David/Susan <gaschlaw@msn.com>; Dennis Morgan <nodblspk@rcabletv.com>; Larry Stienmetz <scpaappeals@spokanecounty.org>; Larry Stienmetz <scpaappeals@spokanecounty.org>  
**Subject:** Supplemental Brief of Jayme Rodgers in State v. Thomas Weatherwax (consolidated), Supreme Court No. 93192-5

Dear Mr. Carpenter,

Attached for filing is Mr. Rodgers' supplemental brief in this consolidated case. If you have any questions, please let me know. Thank you.

Susan Marie Gasch

Gasch Law Office P. O. Box 30339 Spokane WA 99223-3005 (509) 443-9149

ATTORNEY WORK PRODUCT / ATTORNEY-CLIENT PRIVILEGED INFORMATION -- DO NOT DISSEMINATE  
CONFIDENTIALITY NOTICE: This electronic mail transmission may contain legally privileged, confidential information. The information is intended only for the use of the individual or entity named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or taking any action based on the contents of this electronic mail is strictly prohibited. If you received this in error, please contact the sender and delete all copies.