No._____

IN THE DISTRICT COURT OF WASHINGTON

WESTERN DIVISION

JANE PARNELL, SUPERINTENDENT

WASHINGTON CORRECTIONS CENTER FOR WOMEN,

Respondent

v.

JENNIFER L. RICE,

Petitioner

PETITION FOR RELIEF FROM CONVICTION/SENTENCE
WRIT OF HABEAS CORPUS

MEMORANDUM OF PETITIONER

Jennifer L. Rice
Pro Se
WA Corr. Center for Women
9601 Bujacich Rd NW
Gig Harbor, WA 98332

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A. ASSIGNMENT OF ERROR

1) The prosecuting attorney failed to exercise discretion when charging Rice with special allegations and sentencing enhancements, resulting in an abuse of discretion. The prosecutor was unwilling to enter into negotiations with defense counsel because he believed charging statutes were mandatory.

(2) Because Sentencing Guidelines were viewed as mandatory the court erred by not considering the nature and circumstances of the offense, the character of the defendant, and statutory sentencing factors before imposing the sentence.

(3) Rice was sentenced to life in prison with a mandatory minimum of 25 years after agreeing to stipulated facts presented at bench trial. Rice did not intelligently enter into the stipulated facts agreement with a full knowledge and understanding of law or the consequences of that decision.

(4) The sentencing enhancement for victim under 15 violates the prohibition against double jeopardy where the charged crime necessarily requires proof that the victim was under 15.

(5) Due process requires that every element of an offense must be proven beyond a reasonable doubt. There are evidentiary problems connected to special allegations and the sentencing enhancements charged.

(6) Defense counsel did not adequately understand the statutes, sentencing enhancements, and special allegations being applied to Rice's underlying charges. This resulted in a misinterpretation of law, manifest injustice and ineffective assistance of counsel.

B. STATEMENT OF CASE

Jennifer Rice was convicted of Kidnapping 1, Child Molestation 1, and two counts of Rape of a Child 3. With respect to the kidnapping offense, the prosecution charged two special allegations: sexual motivation pursuant to RCW 9.94A.835 and victim less than 15 years of age pursuant to RCW 9.94A.837. With respect to the child molestation offense, the prosecution charged a special allegation that the crime was predatory pursuant to RCW 9.94A.836. At a stipulated bench trial, Rice was found guilty of these offenses and the special allegations. The trial court sentenced Rice to two concurrent life sentences with a minimum of 25 years confinement on the Kidnapping 1 and Child Molestation 1 offenses, and to two concurrent 5 year terms of confinement on the two Rape of a Child 3 offenses. CP 53-57, 60-67.

C. PERTINENT CONSTITUTIONAL AMENDMENTS

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United Sates; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

D. PERTINENT WASHINGTON STATUTES

RCW 9.94A.835(1) provides in pertinent part:

> *The prosecuting attorney shall file a special allegation of sexual motivation in every criminal case*, felony, gross misdemeanor, or misdemeanor, other than sex offenses as defined in RCW 9.94A.030 *when sufficient admissible evidence exists, which,* when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, *would justify a finding of sexual motivation by a reasonable and objective fact-finder.*

(Emphasis added).

RCW 9.94A.836(1) states in pertinent part:

> In a prosecution for rape of a child in the first degree, rape of a child in the second degree, or child molestation in the first degree, *the prosecuting attorney shall file a special allegation that the offense was predatory whenever sufficient admissible evidence exists which,* when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, *would justify a finding by a reasonable and objective fact-finder that the offense was predatory, unless the prosecuting attorney determines,* after consulting with a victim, *that filing a special allegation under this section is likely to interfere with the ability to obtain a conviction.*

(Emphasis added).

RCW 9.94A.837(1) provides in pertinent part:

> In a prosecution for ... kidnaping in the first degree with sexual motivation, *the prosecuting attorney shall file a special allegation that the victim of the offense was under 15 years of age at the time of the offense whenever sufficient evidence exists which,* when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, *would justify a finding by a reasonable and objective fact finder that the victim was under 15 years of age at the time of the offense, unless the prosecuting attorney determines,* after consulting with a victim, *that filing a special allegation under this section is likely to interfere with the ability to obtain a conviction.*

(Emphasis added).

> In addition, all three statutes have substantially identical language * which, as stated in 9.94A.835(3) provides:
> *The prosecuting attorney shall not withdraw the special allegation of sexual motivation without the approval of the court* through an order of dismissal of the special allegation unless it finds that such an order is necessary to correct an error in the initial charging decision or unless there are evidentiary problems which make proving the special allegation doubtful.

(Emphasis added)

*In place of the words "the special allegation of sexual motivation" used in RCW 9.94A.835(3), RCW 9.94A.836(3) and RCW 9.94A.837(3) both refer instead to "a special allegation filed under the section." Whereas the second sentence of .835(3) provides "The court *shall not* dismiss *this* special allegation...," the second sentences of .836 and .837(3) provide that "The court *may not* dismiss *the* special allegation..." In its final clause RCW 9.94A.835(3) refers to evidentiary problems "which" make proving the special allegation doubtful, whereas .836(3) and .837(3) refer to evidentiary problems "that" make proving the special allegation doubtful.

E. ARGUMENT/GROUNDS

(1) PROSECUTOR FAILED TO EXERCISE MEANINGFUL DESCRETION BECAUSE HE BELIEVED HE DID NOT HAVE THE AUTHORITY TO DO SO

The charging decision of a prosecuting attorney is one of careful professional judgment as to the strength of the evidence, the availability of resources, the visibility of the crime and the likely deterrent effect on the part of the defendant and others similarly situated (*US v. Redondo-Lemas,* 955 F.2d 1296, 1298-1299 (CA9 1922)). The discretion to prosecute carries with it the ability to choose the statute that will be filed (*US v. Batchelder* , 442 U.S. 114, 124; 99 S. Ct 2198; 60 L.Ed.2d 755 (1979)), and necessarily includes whether to charge an available special allegation. *United States v. LaBonte* , 520 US 751, 762; 117 S. Ct 1673; 137 L.Ed.2d 1001 (1997) (In so far as prosecuting attorneys determine whether a particular defendant will be subject to the enhanced statutory maximum, any such discretion would be similar to the discretion a prosecuting attorney exercises when he decides what, if any charges to bring against a criminal suspect. Such discretion is an integral feature of the criminal justice system).

Failure to exercise discretion is a violation of law; and the failure to exercise discretion or the decision of the court that it lacks discretion is reviewable on appeal. *US v. Brown* , 985 F.2d 478 (CA9

1993); *US v. Mejia*, 953 F.2d 461 (CA9 1991); *US v. Morales*, 898 F.2d 99 (CA9 1990); *US v. Spedalieri*, 910 F.2d 707 (CA10 1900); *US v. Burleson,* 22 F.3d 93 (CA5 1994); *US v. Saldana,* 109 F.3d 100 (CA1 1997).

In charging Rice the prosecuting attorney believed that because Rice was a teacher and the alleged victim was a student, statutes *required* that the prosecutor file the "predatory" and "victim less than 15" enhancements. The prosecutor failed to evaluate the individual circumstances of the case to determine whether special allegations were warranted thereby failing to exercise charging discretion, resulting in an abuse of discretion. The prosecutor is both an administrator of justice and an advocate, he must exercise sound discretion in the performance of his functions. The plain language of RCW 9.94A.835, .836, and .837 curtailed the core components of the prosecutor's discretion. They are unique in that they require the prosecuting attorney to charge special enhancement allegations where (a) the facts would permit a reasonable trier of fact to find them proven, given the foreseeable defense, and (b) the charging of the enhancement would not jeopardize a conviction on the underlying offense

Since it would be unethical for a prosecutor to knowingly charge a crime for which there was insufficient evidence to support a conviction, these statutes effectively require the prosecutor to charge

the allegations whenever ethically possible. This does not leave room for the exercise of discretion. Nothing in the statutes provide that the prosecutor can decide not to charge the allegation for reasons unrelated to evidentiary sufficiency. The prosecuting attorney also believed that there was nothing in the statutes that would allow him to avoid charging the enhancements by engaging in plea negotiations or consider mitigating circumstances. He interpreted the plain language of these statutes to mean he was *required* to file allegations *whenever* the evidence would support them.

However, the exercise of prosecutorial discretion includes the right to consider factors outside of the evidentiary strength of the case in deciding whether to file a charge. Most importantly, prosecutors need not charge every person who may be guilty of a crime. *US v. Lovasco*, 431 US 783, 794 (1997); *Oyler v. Boles*, 368 US 448 (1962) (because of the broad discretion vested in the prosecutor, charging some but not all guilty of the same crime does not violate due process as long as the prosecutor's decision is not based on "some unjustifiable standard"). This decision not to charge someone with a crime, even though there is sufficient evidence to support a conviction is within the core discretion of the prosecutor. *Heckler v. Chaney* 470 US 821, 832 (1985). The prosecuting attorney believed these statutes mandated filing special allegations in every case where there is a likelihood of successful prosecution: "The prosecuting attorney *shall*

file a special allegation... *when* sufficient admissible evidence exists..." This violates due process and the Eighth Amendment because it fails to provide for the consideration of individual factors and/or mitigating circumstances.

Rice has challenged at every level sentencing enhancements as unconstitutional curtailments of prosecutorial discretion. CP 10-22, 37-43; *State v. Rice*, 246 P.3d 234 (2011). Implicit in her claims that these enhancements violate the separation of powers doctrine because they are mandatory is the claim that prosecution did *not* believe they could exercise discretion to charge or not charge them in her case. The Pierce County attorneys have never established that they exercised discretion. Throughout the appeal process the state never argued that it had full prosecutorial discretion under the statute or that it exercised such discretion in spite of the mandatory language of the statutes. In fact the state argued that the Washington Legislature had legitimately curtailed prosecutorial discretion. At every level their clear argument has been that the legislature has the power to enact mandatory sentencing enhancements and curtail the prosecutor's charging discretion. The state even argued that Rice had “not shown that discretion would have been exercised in her favor if it were possible to do so".

> "When a defendant is charged with rape of a child in the first degree or second degree, or child molestation in the first degree, and when sufficient evidence exists, the prosecuting

> attorney is ***required*** to allege that the offense is "predatory". Once the allegation is filed, it may ***not to be withdrawn*** except in certain limited circumstances.
>
> ... The defense first seems to claim that the statute is unconstitutional because it is mandatory and therefore does not provide for consideration. (Footnote . ***It should be noted that the defendant has not made any showing that prosecutorial discretion would be exercised in her favor even if it was possible to do so.)*** This argument assumes that the defendant has a right to a consideration of mitigating factors.

States response to Rice's motion to Dismiss Special Predatory Allegation, CP 22-33

(Emphasis added).

This argument assumes both that discretion had *not been exercised* in Rice's case and that it would *not be permissible to exercise discretion* under the statute. At least, this is the clear belief of the prosecutor. The trial court did not find that the prosecutor had discretion to charge or not to charge the allegations or to dismiss the allegations, nor did it find that such discretion had been exercised in Rice's case. In the Washington Supreme Court's ruling the court clarified that the prosecutor's broad charging discretion is part of the inherent authority granted to prosecuting attorneys as executive officers under the Washington State constitution. However, the state argues that prosecuting attorneys have no inherent authority whatsoever because the legislature can "prescribe their duties" under article XI, section 5 of our constitution. They ignore that under

article XI, section 5 the very concept of a locally elected prosecuting attorney includes the core function of exercising broad discretion on behalf of the local community. Without broad charging discretion, a prosecuting attorney would cease to be a prosecuting attorney as intended by the state constitution (Supreme Court Response p.22, *State v. Rice*, 279 P.3d 849 (2013)). The legislature cannot interfere with the fundamental and inherent charging discretion of prosecuting attorneys, including discretion over the filing of available special allegations (Washington Supreme Court, p. 23). Although the Pierce County prosecuting attorney defends statutes challenged by Rice by arguing that the legislature has the authority to eliminate all meaningful prosecutorial discretion, any attempt to do so would violate the separation of powers doctrine and article XI, section 5, notwithstanding the prosecutor's apparent consent.

The Supreme Court of Washington has held that RCWs 9.94A.835, .836 and .837 remain subject to prosecutorial discretion and are not mandatory. Further, an executive officer must never file a special allegation based solely on the presence of legislatively defined factual elements and without any exercise of discretion. This undoubtedly would produce unjust results, which according to the Supreme Court would not be what the legislature would intend. Unfortunately these are the results experienced by Rice due to the prosecutor's interpretation of RCWs 9.94A.835, .836, and .837 and

subsequent lack of discretion. It is clear from the state's own arguments and unwillingness to enter into negotiations with defense counsel that they believed the charges were indeed mandatory and therefore did not exercise prosecutorial discretion in Rice's case.

In a supplemental brief filed much later the state claimed to have exercised some sort of "discretion" in Rice's case stating "for some reason, the prosecuting attorney decided not to file special allegations in the rape and molestation counts... then the prosecutor dismissed several counts including rape of a child and child molestation". Respondent's supplemental brief to the Supreme Court of WA, at 13-14. This statement is inaccurate, misleading, and does not provide any reason for not charging the allegations which would demonstrate discretion had truly been exercised.

Pierce County Prosecutors did not believe that they had discretion not to charge the enhancements or dismiss them after they were charged, therefore they did not exercise discretion. The prosecuting attorney in fact argued that the charges in Rice's case were mandatory and never sought to establish that they exercised discretion pursuant to RAP 9.11. At no point did the prosecutor mention any sentencing possibilities other than "life with a mandatory minimum of 25 years", there was no negotiation, no admission of mitigating factors, no prosecutorial discretion and therefore no individualized justice in Rice's case, as evidenced by the state's own

arguments and stated by defense counsel. (EXHIBIT A) Every charge of the final amended information which could support an enhancement included special allegations. No special allegations were dismissed as confirmed in a letter from the prosecuting attorney to trial counsel as well as the Judgment and Sentence, CP 59, 84-86.

The record does not demonstrate prosecuting attorneys exercised discretion in charging Rice. The Washington Supreme Court could only speculate that the state "probably" did exercise discretion as it relied on the state's claim that they "probably" did exercise discretion on the absence of "evidence that the prosecutor initially omitted the special allegation of victim under fifteen in initial charging because of concerns about obtaining a conviction". It is possible that the prosecutor did not initially charge the victim under fifteen special allegation for any number of reasons (double jeopardy concerns, unaware of the statute mandatory language, intent to add it later, etc.). Perhaps additional charges were added to leverage a settlement without running the risk that the special allegation could not be withdrawn, once charged. Whatever the reason, there is no evidence of discretion or the belief by the prosecuting attorney that the enhancements could be dismissed in a plea-bargaining process. These statutes were treated as mandatory, and were argued as mandatory by the state repeatedly.

Given the history of this litigation and the position of parties throughout, as well as the complete absence of evidence from the state that discretion was actually exercised, the only reasonable finding supported by the record is that the prosecutor did not believe that he had discretion not to charge the enhancements or dismiss them after they were charged.

There is no way of determining how the charging decision would have been made if the prosecutor did not believe he was required to bring the said charges. In Rice's case, counsel brought a pretrial motion seeking to have the statutes in question declared unconstitutional. This motion was denied. CP 10-22, 44-50. Had the motion been granted defense counsel would have had reason to submit a "mitigation packet" and argue that special allegations not be charged. No such packet was submitted as the motion was denied, however even if a mitigation packet had been submitted to the prosecutor, the contents would not appear in the record and there would be no way for the court to determine whether or not the prosecutor would have made a different charging decision. The prosecutor's belief that charging statutes were mandatory impacted the charging decision, and the extent of that impact is unknowable. Without a record of how charging decisions are made there is no way to prove the prosecutor’s charging decision would or would not be different.

