85893-4

NO. 39600-9-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Appellant,

v.

JENNIFER RICE,

Appellant.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Jennifer Rice, seeks the relief designated below.

B. DECISION BELOW

Petitioner seeks review of the published decision issued in *State v. Rice*, 159 Wn. App. 545, 246 P.3d 234 (2011) (Appendix A). A timely motion for reconsideration was denied on March 16, 2011. (Appendix B).

C. STATEMENT OF THE 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 a predatory offense pursuant to RCW 9.94A.836. At a stipulated bench trial, Rice was found guilty of these offenses and all the special allegations were found proved. 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.

D. PERTINENT 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 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.***

(Emphasis added).

In addition, all three statutes have substantially identical language which, as in 9.94A.835(3) provides:

> ***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.

(Emphasis added).[1]

E. THE COURT OF APPEALS' DECISION

The court below acknowledged that these statutes restrict the discretion of the prosecuting attorney, but reasoned that since these statutes left the prosecutor with *some* discretion, and thus did not

[1] 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.

completely eliminate all the prosecutor's charging discretion, they did not violate the separation of powers doctrine. The opinion below reasons 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:

> Despite the use of the words "shall" and "when"/"whenever," under these three statutes, a prosecutor retains discretion to file or not file the special allegations. Under the statutes, a prosecutor must evaluate the admissibility of evidence and determine the strength of that evidence for obtaining a finding on the special allegation. Accordingly, a prosecutor takes the same actions when deciding whether to file a special allegation as he/she does when determining and deciding what crimes to charge. In both instances, a prosecutor evaluates whether the evidence supports various outcomes and then, based on that evaluation, files or does not file charges and/or special allegations believed appropriate.

State v. Rice, 159 Wn. App. 545, ¶ 15, 246 P.3d 234 (2011).

The Court of Appeals acknowledged that charging the special allegations *is* mandatory whenever the evidence is sufficient to support them, but reasoned that eliminating the discretion *not* to charge in all of these cases did not violate separation of powers:

> Here, the legislature merely requires the prosecutor to *sometimes* file these special allegations *when evidence supports them.*

Id. at ¶ 18.

F. ISSUES PRESENTED

1. Do the mandatory charging provisions of RCW 9.94A.835, 9.94A.836 and 9.94A.837, requiring the prosecutor to charge these special allegations every time there is sufficient evidence to support them, violate the separation of powers doctrine by prohibiting the prosecutor from declining to charge these allegations for other reasons?

G. REASONS WHY REVIEW SHOULD BE GRANTED

1. **THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND THE U.S. SUPREME COURT. RAP 13.4(b)(1).**

2. **THE SEPARATION OF POWERS ISSUE POSED BY THIS CASE IS A SIGNIFICANT QUESTION OF LAW UNDER THE CONSTITUTION OF THE STATE OF WASHINGTON. RAP 13.4(b)(3).**

3. **THIS PETITION INVOLVES AN ISSUE OF FIRST IMPRESSION, AND AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THIS COURT. RAP 13.4(b)(4).**

a. **The Court of Appeals' Determination That It Is Permissible to Place Some Restrictions on Prosecutorial Charging Discretion As Long as Not All Discretion Is Eliminated Conflicts With Several Cases Which Expressly Hold that The Prosecutor's Charging Discretion is Absolute**.

The Court of Appeals' decision is premised upon the assumption that as long as prosecutors are left with some degree of charging discretion, it is constitutionally permissible to take away a portion of their charging discretion. The opinion rejects the contention that the three statutes

"eviscerated" the exercise of prosecutorial discretion, *Rice,* 159 Wn. App. at ¶ 17, and thus implies that only such an "evisceration" would be unconstitutional.

The Court of Appeals is mistaken for two reasons. First, several cases establish that the legislature has virtually no power whatsoever to regulate the prosecutors' charging discretion. Second, the test for whether a law violates the separation of powers doctrine is not whether the legislature has "eviscerated" or completely usurped a power that belongs to the executive branch; the test is whether the statute "threatens the independence or integrity or invades the prerogatives of" the executive branch. *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994).

The decision below conflicts with the opinion in *State v. Korum*, 157 Wn.2d 614, 655, 141 P.3d 13 (2006) which refers to the prosecutors' power to make "the discretionary charging decision ***that courts have long recognized as exclusively executive***." (Emphasis added). Since the power is "exclusively" an executive power, the legislature cannot take away "some" of that power without violating the constitution.

