Case Law Summary: Washington

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This summary of Washington appellate case law addresses five topics: availability of and general standards for appellate review, standards and allowable grounds for departure, constitutional requirements for proof of facts permitting upward departure (*Blakely v. Washington* issues), constitutional requirements for proof of facts that increase the minimum sentence (*Alleyne v. United States*), and other important appellate sentencing decisions.[1]

1. Availability of and General Standards for Appellate Review.

Sentences within the standard sentence ranges, as provided by the standard or the drug offense grid, are not appealable.[2] Alternative sentencing of first-time offenders is not considered a deviation from the standard range, and does not create a right to appeal.[3] Sentences outside the standard sentence range for an offense are appealable as a matter of right by either the defendant or the State.[4]

Although a standard range sentence under the Sentencing Reform Act is generally not appealable, Washington appellate courts have determined that this rule "precludes only appellate review of challenges to the amount of time imposed when the time is within the standard range," and does not bar challenges to a sentence based on "circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range."[5] Appeals have also been allowed for alleged constitutional infirmity,[6] procedural error,[7] and error in statutory interpretation.[8] For an appeal to successfully reverse the sentencing court's decision, it must be found either that the deviation was not supported by the record, or that the sentence imposed was clearly excessive or lenient.[9]

In addition to the appeal rights of the parties, the Washington Department of Corrections may petition for review of a sentence committing an offender to the custody or jurisdiction of the department.[10] Any review initiated by the Department of Corrections is limited to errors of law.[11] The purpose of allowing the Washington Department of Corrections to petition for review of an erroneous sentence is to allow review where neither the defendant nor the State appeals an error.[12] This is designed to "alleviate the dilemma" the Department of Corrections is faced with when tasked with enforcing what it considers to be an unlawful sentence, which is to either enforce a perceived illegality or ignore the sentence imposed by the trial court.[13] For instance, in *Combs*, the Department of Corrections claimed that a defendant's credit for time-served was miscalculated. When the prosecution failed to adjust their requested sentence, the DOC appealed.[14] If the

[1] For more information on sentencing case law in this state, see 13B Wash. Prac. Crim. L. ch. 34-43 (2016–2017 ed.).
[2] Wash. Rev. Code § 9.94A.585(1) (2019).
[3] *Id*. (allowing appeals for deviations from the standard range).
[4] Wash. Rev. Code § 9.94A.585(2) (2019).
[5] *State v. McGill*, 47 P.3d 173, 175–76 (Wash. Ct. App. 2002) ("When a court has considered the facts and concluded there is no legal or factual basis for an exceptional sentence, it has exercised its discretion, and the defendant cannot appeal that ruling."); *see also State v. Williams*, 65 P.3d 1214, 1215 (Wash. 2003) ("So long as [a] sentence falls within the proper presumptive sentencing ranges set by the legislature there can be no abuse of discretion as a matter of law as to [a] sentence's length. However, this prohibition does not bar a party's right to challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision.").
[6] *State v. Sandefer*, 900 P.2d 1132, 1134 (Wash. Ct. App. 1995) (contending the sentencing court improperly penalized the exercise of the right to a jury trial); *State v. Franklin*, 786 P.2d 795, 798 (Wash. Ct. App. 1989) (alleging the court violated the due process clause by imposing a harsher sentence following his successful appeal).
[7] *State v. Murawski*, 173 P.3d 994, 995–96 (Wash. Ct. App. 2007); *State v. Medrano*, 906 P.2d 982, 984 (Wash. Ct. App. 1995) ("The only statutory basis for appeal of a standard range sentence is failure to comply with applicable procedures. . . .").
[8] *State v. Adamy*, 213 P.3d 627, 629 (Wash. Ct. App. 2009).
[9] Wash. Rev. Code § 9.94A.585(4) (2019)
[10] Wash. Rev. Code § 9.94A.585(7) (2019).
[11] *Id*.
[12] *State v. Broadaway*, 942 P.2d 363, 373 n.5 (Wash. 1997).
[13] *Dress v. Wash. State Dep't of Corr.*, 279 P.3d 875, 879 (Wash. Ct. App. 2012).
[14] *In re Post-Sentence in re Combs*, 353 P.3d 631 (Wash. 2015).