On review the Washington Supreme Court found that the statutes in question are directory rather than mandatory as the statutes do not attach any legal consequences for a prosecutor's noncompliance and the legislature has acknowledged that prosecuting attorneys retain broad charging discretion not withstanding statutory language directing them to file particular charges. Directory statutes only guide and do not limit the charging discretion of prosecuting attorneys. The language in these statutes is meant as an expression of priority, meant to guide prosecuting attorneys but always subject to the prosecutor's underlying charging discretion.

In contrast to the Washington Supreme Court's ruling, the lower court acknowledged that charging special allegations is mandatory, restricting the discretion of the prosecutor but leaving *some* discretion, thus not completely eliminating all charging discretion. The court reasoned that it is permissible to compel prosecutors to file charges in all cases where there is sufficient evidence to support the charge because prosecutors retain their "discretion" to decline to file charges where the evidence is not sufficient to support the charge. *State v. Rice*, 246 P.3d 234 (2011).

This is not meaningful discretion. The rules of Professional Conduct specifically state "The prosecutor in a criminal case shall (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. RPC 3.8(a). The ABA's criminal justice

standards provide that "no criminal case should be instituted or permitted to continue "in the absence of sufficient admissible evidence to support a conviction". ABA Standards for Criminal Justice, Prosecution Function Standards, Commentary to Standard 3-3.7 (3rd Ed. 1993). It is meaningless to "leave" prosecutors the "discretion" not to charge people for whom the evidence is not sufficient to convict. No ethical prosecutor exercises this type of "discretion".

The only meaningful discretion is the discretion not to bring a charge for which there is sufficient evidence. ABA § 3.9(b) recognizes the prosecutor's discretionary power noting "the prosecutor is not obligated to present all charges which the evidence might support. The prosecutor may... decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction." The US Supreme Court cited this standard with approval in *US v. Lovasco,* 431 US 783, 794 (1997), noting that the decision to file charges requires consideration of many other factors besides the strength of the evidence of guilt.

Prosecutors have broad discretion not to charge in spite of evidentiary sufficiency, by dismissing charges as part of the plea bargaining process. Plea bargaining is a flexible negotiation process between the parties where a prosecutor may agree to dismiss counts/charges, agree to file particular counts/charges, agree to

recommend a sentence outside or within the standard range, agree not to file other counts/charges or make any other promise to the defendant, except not to allege prior convictions. This process allows the prosecutor and the accused to benefit from mitigating information provided by the defense. The prosecuting attorney failed to enter into plea bargaining negotiations or consider the mitigating factors surrounding Rice's case. Defense counsel, Mr. Clower, states specifically: *During the time I represented Ms. Rice the prosecutor's office was unwilling to consider appropriate charges which did not include the special sentencing enhancement. I was never approached by the prosecutor with any charges that did not include special allegations and sentencing enhancements. Despite my best efforts the prosecutor refused to consider any sentence less than life with the mandatory minimum of 25 years.* (EXHIBIT A). Trial counsel believed RCW 9.94A.835(1), .836(1), and .837(1) eliminated the prosecutors discretion to plea bargain by providing that the allegations once filed could be dismissed only if the trial judge found an error in the initial charging decision or evidentiary problems which make proving the special allegation doubtful.

The prosecutor must exercise his discretion. Discretion is key in achieving individualized justice. In Rice's case the prosecutor believed that the language used in RCWs 9.94A.835, .836 and .837 removed his discretion. As determined by the Washington Supreme

Court this was not the case. The Washington Sentencing Reform Act of 1981 calls for structured discretionary sentencing, it has not abolished discretion. The Washington Supreme Court ruled that the prosecutor in Rice's case retained discretion despite language in the special allegations, however the prosecutor failed to exercise said discretion. The prosecutor not only has discretion to refrain from filing charges even when there is sufficient evidence to obtain a conviction, prosecutor must exercise this discretion.

The US Supreme Court has long recognized that the decision whether or not to prosecute and what charge to file or bring before a jury, generally rests entirely in the prosecutor's discretion. *Wayte v. US,* 470 US 598, 607 (1985); quoting *Bordenkircher v. Hayes* , 434 US 357, 364 (1978); *US v. Nixon* , 418 US 683, 693-94 (1974). The discretion to prosecute "carries with it the discretion to choose the statute that will be filed". (Id. citing *US v. Batchelder,* 442 US 114, 124 (1979)). A prosecuting attorney's most fundamental role as both a local elected official and executive officer is to decide whether to file criminal charges against an individual, and if so, which available charges to file. This "most important prosecutorial power" allows for the consideration of individual facts and circumstances when deciding whether to enforce criminal laws, and permits the prosecuting attorney to seek individualized justice; to manage resource limitations; to prioritize competing investigations and prosecutions; to

handle the modern "proliferation" of criminal statutes; and to reflect local values, problems and priorities. Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor* 12-14, 22 (2007); William T. Pizzi, *Understanding Prosecutorial Discretion in the United States* , 54 Ohio St. L. J. 1325, 1343-44 (1993); Norman Abrams, Prosecutorial Discretion, in 3 *Encyclopedia of Crime and Justice* 1272, 1274-75, 1276-77 (Sanford H. Kadish ed., 1983). In addition our constitution provides prosecuting attorneys with the authority to be merciful and seek individualized justice.

(2) THE DISTRICT COURT COMMITED A SIGNIFICANT PROCEDURAL ERROR IN TREATING SENTINCING GUIDELINES AS MANDATORY, FAILING TO CONSIDER FACTORS OF 18 USCA 3553(a).

Mandatory application of sentencing guidelines violates the defendant's Sixth Amendment rights under *US v. Booker* , 543 US 220; 125 S.Ct 738 (2005). The US Supreme Court in Booker held that (1) the Sixth Amendment right to trial by jury applies to sentencing under the mandatory USSG so that a sentence imposed thereunder is subject to the principle that any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt; and (2) the provision of the Sentencing Reform Act of 1984 which makes the USSGs mandatory is incompatible with the

courts Sixth Amendment jury-trial holding and therefore had to be severed and excised from the SRA along with 18 USCA § 3742(e), which depends on the mandatory nature of the Sentencing Guidelines. As a result the SRA now makes the USSGs effectively advisory, requiring a sentencing court to consider the USSGs sentencing ranges but permitting it to tailor a sentence in light of other statutory concerns.

Treating sentencing guidelines as mandatory regardless of whether the defendant is sentenced under a statute governing the general application of the guidelines in sentencing, or a statute governing the application of the guidelines for crimes involving sexual offenses and offenses against minors, violates the Sixth Amendment. *US v. Yazzie*, 407 F.3d 1139 (CA10 2005).

In sentencing Rice, District Court Judge Steiner conceded that his "hands were tied" and he was sentencing Rice to the mandatory sentence proposed by the prosecutor based upon special allegations and sentencing enhancements.

> PROSECUTOR: …As to count I and count IV, it is life with a mandatory minimum of 25 years. As we previously discussed at the guilty plea, the ***Court has minimal discretion.***
>
> DEFENSE COUNSEL: …We understand that, as counsel just stated, ***the Court really has very little discretion*** here with the way this case ended up; the ***required*** 25 years to life indeterminate. So, as far as the – that part of it, not much needs to be said.

> COURT: …following the State Law, which ***requires*** a life sentence with a minimum of 25 years ... I am imposing the ***punishment pursuant to law***…

Court transcript, sentencing pages 2, 11. (Emphasis added).

As noted in Ground (1), the prosecutor treated charging said allegations/enhancements as mandatory, failing to exercise discretion. Judge Steiner may have imposed a different sentence if he did not feel he was bound by the Guidelines. Instead sentencing guidelines were treated as mandatory and none of the factors outlined in 18 USCA § 3553(a) were considered and defense counsel was denied the opportunity to submit a packet outlining mitigating circumstances for the court's consideration.

In *US v. Houston* ,456 F.3d 1328 (CA11 2006), the government failed to establish that district courts sentencing individuals under a mandatory sentencing scheme was harmless. In Houston the court imposed a sentence at the statutory minimum and the judge's statements at sentencing did not give clear indication of what the judge would have done if not bound by the Guidelines. Houston's sentence was vacated and remanded for resentencing. The circuit court also ruled that sentencing a defendant under a mandatory sentencing guidelines regime was not harmless error where it was unclear from the totality of the district court's comments whether it would have imposed the same sentence under an advisory system. *US v. McMorrow* , 434 F.3d 1116 (CA8 2006).

RCWs 9.94A.835, .836, and .837 added years to Rice's sentence. Rice was clearly prejudiced by being charged with the special sentencing enhancement allegations set forth in those provisions. Absent an allegation pursuant to RCW 9.94A.836 that the offense committed was predatory in nature, no 25 year minimum term could be imposed for conviction for child molestation in the first degree as specified by RCW 9.94A.507: (ii) if the offense that caused the offender to be sentenced under this section was... child molestation in the first degree, and there has been a finding that the offense was predatory under RCW 9.94A.836, the minimum term shall be either the maximum of the standard sentencing range for that offense or 25 years. RCW 9.94A.507 (c) (ii).

The maximum standard range for first degree child molestation, a seriousness level X offense, even with an offender score of 9, is 149 to 198 months, far short of the 25 year (300 month) sentence mandated by RCW 94A.836 and .507. Without the sexual motivation allegation, first degree kidnapping could not be the basis under RCW 9.94A.507 of a 25 year minimum term based on the allegation that the victim was under 15 years of age, as set out in RCW 9.94A.837. Again, kidnapping in the first degree is a seriousness level X offense where the maximum standard range sentence, with an offender score of 9, extends to only 198 months—two thirds of a 25 year sentence. There are no alternative provisions for imposing the mandatory 25

year minimum terms for convictions for kidnapping or for child molestation.

Further, only "sexual motivation" is among the exclusive list of aggravating factors which could support an exceptional sentence under RCW 9.94A.547. This aggravating factor, if proven, together with the additional proof that the victim was under 15 years of age, could justify an exceptional sentence above 198 months, but it could not support a 25 year minimum term under RCW 9.94A.507. Because Rice was prejudiced by the court's treatment of charging provisions of the sentencing enhancement allegation statutes as mandatory the error is not harmless under any harmless error test, and even under the non-constitutional harmless error test she is entitled to relief. Because the state cannot prove the error was harmless beyond a reasonable doubt, the sentencing enhancements in this case could be vacated and the case remanded for resentencing without them.

Plain error is (1) error, (2) that is plain, and (3) affects substantial rights. When these conditions are met the court may then exercise discretion to grant relief if the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *US v. Cotton*, 535 US 625, 631 (2002). In light of the court's precedent in *US v. Carty* (520 F.3d 984 (CA9 2008)), the district court plainly erred by presuming that Rice's sentence within the Guidelines range was reasonable. See *US v.Ameline*, 409 F.3d at 1078 (CA9 2005) (noting

that "an error is plain if it is contrary to law at the time of appeal"). There is a strong probability that Rice would have received a different sentence if the district court had not assumed sentencing directives were mandatory. This satisfies the third prong of the plain error test.

The fact that a sentence within Sentencing Guidelines is presumed reasonable on appeal does not mean that a sentence outside the range is presumptively unreasonable. USSG § 1B1.1. The Sentencing Guidelines are not only not mandatory on sentencing courts; they are also not to be presumed reasonable. *Nelson v. US*, 129 S.Ct 890; 555 US 350 (2009). A sentence may be procedurally unreasonable if the district judge fails to consider the applicable guidelines range or neglects to consider the other factors listed in 18 USCA § 3553(a), and instead simply selects what the judge seems an appropriate sentence without such required consideration. *US v. Webb*, 403 F.3d 373, 383 (CA6 2005). A sentence may be found substantively unreasonable when the district court selects the sentence arbitrarily, bases the sentence on impermissible factors, fails to consider pertinent factors or gives an unreasonable amount of weight to any pertinent factor. *US v. Collington*, 461 F.3d 373, 383 (CA6 2005).

The abuse of discretion standard applies to the review of all reasonableness sentencing questions. *Gall v. US*, 552 US 38; 128 S.Ct 596 (2007). The reviewing court must first ensure the district court

committed no significant error such as treating the guidelines as mandatory and/or failing to consider 3553(a) factors; then consider the substantive reasonableness of the sentence under the abuse of discretion standard and take into account the totality of circumstances. If the sentence is within the guidelines range the appellate court may, but is not required to, apply a presumption of reasonableness. The District Court may not presume that the Sentencing Guidelines range is reasonable. Each Guidelines sentencing factor should not be given more or less weight than any other. Rather, each factor is only one factor among the sentencing factors that are to be taken into account in arriving at an appropriate sentence. *US v. Dallman*, 533 F.3d 755 (CA9 2008); *US v. Carty*, 250 F.3d 984, 991 (CA9 2008).

As explained in Rita (*Rita v. US*, 551 US 338; 127 S.Ct 2456 (2007)), a district court should begin all sentencing proceedings by correctly calculating the applicable guidelines range. As a matter of administration and to secure nationwide consistency, the Sentencing Guidelines should be the starting point and initial benchmark; however Sentencing Guidelines are not the only consideration. After giving parties an opportunity to argue for a sentence they deem appropriate, the district court should consider all of the 3553(a) factors to determine whether they support the sentence requested. In so doing the court may not presume the guidelines are reasonable; it

must make an individualized assessment based on facts presented. If the court determines a sentence outside the Sentencing Guidelines is warranted, it must also ensure the justification sufficiently supports the variance. *Gall v. US*, 128 S.Ct 596 (2007).

The Ninth Circuit Court has found the reasoning in Castro-Juarez persuasive, holding that the substantive reasonableness of a sentence—whether objected to or not at sentencing—is reviewed for abuse of discretion. *US v. Autrey*, 555 F.3d 864 (CA9 2009); *US v. Castro-Juarez*, 425 F.3d 430, 4343 (CA7 2005) (holding that "review of sentence" for reasonableness is not affected by whether the defendant had the foresight to label his sentence as unreasonable before the sentencing hearing adjourned). As Rice states in Ground (3), she did not have a full knowledge of the law or the consequences of agreeing to stipulated facts; therefore she did not have the insight to challenge the reasonableness of her sentence during sentencing. The Supreme Court in Gall noted that "abuse of discretion" standard of review applies to appellate review of all sentencing decisions inside and outside of the sentencing guidelines range. A "Booker error" occurs when a sentencing court applies the USSG in a mandatory fashion, even though the resulting sentence was calculated solely upon facts that were admitted (or stipulated to) by the defendant, found by the jury, or based upon the fact of a prior conviction. *US v. Thomas*, 410

F.3d 1235 (CA10 2005); *US* v. *Fornia-Castillo*, 408 F.3d 52 (CA1 2005).

A key element of the fundamental fairness doctrine is its focus on the factual setting of the individual case. LaFave, Isreal and King, *Criminal Procedure*, Part 1, Chapter 2, § 2.4 (quoting *Betts v. Brady*, 316 US at 462 (1942)). Mandatory charging statutes and sentencing guidelines violate this basic concept of individualized consideration.

The Supreme Court's decision in Booker requires the sentencing judge to first compute the guidelines sentence just as he would have before Booker, and then—because Booker demoted the guidelines from a mandatory to advisory status—to decide whether the guideline sentence is the correct sentence to give the particular defendant. Booker sentencing discretion is exercised in accordance with the sentencing factors specified in 18 USCA § 3553(a). These factors are broad, vague, and open ended, so the judge should offer considerable discretion to individualize the sentence to the offense and offender as long as the judge's reasoning is consistent with 3553(a). In fact, the Circuit Court gives substantial deference to the district court's decision to depart from sentencing guidelines because it embodies the traditional exercise of discretion by the sentencing court. *US v. Thompson*, 315 F.3d 1071 (CA9 2002). A court's failure to recognize its power to impose a sentence below the sentencing guidelines range is an error. *US v. Jenkins*, 537 F.3d 894 (CA8 2008).

