NO. 39600-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JENNIFER L. RICE,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable d. Gary Steiner, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing an enhancement for the special allegation that the victim was under the age of fifteen, as set out in RCW 9.94A.837.

2. The special allegation, victim was under fifteen years of age, is unconstitutional under the state and federal constitutions.[1]

3. Imposing an enhanced sentence for the victim's being under fifteen violated Ms. Rice's double jeopardy rights.

4. The trial court erred in imposing an enhancement for the special sexual motivation allegation, as set out in RCW 9.94A.835.

5. The special allegation, sexual motivation, is unconstitutional under the state and federal constitutions

6. The trial court erred in imposing an enhancement for the special allegation that the offense was predatory, as set out in RCW 9.94A.836.

7. The special allegation, offense was predatory, is unconstitutional under the state and federal constitutions.

8. The trial court erred in denying Ms. Rice's motion to dismiss the special predatory violation and Ms. Rice assigns error to the court's conclusions of law number II.[2]

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[1] The statutes challenged here are included in the Appendix to this brief.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Do the mandatory provisions of RCW 9.94A.835, RCW 9.94A.836 and RCW 9.94A.837, requiring the prosecutor to charge the special allegations every time there is sufficient evident to support them and prohibiting the prosecutor from dismissing the allegations through plea bargaining, violate the separation of powers doctrine by invading the prerogatives of the prosecutor's office to exercise discretion in its charging decisions and to engage in meaningful plea bargaining?

2. Do the mandatory charging provisions of RCW 9.94A.835, RCW 9.94A.836 and RCW 9.94A.837 violate the Due Process Clause of the United States Constitution and the Eighth Amendment because they do not allow consideration of mitigation or the weighing of the individual facts of each case in deciding what charges to bring?

3. Do RCW 9.94A.835, RCW 9.94A.836 and RCW 9.94A.837 conflict with the provisions of RCW 9.94A.421 which grant the prosecutor wide discretion in charging and plea bargaining -- and

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[2] Appellant does not assign error to the trial court's findings of fact insofar as they are a recitation of the historical fact that Ms. Rice challenged the predatory allegations and a summary of her legal arguments in her motion to dismiss the allegation. CP 44-50. Error is assigned to the conclusions of law in an excess of caution although this Court reviews such conclusions de novo, *Dickinson v. Kates,* 132 Wn. App. 724, 133 P.3d 498 (2006), and Ms. Rice has expressly preserved her right to challenge the constitutionality of the predatory allegation in this court. CP 51-52, 58-59.

which limit the role of the trial court in plea bargaining?

4. Do RCW 9.94A.835, RCW 9.94A.836 and RCW 9.94A.837 conflict with the ABA standards adopted by the court in *State v. Pouncey*, 29 Wn. App. 629, 635, 630 P.2d 932, *review denied*, 96 Wn.2d 1009 (1981)?

5. Does imposition of a sentencing enhancement for victim under fifteen violate the prohibition against double jeopardy where the crime of conviction, kidnapping in the first degree with intent to commit rape of a child in the first degree, required proof that the victim was under fifteen years of age?

C. STATEMENT OF THE CASE

The trial court, the Honorable D. Gary Steiner, found appellant Jennifer Rice guilty, after a stipulated bench trial, of Kidnapping in the First Degree committed with sexual motivation where the victim was under fifteen years of age (Count I); Child Molestation in the First Degree where the offense was predatory (Count IV); and Rape of a Child in the Third Degree (Counts XII and XII). CP 53-57, 60- 67; RP(4/20/2009) 2-9. On, Count I, the kidnapping count, the state charged, in part, that "Jennifer Leigh Rice. . . did unlawfully and feloniously, *with intent to facilitate the commission of a felony, to-wit: rape of a child in the first degree or flight thereafter*, intentionally abduct O.E. . . . "(emphasis added) CP 55-57.

The parties stipulated that the facts set forth in the Waiver of Right to Jury Trial and Stipulation to Facts Sufficient and Stipulated Bench Trial were "sufficient to support findings of guilt and the special allegations set forth in the Second Amended Information," and that Ms. Rice was waiving the right to challenge the sufficiency of this evidence if the court found her guilty. CP 60-64. Ms. Rice reserved, however, the right to challenge "the constitutionality of the special allegations listed in RCW 9.94A.836 (offense was predatory) and RCW 9.94A.837 (victim was under fifteen years of age) and RCW 9.94A.712(3)(c)(ii) (twenty five year minimum)."[3] CP 58-59. The parties further stipulated that if the matter was remanded for resentencing after appeal without either or both special allegations, Ms. Rice could argue for a sentence at the low end of the standard range and the prosecutor could argue for a sentence at the high of the standard range. CP 51-52.

Prior to the stipulated trial, the court had denied Ms. Rice's motion to dismiss the predatory allegation, and entered written findings of fact and conclusions of law on the issue. CP 10-22, 44-50; RP(7/8/2008) 2-37; RP(8/1/2008) 2.

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[3] Although Ms. 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 statute.

On July 24, 2009, the court entered judgment and sentence against Ms. Rice sentencing her to minimum terms within the standard range for the convictions and special allegation enhancements. CP 68-83, 84-86; RP(7/24/2009) 2-3. A timely notice of appeal followed. CP 87.