Department of Corrections does not seek correction of a sentence, it may not vary the terms of a punishment to include community placement without first receiving an amendment by a court.[15]

2. Standards and Allowable Grounds for Departure.

Standards of Review

When a departure ("exceptional") sentence is appealed by either the defendant or the State, the reviewing court may only reverse upon making one of the following findings: (1) the reasons given by the sentencing judge are not supported by the record under a clearly erroneous standard of review; (2) as a matter of law the reasons do not justify a departure from the standard range under a de novo standard of review; or (3) the sentence is clearly too excessive or too lenient under an abuse of discretion standard.[16] Each of these standards is further explained below.

(1) Clearly Erroneous: Under the clearly erroneous standard, the appellate court asks whether the findings of the appropriate factfinder are supported by substantial evidence.[17] Substantial evidence is defined as "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises."[18] Review under the clearly erroneous standard is a factual inquiry, and is limited to the record as presented in front of the trial court.[19]*2) De Novo*: Whether a court's reasons justify departure is a legal question, and is subject to de novo review.[20] Generally, the appellate court applies this standard by determining whether the departure factor cited by the sentencing court was satisfied. For example, in *State v. Cham*, the court of appeals asked whether the State had proved that the defendant was a rapid recidivist such that an exceptional upward sentence was appropriate.[21] The court noted that rapid recidivism required a showing that the defendant committed the offense of conviction shortly after being released from incarceration, and found that the defendant's commission of a crime within one hour after being released from jail satisfied this requirement.[22] The appellate court will also apply de novo review to challenges to a trial court's authority to run sentences consecutively under a statutory aggregator provision, but a trial court is given "'all but unbridled discretion' in fashioning the structure and length of an exceptional sentence."[23]

(3) Abuse of Discretion: Sentences that are clearly too excessive or too lenient are reversed only if they constitute an abuse of discretion.[24] Determining abuse of discretion involves a two-part inquiry.[25] Under this standard, a sentence will only be overturned if the trial court relied upon an impermissible reason in imposing it, or if it is so long that, in light of the record, it "shocks the conscience" of the reviewing court.[26] Indeed, because of the lack of a legislative definition of clearly excessive, appellate courts have stated that courts have "near plenary discretion to affirm the length of a sentence," just as trial courts have unbridled discretion in setting a sentence's length in the first instance.[27] Following this logic, a sentence is not excessive merely

[15] *Matter of Davis*, 834 P.2d 92, 97 (Wash Ct. App. 1992).
[16] *See* Wash. Rev. Code § 9.94A.535(1) (2019) (listing a non-exhaustive array of potential mitigating factors); Wash. Rev. Code § 9.94A.585(4) (2019); *State v. Alvarado*, 192 P.3d 345, 347 (Wash. 2008).
[17] *State v. Jeannotte*, 947 P.2d 1192, 1197 (Wash. 1997); *see also State v. Dunaway*, 743 P.2d 1237, 1242–43 (Wash. 1987).
[18] *Jeannotte*, 947 P.2d at 1197 (quoting *Olmstead v. Dep't of Health*, 812 P.2d 527 (1991)).
[19] Wash. Rev. Code § 9.94A.585(5) (2019) ("A review under this section shall be made solely upon the record that was before the sentencing court."); *State v. Grewe*, 813 P.2d 1238, 1241 (Wash. 1991); *State v. Estrella*, 798 P.2d 289, 291 (Wash. 1990); *State v. Dunaway*, 743 P.2d 1237, 1242 (Wash. 1987).
[20] *Dunaway*, 743 P.2d at 1242; *State v. Cham*, 267 P.3d 528, 534–35 (Wash. Ct. App. 2011).
[21] *Cham*, 267 P.3d at 535.
[22] *Id.*
[23] *State v. France*, 308 P.3d 812, 816 (Wash. Ct. App. 2013).
[24] *State v. Hodges*, 855 P.2d 291, 293 (Wash. Ct. App. 1993).
[25] *State v. Ross*, 861 P.2d 473, 483 (Wash. Ct. App. 1993).
[26] *Id.*; *State v. Branch*, 919 P.2d 1228, 1235 (Wash. 1996); *State v. Pascal*, 736 P.2d 1065, 1073 (Wash. 1987); *State v. Creekmore*, 783 P.2d 1068, 1075 (Wash. Ct. App. 1989), *abrogation on other grounds recognized by State v. Ramos*, 101 P.3d 872 (Wash. Ct. App. 2004) ("An exceptional sentence is 'clearly excessive' only if no reasonable person would impose it.").
[27] *Creekmore*, 783 P.2d at 1075.