The Guidelines commission provides for sentencing departures beginning with the statutory basis for a departure as "aggravating or mitigating circumstances of a kind or to a degree not adequately taken into consideration by the sentencing commission". According to *Gilbert's Legal Dictionary* (1997 Ed.) mitigating circumstances are defined as; *the circumstances surrounding the criminal act which can reduce the penalty for the defendant, in the discretion of the judge and jury*; e.g. homicide can be reduce from murder to manslaughter if committed in a sudden heat of passion. *It also includes attributes or acts of the defendant which may reduce the sentence of the crime, in the judge's discretion*; e.g. a first offense, good faith or good character.

The judge must give serious consideration to a sentence outside of the sentencing guidelines when appropriate. The sentencing judge is in a superior position to find facts and judge their import under 3553(a) in individual cases. Ordinarily the judge "sees and hears evidence, makes credibility determinations, has full knowledge of facts and gains insights not conveyed by the record". *Gall v. US*. However, due to the limitations imposed up on the District Court judge by the prosecution and the assumption that the Sentencing Guidelines were mandatory, the judge was unable to exercise discretion in the imposition of Rice's sentence.

> PROSECUTOR: …As to count I and count IV, it is life with a mandatory minimum of 25 years. As we previously discussed at the guilty plea, the ***Court has minimal discretion.***
>
> DEFENSE COUNSEL: …We understand that, as counsel just stated , ***the Court really has very little discretion*** here with the way this case ended up; the ***required*** 25 years to life indeterminate. So, as far as the – that part of it, not much needs to be said.
>
> COURT: …following the State Law, which ***requires*** a life sentence with a minimum of 25 years … I am imposing the ***punishment pursuant to law***…

Court transcript, sentencing pages 2, 11. (Emphasis added).

As ruled in Kimbrough, the Federal Sentencing Statute requires the sentencing court to give respectful consideration to Federal Sentencing Guidelines, but the court may tailor sentencing in light of other statutory concerns as well. A mandatory guidelines regime violates the Sixth Amendment. 18 USCA § 3553(a); USSG 1B1.1; *Kimbrough v. US*, 128 S. Ct. 558 (2007).

Like Kimbrough, Rice's statutory enhancements triggered statutory mandatory minimum sentences; saying nothing about appropriate sentences outside of the Guidelines range. The court ruled in Kimbrough that a sentence within a mandate range would have been greater than necessary to accomplish the purposes of sentencing set forth in 3553(a). Rice's sentence of life with a mandatory minimum of 25 years is also greater than necessary to accomplish the purposes of sentencing set forth in 3553(a).

Just as the court abuses its discretion by not considering 3553(a) factors in imposing a sentence, a district court does not abuse its discretion when departing from the Sentencing Guidelines. In Autery (CA9 2009), the court found that the District Court did not act unreasonably in its consideration of the "history and characteristics" of the defendant statutory factor when imposing its sentence. The court reasonably considered the defendant's lack of criminal history, lack of substance abuse and family support. In addition, the court reasonably chose not to consider the defendant's status as a reserve police officer as an aggravating factor. The court noted that it was "required to make a determination under the Sentencing Guidelines, and after that, look at the Sentencing Guidelines as advisory only". The court chose not to impose a sentence within the guidelines range of 41-51 months for one count of child pornography and instead sentenced Autery to 5 years probation. In sentencing Autery the court noted that the defendant did not "fit the profile of a pedophile", there was no evidence of abuse of family members, he possessed redeeming personal characteristics such as no history of substance abuse, no "interpersonal instability", no "sociopathic or criminalistics attitudes", and he was “motivated and intelligent”. The court also noted the continued support of the defendant's family. While acknowledging that the offense was "terrible" the court still chose to

exercise discretion in sentencing outside of the Sentencing Guidelines.

Other Federal Circuit Courts have also held that mitigating circumstances warrant a downward departure from sentencing guidelines, even when aggravated factors may be charged. In *US v. Wachowiak*, 496 F.3d 744 (CA7 2007), the court held that the defendant's 70 month sentence, which was less than the advisory sentencing guidelines range of 121-151 months, was not unreasonably lenient. The District Court gave meaningful consideration to the guidelines range, acknowledged the seriousness of the offense and noted aggravating circumstances. However, the court believed the mitigating circumstances outweighed the aggravating ones. So too, in Rice, had the District Court recognized its power, it may have determined mitigating circumstances outweighed aggravating factors.

In the case of Wachowiak, the District Court judge considered a litany of factors specified in 3553(a), including the nature and severity of the offense, the defendant's history and characteristics, the advisory guidelines range, and the purposes of sentencing enumerated in 3553(a)(2). The judge felt that a 70 month sentence better filled the statutory sentencing purposes of 3553, would promote respect for the law, as well as provide just punishment and adequate deterrence. The judge also noted that the Guidelines fail to account for the significant collateral consequences suffered as a

result of conviction, the stigma of being a sex offender and the inability to pursue a career in the defendant's chosen profession. Rice will suffer the same collateral consequences including registering as a sex offender subject to conditions of community custody, and no longer being able to teach or work with children and families as she had prior to her arrest. Additionally the judge noted that the Sentencing Guidelines failed to consider the positive role of the defendant's family who promised to aid in Wachowiak's rehabilitation and reintegration into the community and support his efforts to avoid reoffending. Rice also has the complete support of her family and friends as evidenced in Exhibit J and in statements made during sentencing years before.

> RURUP: ...We have stood with Jen and her family for the past two years, not because we feel there is any justification for the crime, but because we know her heart and we see the potential in Jen. We have also seen true remorse and repentance from her ... When Jen is finally allowed to come home, the same community of friends will be waiting with open arms. We will be there to support her transition back into normal life. We will be there to hold her accountable on a daily basis. We love her way too much to ever allow her to fall back into this sin.
>
> VANDENBERG: ...Jennifer is our precious daughter. Her mother and I love her dearly. Her husband and children love her beyond words. She has the support and the love of her family and friends.
>
> RICE: ...I want to let the Court know that I love my wife very much. I am not going anywhere. I made a promise to be by her side for the rest of her life and I will be. I love her very much.

Court transcript, sentencing pages 5, 6, 7 and 9.

In Wachowiak mitigating factors included the defendants confession, expression of sincere remorse, a timely plea of guilt, and a sex offender counselor and psychologist's report that the defendant posed little risk of reoffending, was motivated to change and was a good candidate for treatment. These same mitigating factors can be said of Rice. Multiple sex offender treatment providers/psychologists recommended SSOSA, outpatient treatment, based on their conclusions that Rice was "*an extremely low risk to reoffend and very amenable to treatment*".

Reasons for sentencing the defendant based on "excellent" character, genuine remorse, susceptibility to treatment, low risk of recidivism, strong family support, and certain mitigating aspects of his or her offense are rooted in 3553(a). The court must impose a sentence *sufficient but not greater than necessary* to comply with the purposes set forth in 18 USCA § 3553(a)(2). Sections (a)-(c) are structured to reflect the three-step process used in determining the particular sentence imposed. After determining the guideline range the district court should refer to the Guidelines manual and consider whether the case warrants a departure. 18 USCA § 3553(a)(5). As held by several courts the District Court is still required to consider whether a chapter 5 departure is appropriate (*US v. McBride*, 434 F.3d 470 (CA6 2006); *US v. Hawk Wing*, 433 F.3d 622, 631 (CA8

2006)), and they must continue to apply departures (*US v. Jorodi*, 418 F.3d 1212, 1215 (CA11 2005)).

The sentencing court may consider "without limitation, any information concerning the background, character and conduct of the defendant unless otherwise prohibited by law". USSG § 1B1.4.18. USCA § 3661 also states "no limitation shall be placed on the information concerning the background, character and conduct of any person convicted of an offense which the court of the United States may receive and consider for the purposes of imposing an appropriate sentence." The sentencing court retains discretion to depart downward from the Guidelines if it finds "mitigating circumstances of a kind or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from described." 18 USCA § 3553(b); *US v. Lira-Barraza*, 941 F.2d 745, 746, (CA 1991); USSG § 5K2.0; *US v. Cuevas-Gomez*, 61 F.3d 749 (CA9 1995).

Consideration of the individual mitigating circumstances when determining the appropriate sentence is required. In *Pennsylvania ex rel Sullivan v. Ashe*, 302 US 51, 61 (1937) the court noted:

> For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender. His past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him.

Individual allowances must be made when appropriate. District Courts must utilize sentencing guidelines along with sentencing goals when fashioning a sentence. *US v. Bolanos-Hernandez* , 492 F 3d 1140 (CA9 2007). When the government deprives a person of life, liberty, or property it must act in a fair manner.

Discretion of the sentencing court is key in achieving individualized justice. The interpretation of the enhancements and special allegation imposed upon the court during Rice's sentencing severely limited the court's discretion, virtually eliminating it completely in the eyes of the court. In determining what sentence is appropriate "the nature and circumstances of the offense and character of the defendant" must be considered. The District Court's mandate is to impose a sentence that is sufficient, but not greater than necessary to comply with the purposes of 3553(a)(2). A sentence below the "mandatory" range prescribed in the statutes applied to Rice would still reflect the seriousness of the offense, promote respect for the law, and provide just punishment.

18 USCA § 3553 provides guidelines for the imposition of a sentence. In determining the particular sentence to be imposed the court shall consider (1) the nature and circumstances of the offense along with the history and characteristics of the defendant and (2) the need for the sentence imposed to (A) reflect the seriousness of the

offense, promote respect for the law and provide just punishment; (B) afford adequate deterrence to criminal conduct; (C) protect the public from further crimes of the defendant and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

In sentencing a defendant convicted of an offense involving a minor victim the court shall impose a sentence of the kind and within the range referred to above unless the court finds that there exists a mitigating circumstance of a kind or to a degree that (I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements... or (III) should result in a sentence different from that described.

The sentencing judge must "consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and punishment to ensue". *Koon v. US*, 518 US at 113; 16 S.Ct 2035 (1996). The district judge in Gall rightly stated a "sentence of imprisonment may work to promote *not* respect, but derision, of the law if the law is viewed as merely to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing". (Emphasis added). Sentencing Guidelines

are not mandatory, therefore the "range of choice dictated by the facts of the case" is significantly broadened.

In sentencing Rice, the district court committed a significant procedural error when treating the Sentencing Guidelines as mandatory, failing to consider factors of 18 USCA § 3553(a). The District Court failed to give adequate consideration to all statutory sentencing factors when sentencing Rice to life in prison, not considering the positive reports of defense experts—specifically, licensed, well respected sex offender treatment providers. The court focused on deterrence and punishment to the exclusion of other factors. Similarly to Olhovsky (*US v. Olhovsky,* 562 F.3d 530 (CA3 2009)), it appears that the court was so appalled by the offense that it lost sight of the offender.

Rice did not object to the sentence being imposed upon her at sentencing due to her lack of knowledge of the law and the explanation that her sentencing range was mandatory. In addition to the ruling that the District Court plainly errs when not considering any statutory sentencing factors before imposing the sentence, the Circuit Court has held that where a defendant does not object at sentencing to the District Court's failure to sufficiently address and apply the statutory sentencing factors, the court of appeals reviews such a claim on appeal for plain error. *US v. Waknine* , 543 F.3d 546 (CA9 2008). In Waknine the Circuit Court found that the district

court's approach to sentencing was plain error, as the Supreme Court in Gall made it clear that Guidelines should be used as a starting point and district courts should consider 3553(a) factors in reaching a reasonable sentence, viewing the Guidelines as discretionary. The court of appeals may exercise discretion to grant relief if a plain error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Like Waknine, Rice was sentenced within the range proposed by the sentencing guidelines. There was no contemporaneous announcement of the calculated guidelines range, or satisfaction of the requirement that sentencing be reconciled for reasonableness in light of 3553(a) factors. Due to the courts misinterpretation of sentencing guidelines for the special allegations charged against Rice, none of the factors of 3553(a) were considered. In her statement of additional grounds Rice brought similar factors from Washington's Sentencing Reform Act to the court's attention, however the court failed to recognize its error and exercise discretion. Treating the Guidelines as mandatory is a violation of law in that it does not allow consideration of mitigation factors or individual circumstances.

(1) Nature and circumstances of the offense and the history and characteristics of the defendant

Rice was convicted of serious crimes after agreeing to stipulated facts at bench trial. The criminal behavior Rice engaged in cannot be condoned. Nevertheless, her history and characteristics merit a

below guidelines sentence. This is Rice's first criminal conviction, she has led a law abiding life since graduating high school in 1993. After high school Rice went on to obtain her Bachelor's degree in Psychology as well as Teaching Certification. She then went on to receive her Master's degree in Marriage and Family Therapy. She has been a leader and positive role model in her church, home, professional life and community. Together with her husband of 19 years she is raising three sons. Rice has done all she can to maintain the highest level of involvement with her family while being incarcerated. Her family continues to support her faithfully, visiting weekly, participating in programs such as "Mother Child Games" and Boy Scouts on a monthly basis, attending special events throughout the year and participating in Extended Family Visits as often as possible. Rice's husband is also actively involved with the prison's "family council".

As stated in Autrey (CA9 2009), a position of employment (police officer) could be shown as an aggravating factor or a mitigating factor for the purposes of sentencing. In Autrey the court held that being a police officer could be considered an aggravating factor because it is a position of authority; however, it could also be used in mitigation because it shows that the defendant is capable of leading an honorable and respectable life, highlighting the defendant's best qualities. This position could also be argued for Rice, a former

teacher, where her status as a teacher was the basis for sentencing enhancements which equated to aggravating factors. Like Autrey, the attributes that Rice demonstrated as a teacher also give evidence to the fact that she can again become a productive, non-threatening member of free society, thus making severe punishment less appropriate than if Rice lacked these same characteristics.

Rice's history during incarceration is exceptional and further attests to her character. While incarcerated the past 8 years Rice has had no infractions. She maintains a positive rapport with staff and offenders and is a "peer supporter" trained to assist and mentor other offenders within the system. Rice has completed several re-entry programs and has successfully completed sex offender treatment. She has also become a nationally certified Braille Transcriptionist and currently works with the Washington State School for the Blind. At the time of this writing Rice is the highest Nationally certified braille transcriber in the State of Washington, holding 5 certifications. Rice's history both prior to and since her arrest speaks to her character.

In addition, Rice has been evaluated by several licensed sex offender treatment providers as well as other mental health professionals, all concluding that Rice presents an extremely low risk of reoffending. Rice has successfully completed approximately 2.5 years of voluntary sex offender treatment as well as the “core” treatment program for an additional year. A letter attesting to

Jennifer's proactive behavior has been submitted by the Psychology Associate in the Sex Offender Treatment Program for Washington Corrections Center for Women. (EXIBIT I)

All of the Federal circuits have recognized aberrant behavior as a factor that may, in the appropriate case, justify an exceptional sentence downward. Elizabeth Williams, Annotation, *Downward Departure from United States Sentencing Guidelines*. USSG §1A1.1 et. Seq. Based on Aberrant Behavior, 164 ALR Fed. 61 § 2, 3 (2000). If a District Court reasonably determines that there are significant factors that the Guidelines do not adequately address it may exercise its discretion and grant a reasonable downward departure. See 18 USCA § 3553(b) (departures for aberrant behavior are mitigating circumstances "not adequately taken into consideration by the Sentencing Commission"); *US v. Green*, 105 F.3d 1321. 1323 (CA9 1997).

Rice's crime is a result of aberrant behavior. Supporting this conclusion are numerous letters attesting to her good character (EXHIBITS J, K) as well as the history outlined above. However, due to the district court's treatment of sentencing guidelines as mandatory her aberrant behavior was not considered and Rice received the harshest penalty possible. In view of criteria mandated by 18 USCA § 3553(a) Rice's current sentence is excessive.