D. SUMMARY OF ARGUMENT

In enacting RCW 9.94A.835, RCW 9.94A.836 and RCW 9.94A.837, the legislature unconstitutionally usurped the prosecutor's discretion by making the charging of the statutory criminal allegations, with one narrow exception –that the prosecutor finds after consulting with the victim that charging the allegation is likely to interfere with obtaining a conviction -- mandatory and not subject to plea bargaining.[4] To make sure that no plea bargaining will take place, the legislature assigned the trial court the role of monitoring the prosecutor's compliance with the statutes' dictates. Under these statutes, the prosecutor cannot withdraw the statutory allegations unless the court enters an order of dismissal based on the narrow grounds "that the order is necessary to correct an error in

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[4] Each provides that "the prosecuting attorney *shall file a special allegation* . . . 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 victim was under the age of fifthteen [or sexual motivation or predatory] at the time of the offense." RCW 9.94A.836 and .837. (emphasis added). RCW 9.94A.835 is mandatory and without even the narrow exception if the victim objects.

the initial charging decision or that there are evidentiary problems that make proving the special allegation doubtful." RCW 9.94A.835, RCW 9.94A.836(3) and RCW 9.94A.837(3). In other words, the allegations have to be charged unless the victim objects and can be withdrawn only if the trial judge finds that it is doubtful that they can be proven.

Such mandatory allegations are unconstitutional because they infringe on the prosecutor's charging discretion and discretion to engage in plea bargaining; because they do not allow consideration of mitigation; and because they improperly involve the court in overseeing the decisions of the prosecutor and the plea bargaining process.

If, in fact, RCW 9.94A.835, .836 and .837 were constitutional, the legislature could, if it chose to do so, remove entirely the discretion of the prosecutor to charge or not charge a crime or to engage in meaningful plea bargaining. The legislature could mandate that the prosecutor charge the highest degree of every crime which the facts would support in every case, charge every enhancement and every aggravating factor in support of an exceptional sentence, without regard for the particular facts of the case or the accused. The legislature could in this way abrogate any independent function of the prosecutor and leave the prosecutor with only the ministerial task of charging the most serious crime that fit the facts. This would violate the separation of powers implicit in the three branches of

government created by the state constitution. Const. Art. II, III, and. IV.

Finally, where as here, the charged crime necessarily requires proof that the victim was under the age of fifteen, it violates the prohibition against double jeopardy to also punish with the special allegation that the victim was under fifteen under RCW 9.94A.837.

E. ARGUMENT

1. THE MANDATORY PROVISIONS OF RCW 9.94A.835, RCW 9.94A.836 AND RECW 9.94A.837 VIOLATE THE SEPARATION OF POWERS DOCTRINE.

a. Washington courts employ a doctrine that separation of powers is violated when one branch invades the prerogatives of another.

Although the Washington Constitution does not contain a formal separation of powers clause, "[n]onetheless, the very division of our government into different branches has been presumed throughout our state history to give rise to a vital separation of powers doctrine." *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009), quoting *Carrick v. Locke,* 125 Wn.2d 129, 135, 882 P.2d 173 (1994). "The doctrine serves mainly to insure that the fundamental functions of each branch remain inviolate." *Brown*, 165 Wn.2d at 718; *Carrick,* 125 Wn.2d at 135; *In re Salary of Juvenile Director*, 87 Wn.2d 232, 238-240, 552 P.2d 163 (1976).

"To determine whether a particular action violates separation of powers, [courts] look ' . . . [to] whether the activity of one branch

threatens the independence or integrity or invades the prerogatives of another.'" *Carrick*, 135 Wn.2d at 135, quoting *Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975). "Our system of government allows each branch to exercise some control over the other in the form of checks and balances, but the power to interfere is a limited one." *Brown*, at 720; *Juvenile Director*, 87 Wn.2d at 239.

Where the Legislature invades the prerogative of the prosecutor, who is part of the Executive Branch of government, the separation of powers doctrine is violated.

b. Washington courts are guided by federal principles regarding separation of powers.

Although the separation of powers doctrine embedded in the federal constitution applies only to the federal government, Washington courts "continue to rely on federal principles regarding the separation of powers doctrine to interpret our state constitution's stand on this issue." *Carrick*, 125 Wn.2d at 135, n.1.

c. Under U.S. Supreme Court precedent, the prosecutorial decision whether to bring charges is a core executive function that neither the legislature nor the judiciary can infringe upon.

The U.S. Supreme Court has had several occasions to comment on the prosecutorial power to decide whether to bring criminal charges against a person, and has consistently held that this task is a core function

of the Executive Branch.

For example, in *Wayte v. United States*, 470 U.S. 598, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985) the defendant was charged with willfully failing to register for the draft, and he asked the courts to review the Justice Department's "passive enforcement policy" under which the Government prosecuted only those who reported themselves as having violated the law. The Court declined the invitation to review the Attorney General's charging policy, noting that "the decision whether or not to prosecute and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Id.*, at 607, quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S. Ct. 663, 54 L. Ed. 2d 604(1978). "this broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." *Wayte*, at 607.

Of course the prosecutorial decision whether to prosecute is not entirely immune from judicial review because it is "subject to constitutional constraints" such as, for example, the equal protection clause. *United States v. Armstrong,* 517 U.S. 456, 464, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996). "[T]he decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.*, at 464, quoting *Oyler v. Boles,* 368 U.S. 448, 456, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962). *See, e.g., Yick Wo v. Hopkins*,

118 U.S. 356, 373, 65 S. Ct. 1064, 30 L. Ed. 220 (1886) (unconstitutional to charge only persons of Chinese ancestry). But as the *Armstrong* Court explained, absent clear proof of a violation of equal protection by means of an oppressive practice such as charging only African-Americans, a prosecutor's decision to charge, or not to charge, is beyond the control of the other branches of government.