because it exceeds twice the presumptive range for an offense,[28] and generally the only limit to the trial court's discretion is the statutory maximum.[29] Similarly, sentences that are appealed for being clearly too lenient are only reversed if no reasonable person would take the position adopted by the trial court.[30]

Allowable Grounds for Departure

The sentencing court may impose a sentence outside of the standard sentence range for an offense if it finds "substantial and compelling reasons justifying an exceptional sentence."[31] Whenever a court deviates from the presumptive standard sentence, it must provide reasons for its decision in written findings of fact and conclusions of law.[32]

Permissible Departure Grounds: In determining whether a mitigated sentence is appropriate, the court is required to consider a non-exclusive list of statutory factors.[33] The court is not required to select a reason from that list of factors, but must identify some specific mitigating circumstance.[34] Specific examples of these circumstances include a defendant's lesser degree of participation in an offense[35] or a defendant's assistance and cooperation with authorities.[36] In contrast, if a court determines it necessary to impose an aggravated sentence, it must first find that one or more of an exclusive list of statutory factors or circumstances is satisfied.[37]

Prohibited Departure Grounds: There are a number of prohibited grounds for departure.
(1) The court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range.[38] Examples of this include criminal history[39] and the purposes of the Sentencing Reform Act – disproportionality,[40] public safety,[41] rehabilitation,[42] and consideration of state resources.[43]

(2) The court may not impose a sentence based on the "Real Facts Doctrine," which considers the elements of a more serious crime that was not charged or proved.[44] The trial court may not rely upon evidence that was not admitted in the plea agreement or proved at a trial or a subsequent sentencing proceeding.[45]

[28] *State v. Sanchez*, 848 P.2d 735, 742 (Wash Ct. App. 1993).
[29] *Creekmore*, 783 P.2d at 1076.
[30] *State v. Alexander*, 888 P.2d 1169, 1176 (Wash. 1995); *Pascal*, 736 P.2d at 1073.
[31] Wash. Rev. Code § 9.94A.535 (2019).
[32] *Id.*
[33] *Id.* at (1).
[34] *See State v. Alexander*, 888 P.2d 1169, 1175 n.22 (Wash. 1995).
[35] *State v. Evans*, 911 P.2d 1344, 1348 (Wash. 1996).
[36] *State v. Nelson*, 740 P.2d 835, 837 (Wash. 1987).
[37] Wash. Rev. Code §§ 9.94A.535(2) (aggravating facts that may be found by the court), 9.94A.535(3) (2019) (aggravating facts subject to *Blakely*, that must be found by the jury).
[38] *State v. Grewe*, 813 P.2d 1238, 1240 (Wash. 1991).
[39] *State v. Pascal*, 736 P.2d 1065, 1072 (Wash. 1987); *State v. Nordby*, 723 P.2d 1117, 1119 (Wash. 1986). However, the guidelines permit upward departure when the exclusion of certain priors from the criminal history score results in a recommended sentence that is "clearly too lenient." Wash. Rev. Code Ann. § 9.94A.535(2)(b), (d) (2019). Upward departure is also permitted where the defendant has been convicted of multiple current offenses, and his high offender score causes some of the current offenses to go unpunished. *Id.* at (c).
[40] *State v. Law*, 110 P.3d 717, 725 (Wash. 2005).
[41] *Id* at 721–22.
[42] *Id.*
[43] *Id.*
[44] *State v. Morreira*, 27 P.3d 639, 643 (Wash. 2001).
[45] Wash. Rev. Code Ann. § 9.94A.530(2) (2019).