Sentencing Guidelines have recognized the authority of the court to depart downward for aberrant behavior before the sentencing commission's adoption of the specific policy statement set out in § 5K2.20. See USCA 3553(b) (providing that a court may consider mitigating circumstances of a kind not adequately taken into consideration by the sentencing commission in formulating the Guidelines that should result in a sentence different than described) *US v. Guerror*, 333 F.3d 1080 (CA9 2003). In proposing the new Guidelines the Commission explained that it was responding to a split in the circuits regarding whether "for purposes of a downward departure from the Guidelines range, a single act of aberrant behavior includes multiple acts occurring over a period of time". USSG Supp. to App. C. cmt. to amend. 603 at 78 (2000).

In November 2000 the Federal Sentencing Commission added section 5K2.20 to the Guidelines, defining aberrant behavior as a single criminal occurrence or single criminal transaction that (a) was committed without significant panning, (b) was of limited duration, and (c) represents a marked deviation by the defendant from an otherwise law-abiding life. *US Sentencing Commission Guidelines Manual,* § 5K2.20 cmt. 1 (2000). The commission directed that in deciding whether to depart from the Guidelines on the basis of aberrant behavior a court could consider the defendant's (a) mental and emotional conditions, (b) employment history, (c) record of prior

good works, (d) motivation for committing the offense, and (e) efforts to mitigate the effects of the offense. These considerations are very similar to the factors weighed under the “totality of circumstances” approach which has been held by the court.

The courts have adopted the "totality of circumstances" test under which the sentencing court is to consider a variety of factors in determining whether a defendant's behavior was aberrant. 154 ALR Fed. 61 (2000). The court may for example, consider whether the conviction was for a first offense. *US v. Lam*, 20 F.3d 999, 1003 (CA 1994). It may evaluate whether or not the defendant engaged in a significant period of advanced planning or reflection, his motivation for undertaking the unlawful scheme, and whether the action was a one-time event or part of a regular pattern. *US v. Green*, 105 F.3d 1321, 1322; *US v. Pierson*, 121 F.3d 560, 564-65 (CA9 1997); *US v. Morales*, 972 F.2d 1007, 1011 (CA9 1992). If a district court finds a “convergence,” *US v. Fairless*, 975 F.2d 664, 667 (CA9 1992), of these or similar factors demonstrating that a defendant’s actions “constitute a single act of truly aberrant behavior,” *US v. Dickey*, 924 F.2d 836, 8383 (CA9 1991), a downward departure is justified.

The Ninth Circuit has held that there is an "aberrant behavior spectrum" in determining when the aberrant behavior departure should apply. *US v. Dickey*; *US v. Takai*, 941 F.2d 738, 743 (CA9 1991). Courts may consider a "convergence of factors" and should

take into account the "totality of circumstances" when considering where a defendant's behavior falls along the spectrum and whether to grant a departure. *US v. Fairless*, (CA9 1992). When all is said and done, the conduct in question must truly be a short-lived departure from an otherwise law abiding life.

In *US v. Riley* (335 F.3d 919, 925 (CA9 2003)) the court held that courts should look at the "totality of circumstances" when determining what standard to apply in sentencing and that the clear and convincing standard is appropriate when "contested enhancements" would have "an extremely disproportionate effect on the sentence imposed". *US v Garro*, 517 F.3d at 1168 (CA9 2003). Factors considered in the "totality of circumstances" approach include (a) the singular nature of the criminal act, (b) spontaneity and lack of planning, (c) the defendant's criminal record, (d) psychological disorders the defendant may have suffered from, (e) extreme pressures under which the defendant was operating, including the pressure of losing a job, (f) letters from friends and family expressing shock at the defendant's behavior, (g) the defendants motivation for committing the crime, (h) pecuniary gain, (i) the defendants effort to mitigate the effects of the act, (j) employment history, and (k) the support of the defendant's family. *Fairless* at 668; *Takai* at 743-744; *US v. Working*, 224 F.3d 1093(CA9 2000); 18 USCA; USSG Ch. 1, Pt. A, intro 4(b). All of these factors should have been considered in the

development of mitigating circumstances surrounding Rice's sentencing.

The majority of these factors could have been considered before sentencing Rice. In a 2009 evaluation Allen Traywick Ph.D. speaks to Rice's amenability toward treatment, aberrant behavior, and low risk to reoffend. He states "the professional literature and practicing clinicians often note that persons who sexually offend against children so do under circumstances in which external/internal stressors become overwhelming and under such conditions they regress to a state of development similar to that of their victims. Once again, it is noted that at the time of offending Rice was having marital problems, there were financial pressures, she felt excluded from other support systems, she was not doing particularly well on the job, and there was increased use of alcohol." Dr. Traywick further noted that Rice was "not without the ability to engage in the process of introspection and it is likely that she is therapeutically accessible... she will be a willing participant as is the case with her husband who wants the best for the family."

The commission itself treats aberrant behavior as something it has not considered. USSG Ch. 1 Pt. A, Intro (4)(d). The court must look to the totality of circumstances in determining whether there were single acts of aberrant behavior by the defendant to justify a departure. Federal Courts agree that lack of criminal history alone is

not a basis for a downward sentence under the federal scheme, concluding that "aberrant behavior" is not equivalent to a lack of criminal history. *US v. Rojas-Millan*, 234 F.3d 464, 475 (CA9 2000). It is clear under the Guidelines that "aberrant behavior" and a first offense are not synonymous. The Guidelines make due allowance for the possibility of a defendant being a first offender. *Guidelines Manual*, Ch. I, Part A, Introduction, Para. 4(d). Nevertheless, the Guidelines recognize that a first offense may constitute a single act of truly aberrant behavior justifying a downward departure. *US v. Dickey*. Absences of prior convictions are not enough to show that the act in question was a single act of aberrant behavior but there is more than absence of prior convictions here.

Examples of cases where the court ruled that aberrant behavior warranted a departure from the sentencing guidelines include: *US v. Takai*, 941 F.2d 738 (CA9 1991) (otherwise admirable law-abiding people, engaged in criminal acts over a number of days; actions were self-contradictory, naïve and unreflective); *US v. Fairless*; 975 F.2d 664 (CA9 1992) ("convergence of factors": (1) first offense, (2) manic depression, (3) unloaded gun indicated the defendant was suicidal, (4) loss of job, (5) letters from friends and family "expressing shock" that the behavior of the defendant was "out of character"); *US v. Lam*, 20 F.3d 999 (CA9 1994) (analyzing "combination of factors" to find the defendant's conduct was aberrant). Additional cases granting a

downward departure on the grounds that the defendant's conduct constituted aberrant behavior include: *US v. Dickey*; *US v. Morales*, 972 F.2d 1007 (CA9 1992); *US v. Eaton*, 31 F.3d 789 (CA9 1994); *US v. Green*, 105 F.3d 1321 (CA9 1997), 152 F.3d 1202 (CA9 1998); *US v. Pierson*, 121 F.3d 560 (CA9 1997); *US v. Colace*, 126 F.3d 1229 (CA9 1997); *US v. Daas*, 198 F.3d 1167 (CA9 1999); *US v. Wetchie*, 207 F.3d 632 (CA9 2000); *US v. Baker*, 804 F.Supp 19 (ND Cal. 1992); *US v. Patillo*, 817 F.Supp 839 (CD Cal. 1992); *US v. Martinez-Villegas*, 993 F.Supp. 766 (CD Cal. 1998); and *US v. Autery*.

Aberrant conduct is conduct that represents a short-lived departure from an otherwise law-abiding life. As justification for a downward departure from sentencing guidelines, aberrant behavior is best assessed in the context of the defendant's day-to-day life, rather than solely with reference to the particular crime committed. USSG § 5K2.0; 18 USCA; *US v. Working*. Rice's offense represents her only police contact, she is a first time offender and her offense was not part of a regular pattern. In fact, while incarcerated Rice has continued to live a "law-abiding" life by following all institutional directives and maintaining a clear infraction history. At the time of the offense Rice was operating under extreme pressures in her personal and professional life. The criminal behavior that Rice engaged in during the summer of 2007 was of limited duration and represents a marked deviation from her otherwise law-abiding life.

This fact is substantiated by the shock expressed by friends and family. [EXHIBIT J] In addition, other incarcerated offenders have stated that Rice does not have a criminal mind-set and does not "fit" with the general prison population, nor does she "belong" in prison for 25 years. [EXHIBIT K] These factors come together to demonstrate that Rice's conduct in the summer of 2007 was out of her "norm" and represent aberrant behavior.

(2)(A) Reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment

The seriousness of the offense is reflected by the time (8 years) that Rice has already served toward her sentence (life with a mandatory minimum of 25 years), as well as the time she will spend in community custody upon release. Additionally Rice will be subject to the requirement that she register as a sex offender. This is a punishment that has lifelong significance and adequately reflects the seriousness of the offense.

(2)(B) Afford adequate deterrence to criminal conduct

A life sentence is not necessary to promote respect for the law, to deter others, or to protect the public; it is simply excessive and disproportional to the sentences received by others with similar records committing similar crimes. Prior to incarceration Rice had no history of criminal conduct. Since her arrest Rice has continued to remain infraction free and follow rules set in place by the State of Washington. This demonstrates Rice's respect for the law and her law-abiding lifestyle. The amount of remorse Rice has expressed also demonstrates that the time she has spent incarcerated has deterred her from engaging in any future criminal behavior. As reported by several evaluators, Rice has "learned from her past behavior and does not pose a risk to reoffend."

(2)(C) Protect the public from further crimes of the defendant

Protecting the public is a very worthwhile goal however, there is a substantial difference between protecting the public from an offender who is a high risk repeat offender as opposed to an individual who is not predisposed to commit a crime and/or is a very low risk to reoffend.

Several certified sex offender treatment providers who have evaluated Rice over the course of time have all deemed Rice to be "*very amenable to treatment and an extremely low risk to reoffend*."

Additionally, Rice has been evaluated on two occasions by Department of Corrections, Washington Corrections Center for Women head psychologist, Ronald Dahlbeck, Psy.D (June 16, 2011 and September 19, 2012). On several areas of psychological testing conducted by Dr. Dahlbeck, Rice tested below the mean in areas that may predict future criminal behavior and/or concerns. (EXHIBIT H). Areas where Rice scored well *below the mean* include: impulsive personality (prone to be impulsive in areas that have high risk for negative consequences such as spending, sex or substance abuse), psychopathy, criminal orientation and attitudes, drug/alcohol problems, hostility, physical aggression, and being negatively influenced by friends/family. Conversely, Rice scored well *above the mean* in qualities such as resourcefulness, independence, self-reliance, discipline, determination, initiative, flexibility, tolerance (higher score), willingness to accept the consequences for one's own actions, dependability, trustworthiness, and a responsibility to the group. Rice's Overall Risk Index was "well below the mean which suggests that *Ms. Rice's vulnerabilities to recidivism are significantly exceeded by the factors that mitigate risk."* (Emphasis added.) Dr. Dahlbeck further stated in his second evaluation:

> Ms. Rice's current offense is concerning but not violent per se. Her criminal history has no violence-related offense. Regarding aggression, by and large, the testing results were in the below average range. Predatory aggression was below average and explosive aggression was also below average. Impulsivity was

> below average. ***Based on the information provided above Ms. Rice's risk for committing a violent act is estimated to be low.*** ... Regarding Ms. Rice's potential for committing another crime there are several factors: The nature of the current offense is troubling but she expressed empathy for her victims and remorse for her crime.... ***Her criminal history does not suggest recidivism.*** She expressed a reasonable vocational goal. Her infraction record is excellent. Substance abuse played a role in Ms. Rice's antisocial violent behavior, hence she must remain drug and alcohol free if she is to avoid recidivism. Derived from the above listed factors, her risk to reoffend is estimated to be low if she remains drug and alcohol free but moderate if she does not... ...***Ms. Rice's vulnerabilities to recidivism are significantly exceeded by the factors that mitigate risk.*** The PCL-R score was well below the mean for female offenders. (PCL-R measures risk due to psychopathy not due to other factors such as mental illness or substance abuse. Ms. Rice's PCL-R score placed her well below the mean for female offenders.)

(Emphasis added.)

In 2013, Rice was evaluated by Dr. Traywick a second time. (EXHIBIT E, G) His Summary and Recommendations state: “It is the opinion of this writer that Mrs. Rice carries *a low risk for sexual re-offense and she is considered not to be a risk to her children.* Under Diagnostic Impressions Dr. Traywick states, “*no current evidence of pedophilia”*. Additionally Dr. Traywick ordered a current polygraph which supports the appropriateness of individualized justice in the case of Ms. Rice, concluding that she has not sexually acted out since her incarceration in thought or action. (EXHIBIT F) Finally, Dr. Traywick also provided a letter of support for Rice’s legal proceedings (EXHIBIT G), in that letter Dr. Traywick reflects on his extensive history working with sex offenders and reiterates “In the case of...

Jennifer Rice, it is the belief of the undersigned that *she poses little, if any, risk to the community if she was released from confinement."* (Emphasis added.) Regarding her current sentence Dr. Traywick also believes it "is excessive when compared to other females seen through the course of my career."

In addition to the seriousness of the defendant's criminal history, recidivism should be considered in deciding whether to depart downward when imposing a sentence. *US v. Maldonado-Campos*, 920 F.2d 714 (CA10 1990). The recidivism aspect of the sentencing guidelines criminal history category captures the concept of the possibility that the defendant by serving an intervening sentence, has demonstrated his determination to avoid future crimes, and therefore any downward departure from the sentencing guidelines range on grounds that the defendant is unlikely to commit crimes in the future must be made under the guided departure procedure outlined in the Guidelines. *US v. Collins*, 915 F.2d 618 (CA11 1990).

(2)(D) Provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective manner

Rice has no educational needs. She has successfully graduated high school, completed college and gone on to obtain a graduate degree. While incarcerated Rice has pursued additional vocational training as she will no longer be permitted to work in her chosen professions of education or marriage and family therapy. Rice is currently working as a braille transcriber affiliated with the Washington State School of the Blind. She is Nationally certified in the areas of Literary Braille, Textbook Formatting, and Math and Science Notation. Rice also has certification in Braille Music at both the associate and full music levels. This will be a viable skill and employment opportunity upon Rice's release as she will be able to contract independently with the Washington School for the Blind and other agencies across the nation which may request her transcription services.

Rice has also successfully completed several years of voluntary sex offender treatment as well as the intensive "core treatment" offered within Washington Correction Center for Women. Upon Completion of the treatment Sonja Stenberg, MA, Psychology Associate with the Sex Offender Treatment Program, and Robert Hossack, Ph.D, Psychologist 4, Director of Washington's Department of Corrections Sex Offender Treatment Program stated the following:

> "Ms. Rice has remained compliant with her treatment expectations. She completed assignments in a timely manner. She also mentored and assumed a leadership role with her peers. Her Relapse Prevention Plan appeared to be adaptive, pro-social and realistic...Ms. Rice appears to have a clear understanding of her motivation and internal and external barriers in relation to her offense...Ms. Rice made significant progress in identifying her dynamic-risk based treatment goals. She was an active participant in her own treatment and demonstrated her ability to transfer the skills she learned in treatment to a less restrictive setting."

In all of the following areas Rice was rated to have made significant progress in treatment (scale included minimal, adequate, or significant options): Sexual self-regulation, Attitudes supportive of sexual assault, Intimacy deficits, Social functioning, General self-regulation, Compliance and Responsivity needs. In addition, all of the ongoing treatment-related concerns were also related low (scale included low, moderate or high options) in the areas listed above.