> We explained in *Wayte* why courts are "properly hesitant to examine the decision whether to prosecute." 470 U.S., at 608, 105 S.Ct. at 1531. Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's overall relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Id.*, at 607, 105 S.Ct. at 1530. ***It also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function***. "Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Ibid.*

Armstrong, 517 U.S. at 465 (bold italics added).

The Court has recognized that Congress violates the separation of powers doctrine whenever it seeks to compel Executive Branch officials to bring enforcement actions. This principle is very old and well established. *See, e.g., Springer v. Philippine Islands*, 277 U.S. 189, 202, 48 S. Ct. 480,

72 L. Ed. 845 (1928) ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.") *See,also., Buckley v. Valeo*, 424 U.S. 1, 140, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (striking down portion of federal election law that purported to give Congress the power to appoint agency commissioners who had the power to bring lawsuits to enforce the law; holding that officials who bring suits to enforce the law are Executive Officers).

These separation of powers considerations are even more compelling when instead of reviewing a decision to bring charges, a court is given the responsibility of reviewing the decision *not* to bring charges (or to dismiss or reduce them). As Justice Jackson said when he was United States Attorney General, a prosecutor exercises enormous discretion in deciding who *not* to prosecute:

> Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probably violation of federal law, ten times its present staff will be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning. What every prosecutor is practically required to do is to select the cases for prosecution and to select those

> in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

R. Jackson, *The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys*, April 1, 1940.

In *Heckler v. Chaney*, 470 U.S. 821, 831, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985), the Court held that there was a strong presumption that the decision of an Executive agency *not* to bring an enforcement action, was not judicially reviewable:

> This Court has recognized on several occasions over many years that ***an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to the agency's absolute discretion.*** [Citations]. This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement.

(Bold italics added). In *Heckler* a class of death row inmates brought suit seeking to have the courts compel the Food and Drug Administration to take various enforcement actions against the prison officials charged with carrying out executions by injecting the inmates with drugs on the grounds that various practices violated the Federal Food, Drug and Cosmetic Act. In the course of holding that the administrative decision not to commence an enforcement action was not reviewable by the courts, the Supreme Court compared the refusal to undertake a civil enforcement action with the refusal to bring a criminal charge, which it also held to be

unreviewable because that decision was committed to the Executive branch:

> [W]e recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of ***the decision of a prosecutor in the Executive Branch not to indict – a decision which has long been regarded as the special province of the Executive Branch,*** inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed."

470 U.S. at 832 (bold italics added).

Adhering to this separation of powers principle, in *United States v. Bass*, 536 U.S. 862, 122 S. Ct. 2389, 153 L. Ed. 2d 769 (2002), a unanimous Supreme Court set aside a trial court's discovery order compelling the Government to produce information as to why it chose to seek the death penalty against the defendant. The Court held that since the defendant had not made a credible showing that the prosecutor's decision to file a death penalty notice was motivated by racial considerations, the trial court erred in ordering the prosecutor to disclose. The court set aside the discovery order because it "threatens the performance of a core executive constitutional function." *Id.* at 864.

As consistently held by the United States Supreme Court, a prosecutor's decision to bring charges or not to bring charges is a core executive function that neither the legislature nor the judiciary can infringe upon.

d. Washington cases also explicitly recognize that the decision to charge or not to charge is within the prosecutor's absolute discretion.

Washington courts also explicitly recognize that making a charging decision is an executive branch function. In *State v. Finch*, 137 Wn.2d 792, 809, 975 P.2d 967 (1999), where the issue involved the prosecutor's decision to charge sentencing aggravating factors and to seek the death penalty, the Court rejected the defendant's argument that the prosecutor acted as a quasi-judicial officer when deciding whether to charge and whether to plea bargain:

> The State correctly argues that the prosecutor's decision whether to file charges or to plea bargain is ***an executive***, not adjudicatory, ***decision.***

Similarly, in *State v. Korum*, 157 Wn.2d 614, 655, 141 P.3d 13 (2006), the Court rejected the contention that it should apply a presumption of vindictiveness to the prosecutor's decision to add additional charges after the defendant decided to go to trial. As Justice Johnson noted in his concurring opinion, judicial review of this type of a decision made by a prosecutor would threaten the independence of the executive branch:

> Were this court to apply a presumption of prosecutorial vindictiveness where criminal charges are increased in the pretrial context, the "give and take" dynamics of such plea negotiations would be undermined. Prosecutors would face judicial second-guessing of the discretionary charging decision ***that courts have long recognized as exclusively executive.***

Korum, 157 Wn.2d at 655 (J.M. Johnson, J., concurring) (bold italics added). *Accord State v. McDowell,* 102 Wn.2d 341, 345, 685 P.2d 595 (1984) (rejecting argument that structure of juvenile court system requires a presumption of vindictiveness whenever a prosecutor increases the charges against a juvenile who declines to participate in diversion and holding that "it remains a prosecutorial duty to determine the extent of society's interest in prosecuting an offense."); *State v. DiLuzio*, 121 Wn. App. 822, 90 P.3d 1141 (2004)(rejecting contention that giving prosecutor sole authority to decide whether to refer defendant to drug court violates separation of powers and recognizing that this decision is one properly committed to the discretion of an executive branch official).