(3) The court may not consider factors that are personal and unique to a particular defendant, but unrelated to the crime or the past criminal record of the defendant.[46] Examples include the potential loss of parental rights,[47] extraordinary community support,[48] and showing remorse.[49]

(4) The court may not consider a defendant's inability to appreciate the wrongfulness of his or her conduct because of voluntary drug or alcohol use.[50] While significant impairment of a defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, are valid mitigating factors, they are not valid if the defendant's diminished capacity resulted from the voluntary use of drugs or alcohol.[51]

Consecutive/Concurrent Sentences: A departure from the standards governing whether multiple current sentences are to be served concurrently or consecutively constitutes an exceptional sentence and is appealable by the defendant.[52] In *State v. McFarland*, the Washington Supreme Court leaned on the Sentencing Reform Act's goals of proportionality and consistency to depart from standard firearm sentences.[53] The *McFarland* defense utilized proportionality by arguing that if the defendant stole "toasters instead of fire-arms, she would be looking at nine to twelve months confinement, versus 237 months to 306 months. . . which is what people typically get for murder in the second degree."[54] The court agreed with the defense and determined that concurrent sentences could be used for firearm offenses when consecutive sentences would create a presumptive sentence that was excessive.[55]

3. Constitutional Requirements for Proof of Facts that Permit Upward Departure Under *Blakely v. Washington*

After the Supreme Court's decision in *Blakely v. Washington*[56] invalidated the Washington guidelines upward departure procedures on the grounds that they violated the Sixth Amendment right to trial by jury, the Washington legislature attempted to remedy the constitutional violation by passing the so-called "*Blakely*-fix" amendment.[57] This amendment satisfied *Blakely* by providing trial courts with the authority to empanel juries to consider aggravating factors supporting exceptional sentences.[58] This legislative fix did not contain language authorizing its application to cases decided (but not sentenced) before its enactment. The Washington Supreme Court found that in those cases, the amendment did not require jury consideration of

[46] *Law*, 110 P.3d at 722.
[47] *State v. Amo*, 882 P.2d 1188, 1189 (Wash. 1994).
[48] *State v. Hodges*, 855 P.2d 291, 292–94 (Wash. 1993). The appellate court also rejected the following grounds cited by the trial court to justify downward departure: defendant's "extraordinary efforts at self-improvement"; her claim that she saw selling drugs "as a way to help 'put food on the table'" for her children; and the court's findings that she was "an exceptional mother, and there was a need to prevent irreparable harm to her relationship with her children." *Id*. Note that in the past, state courts have held that age of the defendant could not be considered except in terms of lack of capacity; *see State v. Ha'mim*, 916 P.2d 971 (Wash. Ct. App. 1996). Recent case law, however, has interpreted *Ha'mim* to mean that there is only a prohibition on *automatically* using youth in mitigation; this allows a defendant's youthfulness to be considered as a possible mitigating factor justifying an exceptional sentence. *See State v. O'Dell*, 358 P.3d 680 (Wash. 2015).
[49] *State v. Kinneman*, 84 P.3d 882, 893 (Wash. 2003).
[50] Wash. Rev. Code Ann. § 9.94A.535(1)(e) (2019).
[51] *Id*.
[52] *Id.*
[53] *State v. McFarland*, 399 P.3d 1106 (Wash. 2017).
[54] *Id*. at 1108.
[55] *Id*. at 1109, 1111.
[56] *Blakely v. Washington*, 542 U.S. 296 (2004).
[57] Wash. Rev. Code § 9.94A.537 (2019); *see State v. Rowland*, 249 P.3d 635, 642 n.6 (Wash. Ct. App. 2011).
[58] *State v. Applegate*, 194 P.3d 1000, 1003 (Wash. Ct. App. 2008).

aggravating factors.[59] In response, the legislature amended the *Blakely*-fix statute to apply retroactively to any cases that required resentencing because of *Blakeley*-related constitutional invalidity.[60]

In *State v. Evans*, the Washington Supreme Court found that neither *Apprendi* nor *Blakely* applied retroactively to convictions that were final when *Blakely* and/or *Apprendi* were announced.[61] Because neither case announced a "watershed rule of criminal procedure implicit in the concept of ordered liberty," they could not be used as a means for collateral attack on a case already final (no longer subject to direct appellate review).[62]

Under the current iteration of the statute, the state is required to give notice that it is seeking a sentence above the standard sentencing range.[63] The facts surrounding aggravating circumstances must be proved to a jury beyond a reasonable doubt, and the jury's verdict in finding those facts must be unanimous.[64] While the jury must find the factual basis for an aggravating circumstance, it is within the trial court's discretion to determine whether those findings are substantial and compelling reasons justifying an exceptional sentence.[65]