An additional factor to be considered when imposing a sentence is the **need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.** 18 USCA § 3553(a)(6)

Due to the court's interpretation of special allegations and enhancements found in RCWs 9.94A.835, .836, and .837 Rice was not afforded the opportunity to have individual factors and mitigating circumstances considered by the court at the time of sentencing. As a result, Rice's sentence of life imprisonment with a mandatory

minimum of 25 years is in no way commensurate with the punishment imposed on others committing similar offenses.

Professional evaluators, Dr. Traywick and Dr. McGovern have also commented on this discrepancy. Dr. Traywick stated in his July 2013 evaluation, "Ms. Rice's *current sentence is excessive when compared to other females* seen through the course of (his) career". (Emphasis added.) Similarly, in July of 2013 Dr. McGovern stated: "(Rice's) sentence appeared to be *very harsh and punitive"*, a sentence he has *"never understood"* ...(Emphasis added.) Dr. McGovern has evaluated sex offenders who have committed more serious crimes but have been allowed to complete an outpatient treatment program after serving a minimal prison sentence and stated his belief that Rice was an "excellent candidate" for outpatient treatment services and that the probability of her re-offense was "*extremely low, close to zero"*. (Emphasis added.)

Rice has submitted several other cases to the court for consideration. Letourneau, a female teacher in Washington State, was charged with two counts of second degree rape of a child. A seriousness level XI offense (one level higher than Rice's most serious offense). In 1997 Letourneau pleaded guilty to her charges and received SSOSA, suspending her standard range sentence of 89 months. After a brief confinement in jail Letourneau re-offended within two weeks of release. Upon having her SSOSA revoked,

Letourneau was sent to Washington Corrections Center for Women to serve the remainder of her 89 month sentence. *State v. Letourneau*, 97 P.2d 436 (2000). Debra Lafave, a middle school teacher in Tampa, Florida charged with having oral sex and intercourse with a male student on campus in 2004; she received three years house arrest and seven years probation. Kristi Oakes, a teacher in Seirville, Tennessee, accused of repeatedly having sex with a sixteen year old Biology student Ms. Oakes faced up to two years in prison. Gary Hoff, a choir instructor from Orforville, Wisconsin received three years probation after pleading no contest to disorderly conduct and fourth degree sexual assault of a male student in 2004. (Hoff was not charged in connection to other allegations from former students dating back to 1994). Gregory Pathiakis, a teacher in Brockton, Massachusetts, received five years probation after pleading guilty to rape of a child, enticement of a child under sixteen, five counts of possession of child pornography, and one count of distributing harmful materials to a child.

Additional cases within the state of Washington involving sexual offenses and their resulting sentences are also noted; *State v. Ramirez*, 165 P.3d 61 (2007) (first degree rape of a child; SOSA); *State v. Partee*, 170 P.3d 60 (2007) (second degree rape of a child, second degree molestation of a child; SSOSA); *State v. McCormick*, 169 P.3d 508 (2007) (first degree rape of a child; SSOSA); *State v.*

Smith , 139 WA.App 599 (2007) (exceptional sentence of six months for rape of a child in the first degree); *State v. Ramirez,* 165 P.3d 61 (2007) (68 months for child molestation in the first degree and kidnapping in the first degree); *State v. Castro* , 141 WA.App 485 (2007) (18 months for second degree child molestation); Nelson Brown Hanton (2006) (rape of a child, child molestation, tampering with evidence, destruction of evidence: 93 months)

Since Rice's conviction and clarification from the Washington Supreme Court regarding the charging of special allegations applied to Rice there have been several teachers convicted of similar crimes. Some of these teachers are from the very same county as Rice, however NONE of them have been charged with the special allegations that were assigned to Rice. K. Allsworth, teacher in Clark County Washington (2012) (sexual misconduct, first degree; received 20 months -10 months for half time deduction); Brianna Strong, basketball coach in Federal Way Washington (2014) (third degree child molestation and communication with a minor for immoral purposes); Michael Edison Allen, teacher in Pierce County Washington (2014) (5 counts sexual misconduct with a minor in the first degree and violation of no contact order); received 20 months. Meredith Powell, teacher in Pierce County Washington (2014) (2 counts child rape in the third degree, 1 count communication with a minor for immoral purposes) sentenced to 6

months and SSOSA; Keshia Shaw, teacher in Pierce County Washington (2014) (2 counts of second degree rape of a child) sentenced to six months home arrest and SSOSA (Case # 12-1-023770 Pierce County Superior Court). Since Rice's arrest and subsequent litigation when Washington Supreme Court clarified the charging discretion of the prosecutor, these special allegations and sentencing enhancements have NOT been applied to any other case involving a teacher since Rice.

In Booker, the Supreme Court invalidated the sentencing provision 3553(b)(1) which made sentencing guidelines mandatory, and 3742(e), which directed the appellate courts to apply a de novo standard of review to departures from the sentencing guidelines. As a result sentencing guidelines are now advisory. District courts must utilize sentencing guidelines along with sentencing goals when fashioning a sentence, allowing for individualized sentences when appropriate. The Sentencing Reform Act of Washington did not eliminate judicial discretion to fashion individualized sentences when the facts of a particular case demand it. Indeed one of the purposes of the SRA is to structure discretionary sentencing as well as to provide for consistency in sentencing. The legislative intent of the Sentencing Reform Act's exceptional provision was to authorize courts to tailor the sentence, as to both the length and the type of punishment imposed, and to the facts of the case, recognizing that not

all individual cases fit the predetermined structuring grid. RCW 9.94A.010; RCW 9.94A.535; *State v. Davis*, 192 P.3d 29; 146 WA.App 179 (2008). This coincides with the intent of the Federal Sentencing Guidelines.

18 USCA § 3742 (e)(1), (2) requires that circuit courts determine whether a sentence has been imposed in violation of law or "as a result of incorrect application of the sentencing guidelines". It is clear that the district courts' approach to sentencing Rice was plain error. Although Rice was sentenced before the court had the benefit of the US Supreme Court's decision in Gall and Carty, her sentence should be vacated and remanded for resentencing in light of those precedents. Additionally, Rice has demonstrated the reasonable probability that she would have received a different sentence if the district court would have considered 3553(a) factors, establishing that "the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding". *Ameline*, 409 F.2d at 1078 (quoting *US v. Dominguez-Benitez*, 542 US at 83;124 S.Ct 2333). Due to the plain error of the court, which seriously affected the outcome of Rice's sentence, this sentence should be vacated and remanded for resentencing with consideration of factors outlined in 3553(a) including the "totality of circumstances" as well as the history and characteristics of Rice. A court must individualize sentencing in

order to fulfill the goals of punishment. *Williams v. People of the State of NY*, 337 US 241; 69 S.Ct 1079 (1949).

GROUND 3: FIFTH AMENDMENT RIGHT TO DUE PROCESS WAS VIOLATED WHEN RICE DID NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY AGREE TO STIPULATED FACTS.

At bench trial the parties stipulated that the facts set forth in the Waiver of Right to Jury Trial and Stipulation to Facts were "sufficient to support findings of guilt and the special allegations set forth in the second amended Information". Rice waived the right to challenge evidence however she reserved the right to challenge " the constitutionality" of special allegations listed in RCWs 9.44A.836 (offense was predatory), .837 (victim was under 15 years of age) and . 712(3)(c)(ii) (25 year minimum). Although Rice did not specifically reserve the right to appeal the finding of sexual motivation, without such a finding, she could not have been sentenced under RCW 9.94A. 712, and she did reserve the right to challenge the constitutionality of her sentencing under this statutes.

The due process of law is a flexible term used to describe the fair and orderly administration of justice in the courts. Essential to this concept is the right a person has to be notified of legal proceedings, the opportunity to be heard and defend him/herself in an orderly proceeding and to have counsel represent him/her. In order for a waiver of jury trial to be valid it must be an intentional

relinquishment or abandonment of a known right or privilege. *McCarthy v. US*, 394 US 459, 89 S.Ct 1166 (1969). Whether there is an intelligent, competent, self-protecting waiver of jury trial by the accused depends on the circumstances of each case. *Adams v. US, ex rel McCann*, 63 S.Ct 236 (1942).

At the time of sentencing Rice lacked said skill and knowledge and entered into an agreement of stipulated facts, being "tried" by bench only, waiving her right to jury trial. Rice has argued that she did not knowingly and intelligently agree to waive her right to trial, nor did she fully understand the repercussions of agreeing to the facts stipulated by the prosecuting attorney. Waiving the right to jury trial based on poor representation or lack of knowledge impedes a defendant's Fifth Amendment rights. Due process requires that a defendant's waiving of jury trial be done knowingly, intelligently and voluntarily. *Boykin v. Alabama*, 23 L.Ed.2d 274 (1964); *Personal restraint of Stoudmire*, 145 Wn. 2d 258, 266.

In arriving at this point in the appeal process Rice has had the oppurtunity to become more familiar with the science of law. Rice has also reviewed transcripts pertaining to the stipulated facts agreement and resulting sentence. At first glance it appears that Rice did indeed knowingly, intelligently and voluntarily enter into this agreement based on statements from defense counsel in court transcripts dated April 20th, 2009. However, Rice maintains her claim to have not done

so knowingly, intelligently or voluntarily. Given an attorneys experience with the law it is expected that such language would be necessarily included on record in an effort to demonstrate that he fulfilled his obligation to the defendant. Yet despite counsel's statements Rice's own response reflects what she truly understood.

> RICE: Your Honor, it is my understanding that if I were to choose the option and go to trial, with a jury, that there would be additional counsel on the prosecution side and they would be coming against me with extra evidence that could lead to guilty verdicts. By doing this, it is my understanding that, um, I'll be having the Amended Information, the amended charges, and in that case, that seems to be the most beneficial to me.

Rice basically conveys that she understands going to trial could result in heavier prosecution with the possibility of additional charges resulting in a more severe sentence. In light of her current life sentence this reasoning seems ridiculous and demonstrates Rice's limited understanding.

Rice's second motivation for excepting stipulated facts was the preservation of her right to appeal, this is what Rice agreed to in her second response as it was the only hope she had for eventually receiving a sentence less than life or 25 years.

> DEFENSE COUNSEL: Your Honor the other part of this agreement, you might call it, is that it does preserve her right to appeal the constitutionality the statutes that is at question here, and there were pre-trial motions made on that, on those issues. This resolution also allows her to preserve those issues for appellate review.

> COURT: Clearly, for the record, are you knowingly and intelligently waiving your constitutional right to a jury trial?
>
> RICE: Yes, Your Honor.

Rice did not intelligently enter into the agreed stipulated facts with full knowledge and an understanding of the consequences of that decision.

The stipulated facts presented by the state were tailored to fit the charges and resulting sentence being sought by the prosecuting team. Throughout this process Rice has raised several objections to the specific allegations attached to her charges. These allegations are highly significant as they result in a much higher sentencing range. Additionally the stipulated facts are not consistent with Rice's statements to investigators.

While Rice may have understood the basic criminal conduct used to formulate her charge she had no understanding of the essential elements pertaining to the special allegations in her case. Had Rice fully understood these elements she would not have agreed to the facts stipulated. This was done at the advice of her attorney who repeatedly emphasized that by agreeing to stipulated facts at bench trial Rice would preserve her right to appeal. Prior to the April 2009 hearing Rice was never informed, nor did she have the knowledge, that a jury of her peers would have to come to a unanimous guilty finding regarding the special allegations involved in

her case. Rice was not familiar with RCW 9.94A.537 which states in part *the facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts*; knowing this Rice would not have stipulated to facts including aggravating factors. Per the US Supreme Court, before a court is permitted to impose sentences above the standard range, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt." *Blakely v. Washington*, 542 US 296, 124 S. St 2531; 159 L.Ed.2d 403 (2004); *Apprendi v. New Jersey*, (2000) 147 L.Ed.2d 435. The defendant must be informed of the nature and cause of the charges against him. *Sheppard v. Rees*, 909 F.2d 1234 (CA9 1989); *Gray v. Raines*, 662 F.2d 569, 571 (CA9 1981).

Rice has repeatedly stated that she was not informed of the components that went into the formation of her charges, specifically special allegations, nor was she able to discuss pertinent details of her case due to the attorney's ignorance of fundamental statutes and laws being applied. Failure to inform a defendant that he/she will be subject to a mandatory sentence, if at bench trial the judge finds a predatory finding or sexual motivation, should render the bench trial invalid. *State v. Turley*, 149 Wn. 2d 395, 399 (2003). Failure to inform a defendant of sentencing consequences upon going to bench trial is governed by court rules; a court must allow a defendant to

withdraw the decision to go to bench trial versus jury trial if necessary to correct a manifest injustice.

When Rice agreed to stipulated facts presented by the state she essentially entered a plea of guilt. As evidenced in the transcript from sentencing the prosecutor himself referred to the agreed stipulated facts as a guilty plea.

> PROSECUTOR: We are on your calendar today, Your Honor, for sentencing. We have been previously here to enter a ***guilty plea***. At that time, the State spoke to our recommendation. Just as a reminder, I'll return to that briefly, Your Honor. As to count I and count IV, it is life with a mandatory minimum of 25 years. As we previously discussed at the ***guilty plea***, the Court has minimal discretion.

Court transcript, sentencing page 2. (Emphasis added.)

According to Federal Rules Criminal Procedure, rule 11, 18 USCA a guilty plea is invalid unless voluntarily given by the defendant with a full understanding of the possible outcomes of the plea. The defendant must understand the length of sentence and amount of time he might possibly receive. Because a guilty plea and/or a "stipulated fact agreement" is a waiver of trial and, unless applicable law otherwise provides, a waiver of right to contest any evidence the state may have offered, a guilty plea must be an intelligent act done with sufficient awareness of relevant circumstances and likely consequences. A plea of guilt must be a voluntary and knowing act *Brady v. US,* 397 US 742 (1970). Since a guilty plea is a waiver of

trial it must be done with sufficient awareness of the relevant circumstances and likely consequences. *McMann v. Richardson* , 397 US 759. 766; 25L.Ed.2d.763 (1970). A defendant must expressly and intelligently participate in any waiver of his right to jury trial. *Jackson v. Hopper* , 547 F.2d 260 (CA5 1977).

A judge cannot properly assume that a defendant is entering a plea with a complete understanding of the charge against him even when a defendant's attorney represents that he explained the charges to the defendant. Federal Rules Criminal Procedure, rule 11, 18 USCA. If a defendants guilty plea is not equally voluntary and knowing, the plea has been obtained in violation of due process and is void. A guilty plea cannot be truly voluntary unless a defendant possesses an understanding of law in relation to the facts. *McCarthy v. US* (1969). Rule 11 requires the judge to inquire into the defendants understanding of the plea. The district judge thus exposes the defendant's state of mind on the record through personal interrogation while determining the voluntariness of the guilty plea. The district judge must determine that the conduct to which the defendant admits constitutes the offense charged. The examination of the relationship between the law and the acts admitted by the defendant is to protect the defendant who voluntarily pleads guilty with understanding of the nature of the charge but without realizing that his/her conduct does not actually fall within the charge.

Personally addressing the defendant as to his/her understanding of the essential elements of a charge is a necessary prerequisite to a determination that he/she understands the meaning of the charge. Federal Rules Criminal Procedure, rule 11, 18 USCA ; *McCarthy v. US* (1969). In instances where stipulation, like a plea of guilty, is an admission by the defendant of all conduct charged, the trial judge should address the defendant personally to determine if the defendant voluntarily waives their constitutional rights and understands the consequences of the act. *US v. Brown* , 428 F.2d 1100 (CA DC 1978).