"Exercise of this [broad prosecutorial] discretion involves consideration of factors such as the public interest as well as the strength of the cause which could be proven." *State v. Judge*, 100 Wn.2d 706, 713, 675 P. 2d 219 (1984) (citing *United States v. Lavasco,* 431 U.S. 783, 794, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1997). 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." *Judge*, at 713 (quoting *Oyler v. Boles*, 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962). Similarly,

the right to charge a single or multiple counts is vested in the prosecutor. *State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990). Prosecutors plainly have the right to charge or not charge a particular crime.

In Washington, as well as in federal court, the prosecutor has discretion to charge or not charge a crime or enhancement which cannot be abrogated by the Legislature.

e.. **The three laws at issue here usurp the exclusively executive branch prerogative to decide what charges to bring, and whether to dismiss them in the course of plea bargaining. Since these laws are a legislative attempt to deprive the prosecutors of a core executive function, they violate the separation of powers function.**

The three laws enacted by the Washington Legislature. RCW 9.94A.835, RCW 9.94A.836, and RCW 9.94A.387, totally eliminate the discretion of the prosecutor to choose those cases in which the sentencing enhancement factors are to be charged. These laws direct that they must be charged in *every* case, and further, direct that the judiciary is tasked with making sure that prosecutors obey these commands.

The constitutional infirmity of the special allegations statutes, then, is that they remove from the prosecutor his or her discretion to consider anything other than whether a case for conviction could be made at trial in determining whether and how to charge a defendant.

The determination of whether, in the unique set of circumstances

presented by a case, the offense should be alleged to be sexually motivated or the defendant should be alleged to be "predatory" or whether the "victim is under fifteen" are the sorts of determination that prosecutor's must have the discretion to determine. The statutes creating these special allegations, however, allow no room for the exercise of discretion where the crime charged is specified and the relationship is specified. It is unconstitutional for this reason because it violates the separation of powers doctrine.

RCW 9.94A.835, .836 and .837, in their mandatory language, in fact, contrast with other, more long-standing special enhancement statutes such as RCW 9.04A.602, the deadly weapon enhancement. RCW 9.94A.602 provides only that "[i]n a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime. "Further, RCW 9.94A.470 provides that for felonies involving deadly weapon enhancements or verdicts, "the prosecuting standard for deciding to prosecute under RCW 9.94A.411)c) [is] as crimes against persons." Similarly, the prosecutor may choose not to file a school or bus zone enhancement. *See, e.g., State v. Conners*, 90 Wn. App. 48, 50-51, 950 P.2d 519 (1998). RCW 9.94A.835, .836 and .837 with their mandatory language differs from other enhancements and

unconstitutionally curtails the prosecutor's discretion.

In essence what the legislature has done, in enacting RCW 9.94A.835, RCW 9.94A.836 and RCS 9.94A.837, is create a new series of crimes, e.g., Rape of a child in the first degree by a stranger; rape of a child where the perpetrator was a teacher and the victim a student under the teacher's authority, etc.[5] This is the holding of *Blakely v. Washington*, 542 U.S. 296, 301-302, 306-307, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 478, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2002). Sentencing enhancements are equivalent to elements of a crime. This is the holding of Washington cases such as *State v. Goodman*, 150 Wn.2d 774, 785-786, 83 P.3d 410 (2004), that the considerations which determine the length of sentence are elements of that crime; in *Goodman* the court expressly held that the identity of the

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[5] "Predatory" means: (a) The perpetrator of the crime was a stranger to the victim . . ; (b) the perpetrator established or promoted a relationship with the victim prior to the offense and victimization of the victim was a significant reason the perpetrator established or promoted the relationship; or (c) the perpetrator was (i) A teacher, counselor, volunteer, or other person in authority in any public or private school and the victim was a student of the school under his or her authority or supervision. . [excluding home-based instruction from definition of school] (ii) a coach, trainer, volunteer, or other person in authority in any recreational activity and the victim was a participant in the activity under his or her authority or supervision; or (iii) a pastor elder, volunteer, or other person in authority in any church or religious organization, and the victim was a member or participant of the organization under his or her authority. RCW 9.94A.030(39).

controlled substance delivered is an element of the crime where the type of drug determined the length of the sentence.

While the legislature has the power to create new crimes such as first degree child molestation committed by a teacher against a student, the prosecutor, not legislature has the discretion to determine when a defendant should be charged with such a crime. *Goodwin, supra; Bordenkircher, supra.*

What the legislature cannot constitutionally do, is prevent the prosecutor from exercising discretion in deciding whether to charge the special allegation.

Moreover, these statutes compromise the right to plea bargain and improperly involve the court in the plea bargaining process. Plea bargaining is integral to the exercise of the prosecutor's core discretion, and the possibility of leniency through plea bargaining is a benefit conferred on the defendant by the plea bargaining process and protected by the separation of powers doctrine. *Bordenkircher v. Hayes, supra.*

The legislature overstepped its bounds in enacting RCW 9.94A.836 and RCW 9,94A.837, by taking away the prosecutor's discretion to engage in plea bargaining and by injecting the court in the process to make sure that there is no plea bargaining. This unconstitutionally involves the judiciary in decisions which are within the

core functions of the Executive Branch of government. Because of this, and because the statutes deprive the prosecutor of his or her right to perform the very core functions of the job, they violate the separation of powers doctrine as established by the United States Supreme Court and Washington courts.