The Washington Supreme Court has supplemented the sentencing procedure by providing a number of specific circumstances under which *Blakely* is and is not applicable. In *State v. Jones*, the Court held that a jury is not required to find whether a defendant was on community placement before a point can be added to offender score.[66] The *Jones* result is in line with the general trend of cases limiting the right to *Blakely*-proceedings to issues that are unrelated to an offender's prior record. Other Washington decisions hold that *Blakely* is inapplicable to: a finding that an offender's high offender score results in some current offenses going unpunished;[67] a finding that a defendant has previously been sentenced to pay restitution;[68] the finding that a defendant has multiple prior juvenile adjudications;[69] and judicial fact-finding in the imposition of a minimum sentence.[70]

4. Constitutional Requirements for Proof of Facts that Increase the Minimum Sentencing under *Alleyne v. United States*

In *State v. Fehr*, a woman's prior felony convictions were used to craft an offender score that resulted in 60 months of imprisonment.[71] The defendant argued that in light of *Alleyne*, the State had to prove the existence of prior convictions to a jury beyond a reasonable doubt. The court disagreed, and interpreted *Alleyne* to include an exception for prior convictions.[72] Thus, the court confirmed long-standing precedent that the State need only prove prior convictions to a judge by a preponderance of the evidence.[73]

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[59] *State v. Pillatos*, 150 P.3d 1130, 1135–37 (Wash. 2007).
[60] 2007 Wash. Sess. Laws 789–790; *see also Rowland*, 249 P.3d at 642 n.6.
[61] *State v. Evans*, 114 P.3d 627 (Wash. 2005); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000).
[62] *State v. Evans*, 114 P.3d 627, 632–633 (Wash. 2005).
[63] Wash. Rev. Code § 9.94A.537(1) (2019); *see State v. Siers*, 274 P.3d 358, 361 (Wash. 2012) (explaining that while aggravating factors do not need to be charged in the indictment or information, to comport with due process the defendant must be given notice prior to the proceeding in which the state intends to prove aggravating circumstances to a jury).
[64] Wash. Rev. Code § 9.94A.537(3) (2019).
[65] *See, e.g. State v. Hyder*, 244 P.3d 454 (Wash. Ct. App. 2011).
[66] *State v. Jones*, 149 P.3d 636, 637 (Wash. 2006).
[67] *State v. Alvarado*, 192 P.3d 345, 346 (Wash. 2008).
[68] *State v. Kinneman*, 119 P.3d 350, 351 (Wash. 2005).
[69] *State v. Weber*, 149 P.3d 646 (Wash. 2006) (finding that prior juvenile adjudications fall within "prior conviction" exception of *Apprendi*).
[70] *State v. Clarke*, 156 Wash. 2d 880, 884–85 (Wash. 2006); *but see Alleyne v. U.S.,* 570 U.S. 99 (2013), overruling one of the cases relied on in *Clarke* (*Harris v. U.S.*, 536 U.S. 545 (2002).
[71] *State v. Fehr*, 185 Wash. App. 1031 (2015); *see also State v. Witherspoon*, 329 P.3d 888, 896-898 ("the right to jury determinations does not extend to the fact of prior convictions for sentencing purposes") .
[72] *Fehr*, 185 Wash. App. 1031.
[73] *Id.*

In *State v. Dyson*, a Washington appellate court considered the application of *Alleyne* to mandatory minimum sentences in Washington, and held that any facts that trigger a mandatory minimum sentence must be submitted to a jury.[74] Though *Dyson* did not address the intersection of mandatory minimums with the Washington sentencing guidelines, it is interesting to note that the case contains a dissent indicating that failure of the court to submit the fact that triggered the mandatory minimum sentence to a jury was harmless error because the standard guidelines range was already higher than the mandatory minimum sentence.[75]

5. Other Important Sentencing Decisions

Constitutionality of Sentencing Guidelines. In 1986, the Washington Supreme Court ruled in *State v. Ammons* that the Sentencing Reform Act, which established the sentencing guidelines, is constitutional. The plaintiffs in *Ammons* challenged the guidelines as a violation of separation of powers, a violation of defendant's right to appeal, a violation of the right against self-incrimination, and a violation of due process. The Court first found that the legislature had plenary power to alter the sentencing process, and therefore could permissibly limit or expand the discretion of the judiciary in sentencing. The Court next found that the legislature could validly restrict ability to appeal the merits of a sentence, so long as it did not limit the appealability of alleged procedural error. On the final two challenges, the Court found that the statutory procedure did not compel the defendant to provide information, and provided sufficient opportunity for the defendant to challenge any findings made during sentencing. [76]

Concurrent Sentences in Offender Scores. In *State v. Roberts*, the Supreme Court of Washington ruled that concurrent sentences for crimes committed before July 1, 1986 could not be counted as separate points when calculating offender scores.[77] The court reasoned that because the Sentencing Reform Act did not specify the definition of "concurrent sentence," the language was ambiguous and warranted the rule of lenity.[78] It determined that separate adult sentences do not need to start and end at the same time to be considered concurrent.