The Federal Rules of Criminal Procedure, Rule 11, require personal advice be given to the accused from the court before accepting a guilty plea. This is also applicable when the accused's stipulation or testimony amounts to a guilty plea. According to Rule 11 the court must address the defendant personally in open court and inform him/her of, and determine that he/she understands the nature of the charge as well as the mandatory minimum and maximum penalty provided by law. *US v. Myers,* 451 F.2d 402 (CA9 1972); *Combs v. US* , 391 F.2d 1017 (CA9 1968); *Heiden v. US* , 353 F.2d 53 (CA9 1965); *Pettigrew v. US,* 480 F.2d 681 (CA6 1973). In McCarthy the district judge who accepted McCarthy's guilty plea without personally addressing the defendant and determining that the plea was made voluntarily with understanding the nature of the charge, failed to comply with this rule although his attorney represented that

he had explained the charge to the defendant. (McCarthy's guilty plea was set aside and his case was remanded for another hearing.). In *Heiden v. US* (353 F.2d 53 (CA9 1965)) the court of appeals held that when the district court does not fully comply with the rule 11 the defendant's guilty plea must be set aside and the case must be remanded for another hearing at which he may plea anew. Prejudice is established when lack of understanding in a specific and material respect is sufficiently alleged and such asserted lack, if it existed, would have been disclosed by a proper examination of the trial judge. Heiden was prejudiced by failure of the sentencing court to make the required ascertainment of understanding and this prejudice was not eliminated by the findings of fact made by the court.

It is clear from the record that Rice did not have a full and complete understanding of the meaning of her charge, the acts necessary to establish guilt, specifically the essential elements involved in the special allegations, nor did she fully understand the consequences of pleading guilty and/or agreeing to the prosecutor's stipulated facts.

Before accepting what was essentially Rice's guilty plea, the judge addressed Rice's right to jury trial; however this information was presented in quick succession which did not allow Rice to adequately demonstrate her understanding or enter into dialog which would clarify her misgivings. Rice's uncertainty is clear in her

response, additionally Rice does not address the fundamental issue of waiving her right to jury trial which is crucial.

> RICE: Your Honor, it is my understanding that if I were to choose the option and go to trial, with a jury, that there would be additional counsel on the prosecution side and they would be coming against me with extra evidence that could lead to guilty verdicts. By doing this, it is my understanding that, um, I'll be having the Amended information, the amended charges, and in that case, that seems to be the most beneficial to me.

Court transcripts, stipulated facts trial page 4. Had Rice been afforded the opportunity to participate in thorough inquiry involving dialog with the court it would be clear that Rice's understanding and knowledge was very limited. It is clear that Rice's limited "understanding" is based on information she had received from defense counsel regarding charges prior to this court appearance. If Rice fully understood the importance of jury in determining guilt she would have preserved that right.

After Rice's response noted above the court continued to attempt to ascertain Rice's understanding of the stipulated facts. Before Rice had an opportunity to process the judge's request, defense counsel interjected, telling Rice to simply respond "yes or no". Rice was not even afforded the opportunity to object to elements of the stipulated facts or consider offering testimony or additional evidence.

> COURT: You have a right to testify. You have a right to remain silent. You have discussed that with your attorney. You have a right to present witnesses, but this waiver of right to jury trial and stipulation as to facts waives the other two or three or more important constitutional rights, including your presentation of evidence in various ways. So, I would like to hear from you personally that you are in agreement with the stipulation as to the facts and stipulated bench trial.
>
> DEFENSE COUNSEL: Yes or no is what he wants to hear.
>
> RICE: Yes, Your Honor.

Court transcripts, stipulated facts trial page 6.

While Rice was briefly questioned by Judge Steiner, a defendants affirmative answer to a single inquiry as to whether he/she understands a charge does not provide a substantial basis for determining that a defendant understands the meaning of the charge, what acts are necessary to establish guilt, and the consequences of pleading guilty. *Munich v. US,* 337 F.2d 356 (CA9 1964). Notice of the true nature of the charge made against one is the first and most universally recognized requirement of due process. *Smith v. O'Grady*, 312 US 329, 334; 85 L.ED 859 (1941). As outlined in *Kadwell v. US* (315 F.2d 667 (CA9 1963)) it is absolutely necessary that the defendant understand; (1) the meaning of the charge, (2) the acts necessary to establish guilt, (3) the consequences of pleading guilty. Also in *Munich v. US* (CA9 1964).

Under the law of this circuit much more is required of judges during sentencing. The judge must personally inform the defendant

not only of the right to jury trial but also the right against self-incrimination, the right to confront accusers; the judge must also ascertain that the defendant understands the consequences of waiving those rights, including the maximum penalty the defendant may receive. *Quiroz v. Wawrzaszek,* 471 US 1055 (1985); *US v. Williams* , 782 F.2d 1462, 1466 (CA9 1985); *Worthen v. Meachum* , 842 F.2d 1179, 1182 (CA10 1988). Due process requires the trial court to address the defendant on record about understanding basic rights and the consequences of their waiver. *US ex. Rel. Pebworth v. Conte,* 489 F.2d 266 (CA9 1974); *Yellow Wolf v. Morris,* 536 F.2d 813 (CA9 1976). This is especially important for defendants inexperienced with court proceedings such as Rice. The court has recognized that habeas relief is available when the defendant is not adequately informed of his rights and the full consequence of his plea. *Carter v. McCarthy* , 806 F.2d 1373, 1375 (CA9 1986). "Determining the voluntariness of a plea involves a review of all relevant circumstances surrounding it" *Brady v. US* (1970). Here, Rice was not clearly advised of the federal rights waived by agreeing to stipulated facts, not was she informed by the judge on the record of the "direct consequences" of her stipulation.

There are no factual findings supporting the state court's determination of voluntariness, nor was there an evidentiary hearing on the question. It is the circuit court's rule that "deference is not

accorded to a state courts determinations of mixed questions of law and fact, or of purely legal questions..." *Torrey v. Estelle*, 842 F.2d 234, 235 (CA9 1988). "The voluntariness of a guilty plea is a question of law not subject to deferential review". *Iaea v. Sunn*, 800 F.2d 861, 864 (CA9 1986). When the trial transcript reveals the failure of the court to infirm the defendant of "Boykin rights" the burden is on the state to show a valid plea. Evidence must be clear and convincing; the state may not utilize a presumption to satisfy its burden of persuasion. *Dunn v. Simmons,* 877 F.2d 1275 (CA6 1989). Failure to "Boykinize" would at a minimum require a sentence be remanded for an evidentiary hearing when the state carries the burden of showing a valid plea. *Blalock v. Lockhart,* 898 F.2d 1367, 1370-71 (CA8 1990); *Pitts v. US,* 763 F.2d 197,200 (CA6 1985).

In a "Stipulated facts trial" the judge determines the defendant's guilt or innocence. The state must prove the defendant's guilt beyond a reasonable doubt and the defendant is not precluded from offering evidence, but in essence, by stipulation, agrees that what the state presents is what witnesses would say. A benefit of the stipulated fact trial is that the defendant maintains the right to appeal which is lost upon entering a guilty plea. Some jurisdictions have adopted the rule that when a stipulated facts trial is tantamount to a guilty plea then the defendant must be advised of constitutional rights being relinquished. [*Mosely,* 464 P.2d 473 (1970); *People v. Smith*,

319 N.E.2d 760 (1974); *State v. Steelman*, 612 P.2d 475 (1980); *Yanes v. State,* 448 A.2d 359 (1982); *Commonwealth v. Duquette,* 438 NE. 2d 334 (1982); *Commonwealth v. Tate*, 410 A.2d. 751 (1980); *Glenn v. US,* 391 A.2d 772 (1978); *AEK v. State*, 432 So.2d 720 (1983)].

In *Adams v. Peterson* (968 F.2d 835 (CA9 1992)) the court determined that the stipulated facts were not a de facto guilty plea—but the court also determined that due process protections are required for stipulations and convictions to be valid. *Convictions are only valid if the stipulations are voluntarily and knowingly agreed to*. While the court has ruled that the requirements of Rule 11 are applicable to guilty pleas and not stipulations. *US v. Schuster,* 734 F.2d at 426 (CA9 1984); *US v. Terrack,* 515 F.2d 558, 560 (CA9 1975); This does not mean that defendants who proceed to trial through stipulated facts in order preserve an issue for appeal are left unprotected. It is the responsibility of the trial judge to assure the stipulation is voluntarily made.

As previously stated, Rice's agreement to stipulated facts presented by the state was the functional equivalent of a guilty plea. In fact, upon the advice of defense counsel, Rice only stipulated to facts in order to preserve her right to appeal. The court in *US v. Strother,* 578 F.2d 397 (CA DC 1978); 53 ALR Fed 905; expressed concern when defense seeks to preserve the right to appeal by submitting to a trial on stipulated evidence. The court suggested that

"a trial judge should arguably go to *special pains* to satisfy himself that the defendant is fully informed about precisely what it is he is giving up, and such could be accomplished by taking heed of at least some of the advices enumerated in Rule 11(C). This would aid in impressing upon the defendant the significance of the choice he has purportedly made". (Emphasis added.) An admission of every material fact charged should not be accepted by the court unless made voluntarily after proper advice by counsel and with full understanding of the consequences. Provided all of the elements necessary for conviction are present in stipulations admitting truth of evidence, the court must necessarily dispense a guilty verdict. Such a stipulation is tantamount to a guilty plea and therefore requires significant compliance with the safeguards embodied in Rule 11. *Bonilla-Romero v. US,* 933 F.2d 86 (CA1 1991).

In *Julian v. US (*236 F.2d 155 (CA6 1956)) the conviction was reversed because it was determined that stipulation of facts had the practical effect of a guilty plea and the district court erred in failing to give the defendant the protection of Rule 11 by inquiring whether the defendant understood the charge and acquiesced in stipulation. Additionally, in Julian it was ruled that the defendant was denied a fair trial under the Federal Constitution where the trial court found the defendant guilty in accordance with a stipulation made by his attorney without the court interrogating the defendant personally as

to the truth of the facts stipulated. The court found that the element of felonious intent essential to the conviction could not be stipulated by counsel. Determining that the stipulation could not form the basis of the valid conviction, the court stated at the conclusion as to the existence or non-existence of criminal intent was to be drawn by the trier of fact, who should interrogate the defendant personally as to the truth of the facts stipulated.

Likewise, in Rice, an element of felonious intent essential to the conviction of kidnapping with sexual motivation, cannot be stipulated by counsel. Rice's conviction should be reversed as in Julian. An element of felonious intent essential to conviction cannot be stipulated. The admission on this point was a statement as to the defendant's mental attitude and purpose. This conclusion (of intent) should be drawn by trier of fact. The judge should determine whether the defendant personally admits felonious intent. The judge should also inquire as to whether the defendant understands the charge and voluntarily acquiesced in the stipulations. Such action would comply with Rule 11. Like Julian, Rice did not approve of stipulations.

As in McCarthy it is conceivable that Rice intended to acknowledge only that there was evidence to possibly convict her of a crime, without necessarily admitting that she committed the crime including special allegations; for that crime required the very type of specific intent that she repeatedly disavowed as well as the date

range that she repeatedly objected to. In fact during the moments before signing the stipulated fact agreement during bench trial Rice again expressed concerns about the inaccurate dates to her attorney. Defense counsel assured Rice that the date range was inconsequential and could be addressed upon appeal. This assurance was false and inaccurate. Rice also repeatedly denied the intent involved with special allegation of sexual motivation. Had Rice fully understood these essential elements she would have persisted in her objections and refused to agree to such stipulated facts.

When a defendant signs a waiver of jury trial in order to do so voluntarily and freely they must be advised of the nature of the charges against him, the elements of the crime, possible defenses to the charge, mitigating circumstances and all other factors essential to a broad understanding of the charges. *Neal v. Wainwright*, 512 F.Supp 92 (MD. Fla 1981). In cases where a defendant stipulates to evidence but does not admit truth of evidence, the court may rely on other extrinsic factors to determine whether the defendant's decision to stipulate has been made knowingly and voluntarily (*Bonilla-Romero v. US*). Inquiry is required by the district court as a matter of law to determine whether the defendant's waiver of rights is voluntary and knowingly because trial by stipulated facts is equivalent to a guilty plea. *US v. Lyons,* 898 F.2d at 214 (CA1 1990).

A plea of guilt is more than a confession which admits various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment. Therefore the admissibility of the confession must be based on a reliable determination on voluntariness issue. *Boykin v. Alabama,* 395 US 238 (1969). Defendants in criminal cases are deprived of due process of law when their conviction is founded in whole or in part upon an involuntary confession. *Jackson v. Denno,* 378 US 368 (1964); *Rogers v. Richmond* , 365 US 534 (1961). When stipulated facts agreement is equivalent to a de facto guilty plea due process protections ensue. It is an error for the judge to accept a plea of guilt without showing it was intelligent and voluntary. The question of the waiver of a federal constitutional right is governed by federal standards.

Stipulation to facts does not eliminate the obligation of the government to prove the crime. *US v. Schuster,* 469 US 1189 (1985). The majority in *Adams v. Peterson* (968 F.2d 835 (CA9 1992)) concedes that a "stipulation of facts from which a judge or jury may infer guilt is simply not the same as a stipulation to guilt." In Rice's case the "stipulated facts" were actually the allegations of the indictment, and contained elements that Rice contested throughout the entire process prior to judgment and sentencing.

In Quiroz the Ninth Circuit Court held that when a defendant stipulates to all facts supporting guilt, the protections set forth in

Boykin apply. Quiroz was decided nine years after Terrack, the same year as Schuster, reflecting the courts evolving treatment of cases where the parties stipulate to defendant's guilt. The court held that "without regard to the status of a submission as a matter of law, we agree that due process protections for the waiver of constitutional rights apply equally to the submission procedure used here as they would to the entry of a plea of guilt." While Quiroz submitted his case based on police reports and Rice's stipulations mirrored the statutory charges against her due process protections still apply.

Boykin does not require that the court enumerate all rights of the defendant as long as the record indicates the plea was entered voluntarily and knowingly, but this is not contrary to Quiroz. The Ninth Circuit has held that a voluntary and understanding waiver of the three constitutional rights enumerated in Boykin and an understanding of the direct consequences of that waiver (including the maximum penalty) are a constitutional minimum. Other federal courts have also interpreted Boykin and McCarthy this way. *Walker v. Maggio*, 738 F.2d 714, 716 (CA5 1984); 469 US 1112 (1985); *Long v. McCotter,* 792 F.2d 1338, 1345 (CA5 1986); *US v. Rossillo*, 853 F.2d 1062 (CA2 1988).

It is well established that a guilty plea cannot be voluntary in the sense that it constitutes an intelligent admission unless the accused received "real notice of the true nature of the charge against

him, the first and most universally recognized requirement of due process" *Smith v. O'Grady*, 312 US 329, 334 (1941), quoted in *Henderson v. Morgan*, 426 US 637, 645 (1976). McCarthy extended the definition of voluntariness to include an "understanding of the essential elements of the crime charged, including the requirement of specific intent". McCarthy 394 US at 71.

Right to jury trial is a fundamental right under our laws; therefore every responsible presumption against the waiver of jury trial must be indulged. *Bank of India v. Handloom House Ltd*., 629 F.Supp 281 (SDNY 1986). Rice's stipulation not only mirrors the allegations against her but also includes admission to crimes and their underlying elements which Rice repeatedly objected to. The trial judge failed to ascertain on record that Rice absolutely understood the meaning of the far reaching consequences of her stipulation. While the record indicates Rice waived jury trial, there is nothing indicating the court determined it to be an informed waiver. The Circuit Court requires more—that the waiver of a constitutional right be "made voluntarily, knowingly and intelligently"; *US v. Cochran*, 770 F.2d 850, 851 (CA9 1985), after receiving proper advice and with a full understanding of the consequences. *Machibroda v. US*, 368 US at 493 (1962).

Rice's stipulation was functionally equivalent to a guilty plea. No proof by the prosecutor was presented, controversy was affectively

terminated and judgment was made. Therefore Rice's stipulation contained the basic characteristics that under Supreme Court doctrine delineate a plea of guilty, consequently incidents to accepting a plea of guilt should attach. As noted in McCarthy (*McCarthy v. US*, 394 US 459 (1969)), it is "not too much to require that before sentencing defendants to years of imprisonment, that district judges take a few minutes to inform them of their rights and to determine whether they understand the action they are taking".