2. MANDATORY CHARGING STATUTES VIOLATE DUE PROCESS AND THE EIGHTH AMENDMENT.

The mandatory charging schemes created by RCW 9.94A.835, .836 and .837 are unconstitutional because due process and the right to be free of cruel punishment require that potential mitigation and individual facts be weighed in making charging decisions. Prosecutors not only have the right to exercise discretion in charging crimes, they also have the duty to exercise that discretion in a way which is protective of each individual's rights to due process of law. Absent individualized weighing, the statutes will necessarily be used to force the facts in individual cases into unfair and potentially cruel charges.

When the government deprives a person of life, liberty, or property, it must act in a fair manner. *U.S. v. Salerno,* 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)).

"Due process . . . seeks a very general objective – to achieve 'respect enforced by law for that feeling of just treatment which has evolved through centuries of Anglo-American constitutional history and civilization.'" *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162, 95 L. Ed. 817, 71 S. Ct. 95 (1951)(Frankfurter, J., concurring)).

"A key element of the fundamental fairness doctrine is its focus on the factual setting of the individual case. . . . 'The asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, . . . may, in other circumstances, and in the light of other considerations, fall short of such denial,'" LaFave, Israel and King, *Criminal Procedure*, Part 1, Chapter 2, section 2.4 (quoting *Betts v. Brady*, 316 U.S.[455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942)] at 462). Mandatory charging statutes violate this basic concept of individualized consideration.

After the death penalty was declared unconstitutional in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. ed. 2d 346 (1972), on the grounds that it was being applied arbitrarily and disproportionately, many legislatures, including Washington's enacted mandatory death penalty statutes. In 1975 the voters in Washington approved Initiative Measure No. 316 which provided for a mandatory death sentence following a conviction for first degree murder and a finding of a statutorily-defined

aggravating factor. RCW 9A.32.046.

This mandatory death penalty scheme was held to be unconstitutional in *State v. Green*, 91Wn.2d 431, 588 P.2d 1370 (1979), as violative of due process and the eighth amendment's prohibition against cruel and unusual punishment. The *Green* court held that a mandatory death penalty is unconstitutional because "[i]t is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant either to the particular offender or the particular offense. *Green,* 91 Wn.2d at 445.

The same principle of requiring the consideration of individual mitigating circumstances when determining the appropriate sentence has been recognized in noncapital cases. For example, in Pennsylvania ex rel *Sullivan v. Ashe*, 302 U.S. 51, 61, 58 S. Ct. 59, 82 L. Ed. 43 (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.

Similarly, the court in *State v. Pettitt*, 93 Wn.2d 288, 609 P.2d 1364 (1980), held that the Lewis County prosecutor's mandatory policy of

filing habitual criminal charges against any defendant with three or more prior felonies was an abuse of discretion because it prevented the prosecutor from considering mitigating factors. *Pettittt*, 93 Wn.2d at 294-295 ("The prosecutor is both an administrator of justice and an advocate, he must exercise sound discretion in the performance of his functions").[6]

Washington courts have, in fact, upheld prosecutors' decisions of whether to charge a defendant with being a habitual criminal only where the prosecutors' decision-making practice required an individualized determination and not an automatic filing of habitual criminal charges. *See State., Rowe*, 93 Wn.2d 277, 609 P.2d 1348 (1980); *State v. Gilcrist*, 91 Wn.2d 603. 590 P.2d 809 (1979), *State v. Lee*, 87 Wn.2d 932, 558 P.2d 1976; and *State v. Nixon*, 10 Wn. App. 355, 517 P.2d 212 (1973).

In *Rowe*, the court held:

> The written standards as thus interpreted fully provide the procedural due process recognized in [*Gilcrist, Lee* and *Nixon]*. The standards establish and employ two classes of criminal conduct, and exceptions thereto, to determine whether habitual criminal charges should be filed. As noted above, the

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[6] Although *Pettitt* involved the filing of a habitual offender allegation, the former statute at issue in *Pettitt* was not comparable to the Persistent Offender Accountability Act (POAA). The POAA does not involve the decision to charge a crime at all; it involves a sentencing consequence as a result of criminal history, a legislative function. *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986) (the legislature has the sole authority to set the terms under which the trial court can impose punishment for crimes); *State v. Bryan*, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980) (sentencing is a legislative function).

> classifications are both reasonable and logical. **Moreover, the standards provide for prosecutorial discretion, thus permitting an individualized tempering of charges. . . .** Further, although not required by Lee, Gilcrist or *State v. Cooper*, 20 Wn. App. 659, 583 P.2d 1225 (1978),. . . .[the standard] provides for input by defense counsel through consideration of a defendant's cooperation (which would include plea bargaining), and by allowing consideration of factors going to mercy and manifest injustice.

Rowe, 93 Wn.2d at 285-286 (emphasis added)..

The preclusion of individualized consideration inherent in the mandatory charging policy of either the former death penalty statute or the Lewis County practice of charging the habitual offender allegation in every instance violated due process. The mandatory allegations at issue here are similarly unconstitutional.

3. RCW 9.94A.835, .836 AND .837 CONFLICT WITH RCW 9.94A.837 AND IMPROPERLY INVOLVE THE COURT IN THE PLEA BARGRAINING PROCESS.

RCW 9.94A.835, .836 and .837 conflict with RCW 9.94A.421, the plea bargaining statute, and improperly involve the court in the plea bargaining process.