Prior Convictions in Offender Scores. In *State v. Blair*, a defendant challenged the state's interpretation of his prior conviction for snowmobiles as being thefts of motor vehicles.[79] The Washington Supreme Court rejected this argument by stating that the defense had the burden of proving that a constitutional issue was raised as opposed to one of statutory interpretation. The Court supported its decision by citing *State v. Ammon*, which ruled that the State does not have the affirmative burden to prove the constitutional validity of a prior conviction before it can be used in calculating someone's criminal history.[80]

In *State v. Inocencio*, a man sought to limit the inclusion of prior theft convictions from his offender score calculation because those crimes were charged when he was a juvenile in adult court as part of a plea deal.[81] *Inocencio* argued that in order for those crimes to count toward his offender score, the State had the burden to show that the defendant was properly before the adult criminal court. Upon appeal, the court found that the Sentencing Reform Act did not require the State to prove a defendant's offender score but rather just their criminal history.[82] Because the defendant could not show that his prior convictions were unconstitutionally obtained and therefore not valid components to his criminal history, the court found that they were properly factored into his offender score.[83]

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[74] *State v. Dyson*, 360 P.3d 25, 28–29 (Wash. Ct. App. 2015) *review denied*, *State v. Dyson*, 379 P.3d 957 (2016).
[75] *Id.* at 31-33.
[76] *State v. Ammons*, 713 P.2d 719, 722–27 (Wash. 1986).
[77] *State v. Roberts*, 817 P.2d 855, 860 (Wash. 1991).
[78] *Id*. at 859.
[79] *State v. Blair*, 421 P.3d 937 (Wash. 2018).
[80] *State v. Ammons*, 713 P.2d 719, 726 (Wash. 1986); *But cf.*, *State v. Blair*, 421 P.3d 937, 943 (Wash. 2018) (McCloud, J., concurring) (arguing that the majority misinterpreted the *Ammons* decision about how constitutional questions should be raised to mean that statutory questions were precluded from being raised).
[81] *State v. Inocencio*, 351 P.3d 183 (Wash. Ct. App. 2015).
[82] *Id*. at 188.
[83] *Id*. at 189.

Juvenile Status in Sentencing Departures. In *State v. Solis-Diaz*, the Washington Court of Appeals tried a juvenile defendant as an adult and sentenced him to a 1,111-month sentence for his role in a drive-by shooting. The opinion held that the court abused its discretion in failing to consider an exceptional sentence on the grounds that the presumptive sentence would be clearly excessive under the purposes of the sentencing guidelines. It also found that the sentencing court improperly failed to consider the defendant's youth in mitigation.[84]

Predicate Offenses and the Rule of Lenity. *State v. Weatherwax* examined the statute governing the calculation of the offender score for purposes of mandatory consecutive/concurrent sentencing of violent offenses committed at different times. Under that statute, the sentencing court must use the most serious offense to form the basis of sentencing (this is considered the "predicate offense"). The court held that for offender scoring purposes, the seriousness level of an anticipatory crime is the same as for a completed crime. It also held that the statute is ambiguous about which of several violent offenses with equal seriousness should be the predicate offense, thus the rule of lenity requires that the offense with the fewest repercussions in terms of sentence severity must be selected.[85]

[84] *State v. Solis-Diaz*, 376 P.3d 458 (Wash. Ct. App. 2016) *rev'd in part by State v. Solis-Diaz*, 387 P.3d 703 (Wash. 2017) (upholding that the sentence was an abuse of discretion that required remand, but reversing the part of the decision holding that the sentencing judge appeared unbiased and did not need to be reassigned).
[85] *State v. Weatherwax*, 392 P.3d 1054 (Wash. 2017).