GROUND 4: SENTENCING ENHANCEMENTS BASED ON THE SAME ELEMENT OF AN UNDERLYING CHARGE VIOLATE THE DOUBLE JEOPARDY CLAUSE

The imposition of a sentencing enhancement for victim under 15 violates the prohibition against double jeopardy where the crime of conviction, kidnapping in the first degree, requires that the victim be under 15 years of age. Because the charged crime necessarily requires proof that the victim was under the age of 15 to also punish Rice with the special allegation that the victim was under 15 (RCW 9.94A .837) violates the prohibition against double jeopardy.

Rice was convicted of first degree kidnapping based on her alleged intent to commit a crime, child molestation in the first degree. Child molestation in the first degree necessarily involves a child under 15. ("Rice did unlawfully and feloniously, with intent to facilitate the commission of a felony, to-wit: rape of a child in the first degree...,

intentionally abduct OE...") CP 55-57; RCW 9.94A.083. The resulting sentence is either the maximum of the standard sentence range for the offense or 25 years, whichever is greater. RCW 9.94A .837. The duplication of elements, in the underlying offense and the special allegations, violates the prohibition against double jeopardy.

The Double Jeopardy Clause of The United States Constitution guarantees that no "person shall be subject for the same offense to be twice put in jeopardy of life or limb." It protects against three abuses by the government: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *Justices of Boston Mun. Ct. v. Lydon*, 466 US 294; 104 S.Ct 1805 (1984). A sentence enhancement based on the same element represents effectively both a second prosecution for the same offense after conviction and multiple punishments for the same offense.

Duplicate elements in the underlying offense and special allegations applied to Rice violate the prohibition of Double Jeopardy. "When a defendant has violated two different criminal statutes the Double Jeopardy prohibition is implicated when both statutes prohibit the same offense or when one offense is a lesser included offense of the other". *US v. Davenport*, 519 F.3d 940, 943 (CA9 2008). "Where the same act or transaction constitutes a violation of the two distinct statutory provisions, the test to be applied to determine whether there

are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. US*, 284 US 299 (1932).

According to the "Blockburger test" offenses are considered to be the same if the first offense is a lesser included offense of the second. *US v. Loniello,* 610 F.3d 488, 491 (CA7 2010). "If one statute has an element missing from the second offense, but all of the second offense's elements are in the first, then the second offense is a lesser included offense of the first". In *US v. Schales* (546 F.3d 965 (CA9 2008)) the court ruled that "while the government can indict a defendant for both receipt and possession of sexually explicit material, entering judgment against him is multiplicitous and a Double Jeopardy violation when it is based on the same conduct." Other similar cases have also granted relief due to judgments based on same conduct— *US v. Brobst*, 558 F.3d. 982, 1000 (CA9 2009); *Davenport* (CA9 2008); *US v. Giberson*, 527 F.3d 882, 891 (CA9 2008) —citing that the entry of judgment was plain error affecting substantial rights, threatening fairness, integrity and the reputation of judicial proceedings.

The government must allege and prove distinct conduct underlying each charge, whether the conduct occurred at the same or different times. Where two charged offenses are determined to be the same the Double Jeopardy clause limits conviction and sentencing to

only one of the charged offenses, unless congress intended otherwise. *Rutledge v. US*, 517 US 292, 297 (1996); *US v. Pax Xiong*, 595 F.3d 697, 698 (CA7 2010). Examples of this include....When charge of felony murder is premised on kidnapping, all facts required to prove kidnapping are also required to prove felony murder, and therefore, in such circumstances, kidnapping is a lesser included offense of felony murder for Double Jeopardy purposes. *US v. Howe*, 538 F.3d 820 (CA8 2008); *US v. Mays*, 514 F.Supp.2d 1298 (MD Fla 2007). (Crime of simple assault was a lesser included offense of crime of abusive sexual contact aboard an aircraft, and therefore defendant's conviction of both counts violated the Double Jeopardy clause; elements of simple crime of assault were a subset of elements of crime of abusive sexual contact aboard an aircraft).

In Apprendi the prosecution enhanced the defendant's sentence with a statute authorizing the court to increase his maximum sentence by 10-20 years; the district court subsequently found that Apprendi acted with the purpose of intimidating a person because of their race or other specified characteristics. While the Third Circuit affirmed, the Supreme Court reversed this decision, holding that the Sixth Amendment does not permit the defendant to be "exposed...to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone". Other than the fact of a prior conviction, any fact that increases the penalty for a

crime beyond the prescribed statutory maximum, must be submitted to a jury and proven beyond a reasonable doubt. *Apprendi v. NJ*, 530 US at 483, 490 (2002).

Under the decisions in Apprendi (2002) and Blakely (2004), a sentencing or aggravating factor which increases the maximum penalty that can be imposed is the functional equivalent of an element and must be charged in the information and proven to the trier of fact. In addition, under Washington State law, a reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense. *Blakely v. Washington* , 542 US 296 (2004).

Rice's sentencing range was computed using like elements/factors found in both the underlying charge and statutes applied resulting in an exceptional sentence. This fails the Blockburger test because the sentencing enhancement does not contain any elements not included in the underlying charge. Offenses even arising out of same general course of criminal conduct, do not become same for purposes of a Double Jeopardy claim unless evidence required to support a conviction of one indictment would have been sufficient to warrant a conviction on the other. *US v. Buonomo,* 441 F.2d 922 (CA7 1971); *US v. Edwards* , 366 F.2d 853 (CA 1966); *US v.*

Bruni, 359 F.2d 807 (CA ILL 1966); *US v. Kramer*, 289 F.2d 909 (CA NY 1961); *State v. Alford*, 611 P.2d 1268; 25 Wash.App 661(1980).

Where same conduct violates two statutory provisions the first step in Double Jeopardy analysis is to determine whether legislature intended that each violation be a separate offense. *Garret v. US*, 471 US 773, 105 S.Ct 2407 (1985). The question is whether Congress intended to impose multiple punishments for two crimes by defining each crime to contain an element not found in the other. *US v. Marrero*, 904 F.2d 251 (CA5 1990). The double jeopardy prohibition against placing the accused twice in jeopardy for the same offense is directed at the actual offense with which he is charged and not only at violated statutes. This clause does not permit conviction for the same offense if they are charged under different statutes even though violations of two statutes would normally not constitute double jeopardy. *US v. Sampol*, 636 F.2d 621(CA DC 1980).

The imposition of a sentencing enhancement for victim under 15 violates the prohibition against Double Jeopardy where the crime of conviction, kidnapping in the first degree, requires that the victim be under 15 years of age. The charged crime necessarily requires proof that the victim was under 15 (RCW 9.94A.837) and violates the prohibition against double jeopardy.

The “Real facts” doctrine reflects the principle that a sentence should be based on only the actual crime of which the defendant has

been convicted, his or her criminal history, and the circumstances surrounding the crime, *Tierney v. Washington,* 115 S.Ct 1149 (1995). Even in the case of a guilty plea this is true. When a defendant forgoes right to have guilt determined by trier of fact and instead pleads guilty to charged offense, under some circumstances jeopardy attaches when judge accepts plea. *Adamson v. Ricketts,* 789 F.2d 722 (CA9 1986); *US v. Jerry*, 487 F.2d 600 (CA3 1973); *US v. Hecht*, 638 F.2d 651 (CA3 1981); *US v. Wright,* 902 F.Supp 205 (D.Or 1995)).

Where multiplicitous convictions are found, in violation of Double Jeopardy clause, the only remedy is to vacate one of the underlying convictions as well as the sentence based upon it. *US v. McCullough*, 457.F.3d 1150 (CA10 2006).

GROUND 5: AN INFERENCE RELIED UPON TO ESTABLISH AN ELEMENT OF A CRIME VIOLATES DUE PROCESS. STIPULATED FACTS DO NOT PRESENT SUBSTANTIAL EVIDENCE OF GUILT BEYOND A REASONABLE DOUBT.

Under a clearly erroneous standard there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence. Evidence is sufficient to support a conviction unless viewing the evidence in a light most favorable to sustaining the verdict, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *US v. Green*, 592

F.3d 1057, 1065 (CA9 2010); *US v. Overton*, 573 F.3d 679, 685 (CA9 2009).

The determination must be made as to whether stipulated facts present substantial evidence of guilt beyond a reasonable doubt. *US v. Chesher*, 678 F.2d 1353 (CA9 1982); see *Glasser v. US*, 315 US 60, 80 (1942); *US v. Jacobo-Gil*, 474 F.2d 1213, 1214 (CA9 1973). The Ninth Circuit Court has accepted the view that deference must be afforded even where the trial is on stipulated facts. *Lundgren v. Freeman*, 307 F.2d 104, 113-115 (CA9 1962); *US v. Alaska Steamship Co.*, 491 F.2d 1147, 1151 (CA9 1974); *US v. Ironworkers Local 86*, 443 F.2d 544, 549 (CA9 1971). The court recognized that Lundgren is a civil case and saw no reason for a different rule in criminal cases.

Rice raised objections several times regarding the timeline established by the prosecutor for the charge of child molestation. Rice stated that the dates (Dec. 2006 – Feb. 2007) were inaccurate and questioned how they were established. This date range is highly significant and necessary for the special "predatory" allegation. Rice also expressed concern regarding the special allegation of sexual motivation added to the charge of kidnapping in the first degree. According to the record O. E. stated that he let himself into Rice's unattended vehicle of his own volition, while Rice was not present. Therefore there is no "intent" on Rice's part that would justify the enhancement of sexual motivation.

Gilbert's Legal Dictionary (1997) defines intent as:

> A state of mind that can rarely be proved directly but must be inferred from facts or circumstances. Criminal intent requires that a person knows what he is doing and desires or anticipates the result of his act at the time he commits the offense. It is the state of mind at the time of acting, and differs from motive, which is what causes a person to act or refrain from acting. General intent is the intent to commit a crime. Proof of general intent is required in all criminal proceedings. Specific intent is the intent to accomplish the precise act that the law prohibits. Specific intent is essential for certain crimes, such as "assault with the intent to rape".

Under the Blakely decision, the prosecutor has the burden to prove any factor that increases an offender's sentence above the standard range to a jury beyond a reasonable doubt. Due process requires more than a scintilla of evidence to have been offered to establish proof beyond reasonable doubt. *US v. Campbell*, 777 F.Supp 1259 (WDNC 1991). Although the guilty verdict entitles the government to have all evidence viewed in the light most favorable to it, the prosecution is still required to prove its case beyond a reasonable doubt.

According to RCW 9.94A.010 Rice has allegedly committed the crime of kidnapping due to the definition of restraint (in pertinent part):

> "restricting a person's movements without consent and without legal authority in a manner that substantially interferes with his or her liberty. Restraint is without consent if it is accomplished by… (b) any means including acquiescence of the victim if he or she is a child less than 16 years old, and if the parent, guardian, or other person having lawful control or custody of him or her has not acquiesced."

According to RCW 9.94A.020 kidnapping in the first degree is defined as:

> ...the intentional abduction of another person with the intent (a) to hold him for ransom, reward, or as a shield/hostage, (b) to facilitate the commission of any felony or flight thereafter, (c) to inflict bodily injury, (d) to inflict extreme mental distress on him or a third person, (e) to interfere with the performance of any government function.

Kidnapping is complete when *all* of its *essential elements* are completed. *State v. Dove,* 52 WA. App. 81 757 P.2d 990 (1988); 1 Am. Jour. 2d, *Abduction and Kidnapping* §10 (1962).

Regardless of the stipulated facts presented by the prosecutor during sentencing none of the qualifiers for kidnapping in the first degree were actually proven in Rice's case. Rice repeatedly objected to the prosecutor's allegations that O.E. was kidnapped with the intent to commit a felony. Repeatedly Rice expressed concern regarding the alleged "intent" involved in the kidnapping charge. Without proving the intent to commit a felony this offense does not meet criteria established for kidnapping in the first degree. This is crucial in light of the additional special allegations applied to this charge; sexual motivation and victim less than 15. Sexual motivation is only charged as a special allegation when the state has proven beyond a reasonable doubt that the accused committed the crime with sexual motivation.

An inference relied on to establish an element of a crime will be rejected as violating due process unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. *US v. Travoularis*, 515 F.2d 1070 (CA2 1975). In Baker the court ruled that even if the defendant's possession of a stolen automobile could be drawn from his mere presence in the automobile, an inference of transportation from an inference of possession would be inconsistent with due process. *Baker v. US*, 395 F.2d 368 (CA8 1968). Additionally any statute creating an inference that is given the effect of evidence to be weighed against opposing testimony, violates the due process of law, Fourteenth Amendment, if it is created by a state statute and the same clause of this amendment is created by an act of congress. *Comm. of Internal Revenue v. Bain Peanut Co. of Texas,* 134 F.2d 853 (CA5 1943). If the prosecution proves facts from which inferences relevant to the question of the accused guilt may reasonably be drawn, the burden is necessarily cast upon the accused of going forward with evidence upon the particular point to which the inference relates if he desires to rebut it. The burden upon the accused is merely to go forward with enough evidence to raise reasonable doubt as to the validity of the inference. *Government of Virgin Islands v. Lake*, 362 F.2d 770 (CA3 1966).

The second special allegation only applies if it is proven beyond a reasonable doubt that the kidnapping was done with sexual motivation. A special allegation cannot be established absent a conviction on the underlying offense. The court may impose an aggravated exceptional sentence without a jury finding if the court finds the current offense includes a finding of sexual motivation pursuant to RCW 9.94A.835, however it is this finding that Rice would like to challenge. RCW 9.94A.835 states in part... the state shall prove beyond a reasonable doubt that the accused committed the crime with sexual motivation. Implicit in Rice's challenge is that Rice returned to her vehicle with no intent to commit any crime, much less one of a sexual nature. As documented in court records and pre-sentencing interviews, O.E. had initiated contact with Rice by entering her vehicle of his own volition *while she was not present*. In actuality, Rice had no purpose for kidnapping O.E. nor was there intent on her part. O.E. was in Rice's vehicle upon her arrival and he did not reveal himself until the vehicle was in motion. This fact in itself demonstrates *lack of intent* on Rice's part to commit a felony involving O.E. There was no motivation or intent on the part of Rice as she discovered O.E. in her vehicle. Regardless of events that allegedly took place following the discovery of O.E., Rice did not abduct or restrain O.E. with the intent to facilitate the commission of

any felony or flight thereafter, nor was sexual motivation a factor. With no intent on the part of Rice sexual motivation is not proven.

O.E.'s presence in Rice's vehicle of his own volition, prior to Rice's arrival, is enough to cause doubt as to whether Rice kidnapped or restrained O.E. with the intent to commit a felony. This then becomes an evidentiary problem and unlike any other aggravating factors, sexual motivation must be formally charged and proven to the jury beyond a reasonable doubt. Washington Practice, Criminal Law Vol. 13B §3907. *Intent involves intention, purpose, resolve and determination*. Rice did not arrive at her vehicle in the early morning hours of August 11, 2007 with any intent, determination, or resolve to commit a felony, much less a felony involving sexual motivation.

Rice was also charged with one count of child molestation carrying a special "predatory" allegation. According to RCW 9.94A.836 this special allegation shall be filed by the prosecuting attorney whenever sufficient evidence exists. The state has the burden to prove beyond a reasonable doubt that the offense was indeed predatory, and the court may not dismiss this special allegation unless it is necessary to correct an error in the initial charging decision or there are evidentiary problems. In Rice's case there are both. According to RCW 9.94A.030 (2006) Predatory is defined (in relevant part) as (c) the perpetrator was (i) a teacher... in

authority in any public or private school and the victim was a student of the school under his or her authority or supervision.