Under RCW 9.94A.421, a prosecutor may move to dismiss other counts or charges, agree to file a particular charge or count, agree to recommend a sentence either outside or within the standard range, agree not to file other charges or counts, or "make *any* other promise to the defendant, except" not to allege prior convictions. (emphasis added).

RCW 9.94A.835, RCW 9.94A.836 and RCW 9.94A.837 eliminate this right to engage in plea bargaining for both the prosecutor and the defendant. RCW 9.94A.421 also expressly provides that the trial court "shall not participate in any discussions under this section."

In direct contradiction, RCW 9.94A. 835, .836, and .839 preclude the prosecutor from plea bargaining and assign to the trial court rather than the prosecutor, the role of determining whether the special allegation should be dismissed and under only a limited circumstances. It permits the court to allow withdrawal of the allegation only "to correct an error in the initial charging decision" or when "there are evidentiary problems that make proving the special allegation doubtful." RCW 9.94A.836(3).

At trial, the state asserted that RCW 9.94A.835, .836 and .837 are specific statutes which prevail over the more general RCW 9.94A.421. This argument should be rejected because these statutes do not concern the same subject matter. *State v. Conte,* 159 Wn.2d 797, 803, 154 P.3d 194 (2007)("a specific statute supersedes a general statute only if the two statutes pertain to the same subject matter and conflict to an extent that cannot be harmonized"). RCW 9.94A.421 sets forth the fundamental plea bargaining rules which govern the way in which prosecuting attorneys conduct the much of the basic business of the prosecutor's office; they apply to all crimes from aggravated murder to theft. In contrast, RCW

9.94A .835, .836 and .837, while purporting to alter the rules of plea bargaining in specific instances, are basically statutes which define allegations which can function as additional elements of other crimes. The statutes do not pertain to the same subject matter. RCW 9.94A.421 applies to all criminal charges and the manner in which they can be negotiated prior to trial or plea, while RCW 9.94A.835, .836, and .836 essentially create new crimes.

To uphold statutes which make special cases for individual crimes or allegations could result in a patchwork system that made plea bargaining impossible. Either prosecutors can engage in plea bargaining with defendants or they cannot. The statutes are in irreconcilable conflict which should be resolved in favor of the generally-applicable and constitutional statute, RCW 9.94A.421.

4. RCW 9.94A.835, RCW 9.94A.,836AND RCW 9.94A.837 CONFLICT WITH THE ABA STANDARDS ADOPTED IN *STATE V. POUNCEY.*

RCW 9.94A.835, .836 and .837 are irreconcilably in conflict with *State v. Pouncey*, 29 Wn. App. 629, 635, 630 P.3d 932, *review denied*, 96 Wn2d 1009 (1981), in which the court adopted the ABA standards governing restricting the involvement of the trial judge in the plea bargaining process.

The ABA standards provide that while monitoring plea bargaining

at the request of the parties a trial judge should never "through word or demeanor, either directly or indirectly, communicate to the defendant or defense that a plea should be accepted" or not. *Pouncey*, 29 Wn. App. at 635; 3 American Bar Association Standards for Criminal Justice, Standard 14-3.39(c) and (f). Under RCW 9.94A.835(3), .836(3) and .837(3), the trial court determines whether a plea bargain to dismiss the allegation can be accepted.

The legislature overstepped its bounds in enacting RCW 9.94A.835, RCW 9.94A.836 and RCW 9,94A.837, by taking away the prosecutor's discretion to engage in plea bargaining and by injecting the court in the process to make sure that there is no plea bargaining.

5. IMPOSITION OF THE VICTIM UNDER FIFTEEN ENHANCEMENT VIOLATED DOUBLE JEOPARDY.

Jennifer Rice was convicted of first degree kidnapping based on her intent to commit a crime, Child Molestation in the First Degree. Child Molestation in the First Degree necessarily involves a child under fifteen ("Jennifer Leigh Rice. . . did unlawfully and feloniously, *with intent to facilitate the commission of a felony, to-wit: rape of a child in the first degree or flight thereafter*, intentionally abduct O.E. . . . "(emphasis added) CP 55-57; RCW 9A.44.083.

As set out above, under the decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed. 2d 403 (2004), and *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005), *reversed on other grounds*, 548 U.S. 212 (2006), 163 Wn.2d 428, 180 P.3d 1276 (2008)(on remand), 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.[7] RCW 9.94A.837. The duplication of elements, in the underlying offense and the special allegation, violated 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." U.S. Const. V. The Washington State Constitution provides that "[n]o person shall be . . . twice put in jeopardy for the same offense." Const. art. 1, § 9. The Double Jeopardy Clause 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*

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[7] Under RCW 9.94A.712(c), the minimum term for a finding that the crime was predatory or the victim was under fifteen, is "either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater.

of Boston Mun. Court v. Lydon, 466 U.S. 294, 306-307, 104 S. Ct. 1805, 80 L. Ed. 2d 311 (1984); *State v. Graham*, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005). A sentence enhancement based on the same element represents effectively both a second prosecution for the same offense after conviction and multiple punishment for the same offense.

This issue is pending in the Washington Supreme Court in *State v. Aquirre,* 82226-3 (review granted on 3/31/09 of unpublished decision filed on 4/12/07, COA 36186-8-II), and in *State v. Kelly*, 146 Wn. App. 370, 189 P.3d 853 (2008), *review granted,* ____ Wn.2d _____ (2009), in the context of an assault conviction where the use of a weapon was both an element of the crime and the basis for imposing a deadly weapon sentencing enhancement.