It is alleged that sexual contact occurred at Rice's residence sometime between December 1, 2006 and February 28, 2007. Rice was a teacher at that time and O.E. was a student under her authority/supervision. Based on those allegations Rice was charged with the special predatory allegation resulting in a second sentence of life in prison with a mandatory minimum of 25 years. Without this allegation, as a first time offender, Rice would have been sentenced to the standard range of 48-51 months. Throughout Rice's legal proceedings she challenged the dates connected with this charge. Rice was indeed a teacher from December 2006 to February 2007, however no sexual contact occurred at that time. It appears that these dates were established based on a statement from O.E.'s younger sibling [Sealed Recorded Interview]. Based on Rice's recollection of "Discovery" information provided prior to sentencing she was told that an interviewer questioned this younger sibling, at times leading the witness, asking if they went to Rice's home when it was "cold", "around Christmas," etc. There are a variety of problems that can arise when using the testimony of a child witness, such problems include: lacking the mental capacity to provide an accurate impression of events, lacking sufficient memory, and not understanding the obligation to be factual. Washington Sentencing

Practice, Criminal Law Vol. 13B §2413. In addition to these problems children have difficulty understanding the concept of time.

During every meeting with defense counsel and at every court appearance Rice explained that these dates were in fact inaccurate. It was the impression of defense counsel that the dates themselves were not significant. However, upon review of the previously mentioned RCWs and the definition of "predatory", that is clearly not the case. Interviews with additional witnesses reveal that when O.E. visited Rice's residence he spent time riding an ATV ("quad") [Sealed Interview]. Rice submitted additional evidence, with her PRP to the court, showing that she did not even purchase the ATV until mid-February 2007. [EXHIBIT B] Additional statements provided by O.E.'s parents confirm O.E. did not visit the Rice residence until spring (Sealed Interview). Rice was no longer teaching during the time when alleged sexual contact with O.E. occurred; Rice in fact had separated from the Tacoma School District for unrelated reasons.

While the prosecutor was unwilling to hear any additional information from the defense, Rice was afforded the opportunity to take a polygraph examination as part of an evaluation performed by a licensed sex offender treatment provider. During this polygraph Rice attested to the fact that there was no sexual contact with O.E. during the school year, prior to Rice's separation from Tacoma Public Schools. [EXHIBIT C] Rice left the Tacoma School District in April.

When asked specifically on the polygraph if she had any sexual contact with the victims prior to or before April 2007 she was found to be truthful in answering *NO*.

With questions surrounding the testimony of O.E.'s younger sibling, new evidence regarding the date of purchase for Rice's ATV, statements from O.E.'s parents, and questions regarding the time when Rice was actively teaching it stands to reason that the special predatory allegation may not apply. Certainly reasonable doubt exists. The court has the authority to dismiss this allegation when necessary to correct an error in the initial charging decision or when there are evidentiary problems. In Rice's case both apply, the prosecutor based his charging decisions on the time-line provided by a child and then refused to exercise discretion in charging Rice with this allegation. Additionally there is evidence to support Rice's claim that O.E. never visited her residence prior to the spring of 2007 at which time she was no longer actively teaching.

Due process requires that in a criminal prosecution every essential element of the offense must be proved beyond a reasonable doubt. A defendant's due process rights are implicated when his purported conviction rest on anything less than a finding of guilt as to all the elements of the crime. *US v. Alferahin*, 433 F.3d 1148 (CA9 2006). Prosecution must prove every element of a crime charged beyond a reasonable doubt and diminishing that burden violated the

defendant's right to due process. *Government of Virgin Islands v. Smith*, 949 F.2d 677 (CA3 1991). The government bears the burden to prove all elements of the offense charged, and must persuade a jury beyond reasonable doubt of all facts necessary to establish each element. *US v. Jerke*, 896 F.Supp 962 (D SD 1995).

Like Hardridge by waiving her Sixth Amendment right to jury trial, Rice did not waive her Fifth Amendment right to have facts underlying her conviction and sentence proved beyond a reasonable doubt, and therefore suffered both constitutional and non-constitutional Booker errors when the District Court, treating Sentencing Guidelines as mandatory, imposed sentencing enhancements based on facts found only by a preponderance of the evidence. *US v. Hardridge*, 149 Fed. Appx. 746 (CA10 2005).

GROUND 6: DEFENSE COUNSEL'S FAILURE TO UNDERTAND STATE LAWS AND STATUTES APPLIED, FALLING BELOW THE OBJECTIVE STANDARD OF REASONABLENESS, QUALIFIES AS INEFFECTIVE ASSISTANCE OF COUNSEL

Essential to the concept of due process of law is the right a person has to be notified of legal proceedings, the opportunity to be heard and defend himself in an orderly proceeding, and to have counsel represent him. Regrettably it appears that defense counsel in Rice did not fully understand the statutes and RCWs for the special allegations filed against Rice. This resulted in a misinterpretation of

law and manifest injustice. The defense counsel's lack of knowledge negatively impacted the outcome of Rice's sentencing proceedings.

Rice now raises this issue because state law prohibits defendants from raising any claim of ineffective assistance of counsel on direct appeal, the claim is rightly raised in a post-conviction petition. *Martinez v. Ryan*, 132 S.Ct 1309 (2002). As a general rule, courts do not review challenges to the effectiveness of counsel on district appeal. *US v. Jeronimo*, 398 F.3d 1149, 1155 (CA9 2005). Rather, it is preferred that ineffective assistance of counsel claims be reviewed in Habeas Corpus proceedings under 28 USCA § 2255. *US v. Alferahin*, (CA9 2006).

It has been established the persons accused of a crime are entitled not merely to counsel's presence but to effective assistance of counsel, and that effective assistance means assistance *within the range of competence demanded of attorney's in criminal cases*. *McMann v. Richardson*, supra, 397 US at 771; 90 S.Ct at 1449 (1970). (Emphasis added.) A defendant is denied the right to effective assistance of counsel when the defendant's attorney's performance falls below the objective standard of reasonableness and thereby prejudices the defense. *Yarborough v. Gentry*, 540 US 1; 124 S.Ct 1 (2003).

The right to be heard would be of little value if it did not comprehend the right to be heard by counsel. Even the intelligent

and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is generally incapable of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence; left without the aid of competent counsel he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and the knowledge to adequately prepare his defense, even though he may have one. The defendant requires the guiding hand of counsel at every step in the proceedings against him. *Powell v. Alabama* , 287 US 54, 68-69 (1932).

To establish ineffective assistance of counsel the defendant must show that the representation fell below prevailing professional norms and but for counsel's errors the result of the initial proceeding would have been different. *Premo v. Moore* , 131 S.Ct 733, 740 (2011).

To establish deficient performance the defendant must show that there is a "reasonable probability" that but for the counsel's errors the result of the proceeding would have been different. *Duncan v. Ornoski* , 528 F.3d 1222 (CA9 2008). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington* , 466 US at 694; 104 S.Ct 2052 (1984). It is not necessary however to show that counsel's deficient

conduct "more likely than not altered the outcome of the case." *US v. Sanders*, 21 F.3d at 1461 (CA9 1994). A defense counsel's errors or omissions must reflect a failure to exercise the skill, judgment, or diligence of a reasonably competent criminal defense attorney. They must be errors a reasonably competent attorney, acting as a diligent conscientious advocate, would not have made, for that is the constitutional standard. *Cooper v. Fitzharris*, 585 F.2d 1325 (CA9 1978). In short, the defendant claiming ineffective assistance of counsel must make an affirmative showing not only that counsel failed to perform at least as well as a lawyer with ordinary training and skill in criminal law, but also that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having reached a just result. *US v. Bavers*, 787 F.2d 1022 (CA6 1985).

Throughout the time between Rice's arrest and sentencing Rice raised several concerns which were disregarded by defense counsel. One concern Rice raised repeatedly regarded the dates used to establish the special allegations charged. Counsel dismissed Rice's concerns, believing the timeline set forth by the prosecutor was insignificant in the "bigger picture". In fact, the date range alleged is crucial for meeting the criteria set forth in RCWs 9.94A.836, and .030 (2006)...

> 9.94A.030 (2006) "predatory" is defined as (in relevant part): ... (c) the perpetrator was: (i) a teacher... in authority in any public

> or private school and the victim was a student of the school under his or her authority or supervision.

Repeatedly Rice argued that the dates included with the allegations and charges brought against her were inaccurate. Rice provided evidence to attest to the fact that she was no longer teaching, nor was she in a position of authority at the time of the alleged conduct. Rice submitted letters of separation from her school district; receipts verifying the date of purchase for the ATVs the victim allegedly rode "around Christmas" (showing that the ATV was not even purchased until mid-February); and statements made by the victim's parents which coincide with Rice's claim that she did not have contact with the family outside of school until late spring/early summer. Rice also submitted to a polygraph (June 30, 2009) where she was specifically asked if she had sexual contact with the victim prior to April 2007 (while actively teaching). Rice truthfully answered "*no*" indicating no deception. Despite all of these issues, which are crucial to establishing that Rice was in fact not teaching during the time of the offense, and would have caused the reasonable trier of fact to doubt the date range set forth by the prosecutor and the validity of aggravating factors, defense counsel assured Rice that “at this point” in the process concerns about the date range were "insignificant".

In fact defense counsel did not explore all avenues leading to the facts relevant to the case and completely disregarded Rice's concerns. When counsel fails to comply with a reasonable request of

the accused, ignoring a "key concern" it amounts to a deficient performance. *US v. Rose,* US Armed Forces, 71 MJ 138 (2012). Defense counsel was ineffective due to a lack of knowledge of the statutes and special allegations applied to Rice's charges. Counsel must be familiar with the facts and the law in order to advise the defendant meaningfully of the options available. *Calloway v. Powell*, 393 F.2d 886 (CA5 1968). An attorney's advice should permit the accused to make an informed and conscious choice. *Colson v. Smith*, supra, 438 F.2d 1075, 1079 (CA5 1971). If the quality of counsel's service falls below a certain minimum level, the client's plea of guilt (or in Rice's case—agreement to stipulated facts) cannot be knowing and voluntary because *it will not represent an informed choice*. A lawyer who is not familiar with the facts and the law relevant to his client's case cannot meet that required minimum level. *Mason v. Balcom*, 531 F.2d 717 (CA5 1976). Any defendant who does not receive reasonably effective assistance of counsel in his connection to plead guilty cannot be said to have made that decision either intelligently or voluntarily. *McCarthy v. US*, 394 US 459 (1969); *Walker v. Caldwell*, 476 F.2d 213 (CA5 1973).

In Rice, ineffective counsel resulted in Rice agreeing to stipulated facts without being fully informed of the possible consequences. Counsel did not advise Rice concerning all aspects of her charges, understating her concerns and the risks of agreeing to

the stipulated facts. When a defendant enters a guilty plea without full knowledge of the maximum consequences thereof, the plea is invalid and must be set aside. *Dunlap v. US*, 462 F.2d 163 (CA5 1972); *Wells v. US*, 452 F.2d 1001 (CA5 1971); *US ex rel Hill v. US*, 452 F.2d 664 (CA5 1971); and *Fortia v. US*, 456 F.2d 194 (CA5 1972). The same could be said of stipulated facts effectively functioning as a plea of guilt.

Rice was charged with special allegations which have not been applied to any other teacher accused of similar crimes. The defense counsel's unfamiliarity with the special allegations and RCWs charged to Rice resulted in a great injustice. This ignorance of law falls below the norm of competent criminal attorneys and is an error of great consequence. For that reason, the sentencing decision reached in Rice cannot be relied upon as just. There is a reasonable probability that but for the counsel's error the result of the proceeding would have been different. Specifically, Rice would not have waived her right to jury trial and agreed to stipulated facts presented at bench trial. In a plea context, a defendant who demonstrates that but for counsel's errors he would have gone to trial establishes ineffective assistance of counsel. *Hill v. Lockhart*, 474 US 52, 59 (1985).

According to 28 USCA § 2255 if it appears that the defendant was prejudiced by counsel's conduct relief will be granted for ineffective assistance of counsel. In Strickland, the court explained

that a court should hold that a defendant was denied effective assistance of counsel if there is a reasonable probability that the proceeding would have been different had the counsel not erred. *Strickland v. Washington* , 467 US 1267 (1984). The court also noted that, while it is not enough for the defendant to show that the error had some conceivable effect on the outcome of the proceedings, a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case. Id. at 693.

Rice was prejudiced by the defense counsel's lack of knowledge of the special allegations charged. This lack of knowledge is demonstrated by the counsel's inability to see the importance of the dates alleged by the prosecutor despite Rice's concerns and the information she presented to refute the alleged dates. Had defense counsel exercised skill and judgment in exploring Rice's concerns it is *possible* that the special allegations would not have been charged, and it is *probable* that the result of the proceedings would have been different. If the difference between the evidence that could have been presented and that which actually was presented is sufficient to "undermine confidence in the outcome" of the proceeding, the prejudice prong is satisfied. *Strickland,* 466 US at 694; 104 S.Ct 2052 (1984).

Had defense counsel thoroughly explained all charges, the role of a jury, and that any allegations, especially those including factors

resulting in an elevated sentence, must be proven beyond a reasonable doubt, as well as the possible outcomes, there is a strong probability that Rice would not have waived her rights and accepted the stipulated facts. Instead the stipulated fact agreement was presented as her only option, in order to preserve her right to appeal and avoid a trial which would be sensationalized by the media and difficult for all involved.

An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland. Failure to understand state law is an inexcusable mistake of law and qualifies as ineffective assistance of counsel. *Hinton v. Alabama* , No. 13-6440 (February 24, 2014). Ineffective assistance of counsel constitutes grounds for relief on motion to vacate, set aside, or correct a sentence. 28 USCA § 2255. If counsel fails to render adequate legal assistance, even if inadvertently, a defendant's Sixth Amendment rights have been violated. Due to the probability that the proceeding would have been different if defense counsel had not erred it should be ruled that Rice received ineffective assistance of counsel.

F. CONCLUSION

It is clear that the lack of charging discretion exercised by the prosecution and the subsequent filing of special allegations caused a number of errors, beginning with the prosecutor's abuse of discretion and ending with the District Court's treatment of sentencing Guidelines as mandatory, ignoring statutory sentencing factors and mitigating circumstances. In addition these same sentencing enhancements violated the double jeopardy clause. Prior to sentencing Rice was prejudiced by defense counsel's lack of knowledge of special allegation statutes, and ultimately she agreed to stipulated facts without knowingly, intelligently and voluntarily waiving her right to trial.

For the reasons outlined above, Petitioner Rice respectfully requests that this Court vacate her sentence, strike the special allegation findings, and remand her case for resentencing in light of statutory sentencing factors.

Dated this ____ day of _____,

_____

Jennifer L. Rice, Pro se

G. EXHIBITS

A. 2013 Letter from defense counsel, Gary Clower

B. 2007 Receipt of purchase of ATV, Power Sports NW

C. 2009 Polygraph

D. 2013 Letter/evaluation, McGovern

E. 2013 Letter/evaluation, Traywick

F. 2013 Polygraph

G. 2013 Second letter, Traywick

H. 2011, 2012 Evaluations, Dahlbeck

I. 2013 Letter, Stenberg (SOTP)

J. Letters from friends, family and Washington State School for the Blind.

Rice

(1) **VandenBerg**
(2) **Rurup**
(3) **Albee**
(4) **Foure**
(5) **Gathany**
(6) **Lines**
(7) **Lukowski**

K. Letters from other offenders.

Mckee

(1) **Brown**
(2) **Johnson**
(3) **Ferrell**
(4) **Fox**
(5) **Jones**
(6) **Thomas**

L. Spreadsheet illustrating sentencing disparities