F. CONCLUSION

Appellant respectfully submits that this Court should remand her case for resentencing without the special allegations and enhancements.

DATED this 23rd day of November, 2009.

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Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 23rd day of Nov, 2009, I caused a true and correct copy of the Opening Brief of Appellant to be served on the following via first class mail/delivery to his office:

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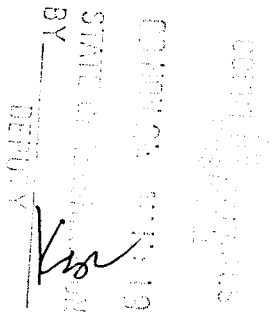

Rita J. Griffith 11/23/09
NAME DATE at Seattle, WA

RCW 9.94A.835
Special allegation -- Sexual motivation -- Procedures.

(1) 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(38) (a) or (c) 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.

(2) In a criminal case wherein there has been a special allegation the state shall prove beyond a reasonable doubt that the accused committed the crime with a sexual motivation. The court shall make a finding of fact of whether or not a sexual motivation was present at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not the defendant committed the crime with a sexual motivation. This finding shall not be applied to sex offenses as defined in *RCW 9.94A.030(38) (a) or (c).

(3) The prosecuting attorney shall not withdraw the special allegation of sexual motivation without approval of the court through an order of dismissal of the special allegation. The court shall not dismiss this 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.

[2006 c 123 § 2; 1999 c 143 § 11; 1990 c 3 § 601. Formerly RCW 9.94A.127.]

NOTES:

***Reviser's note:** RCW 9.94A.030 was amended many times in 2006. The definition of "sex offense" is now found in subsection (42). RCW 9.94A.030 was subsequently amended by 2008 c 276 § 309 changing subsection (42) to subsection (46), and by 2008 c 231 § 23 changing subsection (42) to subsection (39) effective August 1, 2009, and by 2008 c 230 § 2 without any changes to subsection numbering with a delayed effective date in 2010.

Effective date -- 2006 c 123: See note following RCW 9.94A.533.

Effective date -- Application -- 1990 c 3 §§ 601-605: "(1) Sections 601 through 605 of this act, for purposes of sentencing adult or juvenile offenders, shall take effect July 1, 1990, and shall apply to crimes or offenses committed on or after July 1, 1990.

(2) For purposes of defining a "sexually violent offense" pursuant to section 1002(4) of this act, sections 601 through 605 of this act shall take effect July 1, 1990, and shall apply to crimes committed on, before, or after July 1, 1990." [1990 c 3 § 606.]

Index, part headings not law -- Severability -- Effective dates -- Application -- 1990 c 3: See RCW 18.155.900 through 18.155.902.

RCW 9.94A.836
Special allegation -- Offense was predatory -- Procedures.

(1) 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.

(2) Once a special allegation has been made under this section, the state has the burden to prove beyond a reasonable doubt that the offense was predatory. If a jury is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether the offense was predatory. If no jury is had, the court shall make a finding of fact as to whether the offense was predatory.

(3) The prosecuting attorney shall not withdraw a special allegation filed under this section without the approval of the court through an order of dismissal of the allegation. The court may not dismiss the special allegation unless it finds that the order is necessary to correct an error in the initial charging decision or that there are evidentiary problems that make proving the special allegation doubtful.

[2006 c 122 § 1.]

NOTES:

Effective date -- 2006 c 122 §§ 1-4 and 6: "Sections 1 through 4 and 6 of this act are necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and take effect immediately [March 20, 2006]." [2006 c 122 § 10.]

RCW 9.94A.837
Special allegation -- Victim was under fifteen years of age -- Procedures.

(1) In a prosecution for rape in the first degree, rape in the second degree, indecent liberties by forcible compulsion, or kidnapping in the first degree with sexual motivation, the prosecuting attorney shall file a special allegation that the victim of the offense was under fifteen years of age at the time of the offense 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 victim was under fifteen 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.

(2) Once a special allegation has been made under this section, the state has the burden to prove beyond a reasonable doubt that the victim was under fifteen years of age at the time of the offense. If a jury is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether the victim was under the age of fifteen at the time of the offense. If no jury is had, the court shall make a finding of fact as to whether the victim was under the age of fifteen at the time of the offense.

(3) The prosecuting attorney shall not withdraw a special allegation filed under this section without the approval of the court through an order of dismissal of the allegation. The court may not dismiss the special allegation unless it finds that the order is necessary to correct an error in the initial charging decision or that there are evidentiary problems that make proving the special allegation doubtful.

[2006 c 122 § 2.]

NOTES:

Effective date -- 2006 c 122 §§ 1-4 and 6: See note following RCW 9.94A.836.

(39) "Predatory" means: (a) The perpetrator of the crime was a stranger to the victim, as defined in this section; (b) the perpetrator established or promoted a relationship with the victim prior to the offense and the victimization of the victim was a significant reason the perpetrator established or promoted the relationship; or (c) the perpetrator was: (i) A teacher, counselor, volunteer, or other person in authority in any public or private school and the victim was a student of the school under his or her authority or supervision. For purposes of this subsection, "school" does not include home-based instruction as defined in RCW 28A.225.010; (ii) a coach, trainer, volunteer, or other person in authority in any recreational activity and the victim was a participant in the activity under his or her authority or supervision; or (iii) a pastor, elder, volunteer, or other person in authority in any church or religious organization, and the victim was a member or participant of the organization under his or her authority

(46) "Sex offense" means:

(a)(i) A felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.130(12);

(ii) A violation of RCW 9A.64.020;

(iii) A felony that is a violation of chapter 9.68A RCW other than RCW 9.68A.080; or

(iv) A felony that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes;

(b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense in (a) of this subsection;

(c) A felony with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135; or

(d) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection.

(47) "Sexual motivation" means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification.

RCW 9A.44.083
Child molestation in the first degree.

(1) A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Child molestation in the first degree is a class A felony.

[1994 c 271 § 303; 1990 c 3 § 902; 1988 c 145 § 5.]

NOTES:

Intent -- 1994 c 271: See note following RCW 9A.44.010.

Purpose -- Severability -- 1994 c 271: See notes following RCW 9A.28.020.

Index, part headings not law -- Severability -- Effective dates -- Application -- 1990 c 3: See RCW 18.155.900 through 18.155.902.

Effective date -- Savings -- Application -- 1988 c 145: See notes following RCW 9A.44.010.

RCW 9.94A.712

Sentencing of nonpersistent offenders. ***(Effective until August 1, 2009, then recodified as RCW 9.94A.507.)***

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

(a) Is convicted of:

(i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;

(ii) Any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or

(iii) An attempt to commit any crime listed in this subsection (1)(a);

committed on or after September 1, 2001; or

(b) Has a prior conviction for an offense listed in *RCW 9.94A.030(33)(b), and is convicted of any sex offense which was committed after September 1, 2001.

For purposes of this subsection (1)(b), failure to register is not a sex offense.

(2) An offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense shall not be sentenced under this section.

(3)(a) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term and a minimum term.

(b) The maximum term shall consist of the statutory maximum sentence for the offense.

(c)(i) Except as provided in (c)(ii) of this subsection, the minimum term shall be either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.

(ii) If the offense that caused the offender to be sentenced under this section was rape of a child in the first degree, rape of a child in the second degree, or 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 sentence range for the offense or twenty-five years, whichever is greater. If the offense that caused the offender to be sentenced under this section was rape in the first degree, rape in the second degree, indecent liberties by forcible compulsion, or kidnapping in the first degree with sexual motivation, and there has been a finding that the victim was under the age of fifteen at the time of the offense under RCW 9.94A.837, the minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater. If the offense that caused the offender to be sentenced under this section is rape in the first degree, rape in the second degree with forcible compulsion, indecent liberties with forcible compulsion, or kidnapping in the first degree with sexual motivation, and there has been a finding under RCW 9.94A.838 that the victim was,

at the time of the offense, developmentally disabled, mentally disordered, or a frail elder or vulnerable adult, the minimum sentence shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater.

(d) The minimum terms in (c)(ii) of this subsection do not apply to a juvenile tried as an adult pursuant to RCW 13.04.030(1)(e) (i) or (v). The minimum term for such a juvenile shall be imposed under (c)(i) of this subsection.

(4) A person sentenced under subsection (3) of this section shall serve the sentence in a facility or institution operated, or utilized under contract, by the state.

(5) When a court sentences a person to the custody of the department under this section, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody under the supervision of the department and the authority of the board for any period of time the person is released from total confinement before the expiration of the maximum sentence.

(6)(a)(i) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department and the board shall enforce such conditions pursuant to RCW 9.94A.713, 9.95.425, and 9.95.430.

(ii) If the offense that caused the offender to be sentenced under this section was an offense listed in subsection (1)(a) of this section and the victim of the offense was under eighteen years of age at the time of the offense, the court shall, as a condition of community custody, prohibit the offender from residing in a community protection zone.

(b) As part of any sentence under this section, the court shall also require the offender to comply with any conditions imposed by the board under RCW 9.94A.713 and 9.95.420 through9.95.435 .

[2006 c 124 § 3; (2006 c 124 § 2 expired July 1, 2006); 2006 c 122 § 5; (2006 c 122 § 4 expired July 1, 2006); 2005 c 436 § 2; 2004 c 176 § 3. Prior: 2001 2nd sp.s. c 12 § 303.]

NOTES:

Reviser's note: *(1) RCW 9.94A.030 was amended by 2008 c 276 § 309, changing subsection (33)(b) to subsection (37)(b).

(2) 2005 c 436 § 6 (an expiration date section) was repealed by 2006 c 131 § 2.

(3) This section was amended by 2006 c 122 § 5 and by 2006 c 124 § 3, each without reference to the other and without cognizance of its amendment by 2005 c 436 § 2. All amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Expiration date -- 2006 c 124 § 2: "Section 2 of this act expires July 1, 2006." [2006 c 124 § 4.]

Effective date -- 2006 c 124: See note following RCW 9.94A.030.

Effective date -- 2006 c 122 §§ 5 and 7: "Sections 5 and 7 of this act take effect July 1, 2006." [2006 c 122 § 9.]

Expiration date -- 2006 c 122 §§ 4 and 6: "Sections 4 and 6 of this act expire July 1, 2006." [2006 c 122 § 8.]

Effective date -- 2006 c 122 §§ 1-4 and 6: See note following RCW 9.94A.836.

Severability -- Effective date--2004 c 176: See notes following RCW 9.94A.515.

Intent -- Severability -- Effective dates -- 2001 2nd sp.s. c 12: See notes following RCW 71.09.250.

Application -- 2001 2nd sp.s. c 12 §§ 301-363: See note following RCW 9.94A.030.