In *Carrick* this Court held that Washington courts properly "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. Those federal separation of powers principles, articulated in

U.S. Supreme Court cases, have consistently recognized that the executive power to decide when to charge, and when not to charge, is practically absolute. Twice the Supreme Court has stated 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." *Wayte v. United States,* 470 U.S. 598, 607 (1985), quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (emphasis added).

Similarly, in *Heckler v. Chaney,* 470 U.S. 821, 831 (1985), the Court stated that prosecutorial charging discretion was "absolute" and therefore generally completely unreviewable by the courts:

> 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.

(emphasis added).[2]

[2] The only exception is that prosecutors may not exercise their discretion in a constitutionally discriminatory fashion, such as by charging only people of one race. See *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (unconstitutional to charge only persons of Chinese ancestry); *United States v. Armstrong,* 517 U.S. 456, 464 (1996) (unconstitutional to base charging decision on a ground that would violate equal protection, such as race or religion).

In *United States v. Armstrong*, 517 U.S. 456 (1996), the Court explained that executive branch decision of whether to prosecute is generally beyond the competence of the other branches of government:

> 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 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. It also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function.

Armstrong, 517 U.S. at 465 (internal quotations marks and citations omitted). Over eighty years ago the Supreme Court held that Congress did not have the power to order executive officials to bring enforcement actions:

> 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.

Springer v. Philippine Islands. 277 U.S. 189, 202 (1928).

Notwithstanding the decisions in *Korum, Wayte, Armstrong, Heckler, Bordenkircher,* and *Springer*, which hold that the decision whether to file charges is "entirely," and "exclusively" an executive branch decision, committed to the "absolute" discretion of the prosecutor, the Court of

Appeals ignored these decisions and held that some legislative restriction on the prosecution's charging discretion was constitutionally permissible.

The Court of Appeals also reasoned that these three special allegation statutes are analogous to the aggravated murdered statute which mandates certain sentences once a conviction has been obtained:

> We draw an analogy to the aggravated murder statute where the legislature has prescribed that *when the evidence supports and results* in an aggravated first degree murder conviction, the sentence *must* be either death or life without possibility of parole and not simply a life sentence. Former RCW 10.95.030 (1993).

Rice, 159 Wn. App. at ¶ 18 (italics in original). But the statute clearly is *not* "analogous" because it has nothing to do with the *charging* decision.

RCW 10.95.030 provides for a mandatory *sentence* after the charge of aggravated murder is proved. It does not mandate that any particular charge must be brought. It does not eliminate any portion of the prosecutor's discretion to decide *not* to charge aggravated murder. It does not provide that as long as the evidence is sufficient to support a charge of aggravated murder that such a charge must be filed. This passage of the opinion shows simply that the Court of Appeals confused the legislature's "power to define crimes and fix penalties for crimes," (159 Wn. App. at ¶ 18) – a power Rice has never disputed -- with "the discretionary

charging decision ***that courts have long recognized as exclusively executive***." *State v. Korum,* 141 Wn.2d at 655 (emphasis added).

b. <u>The Only "Discretion" That The Legislature Left A Prosecutor With Is The Discretion Not to Charge If He Feels That He Cannot Prove the Allegation. Since it Would be Unethical For a Prosecutor to Bring a Charge That He Thought He Probably Could Not Prove, This is Meaningless "Discretion"</u>.

Focusing on the criterion of evidentiary sufficiency, the Court of Appeals noted that a prosecutor "is not required to bring the special allegations each and every time he or she files charges of one of the enumerated sex offenses." 159 Wn. App. at ¶ 17. Thus, in the Court of Appeals' view there is no separation of powers violation because "[h]ere, the legislature merely requires the prosecutor to *sometimes* file these special allegations *when the evidence supports them." Id.* at ¶ 18 (italics in the original). Since they are not required to file these allegations when the evidence does *not* support them, the Court of Appeals reasoned that prosecutors still have a measure of "discretion," and therefore the power of the executive branch has not been invaded.[3]

[3] To underline the Legislature's intent that the only decision the prosecutor can make is whether the allegation can be established, RCW 9.94A.836(1) and RCW 9.94A.837(1) include a caveat that the prosecutor can decide not to charge the allegation if, after consulting with the victim, it appears that charging the allegation would jeopardize a conviction on the underlying felony. A special allegation cannot be established absent a conviction on the underlying offense.

But this reasoning ignores the fact that it would be unethical for a prosecutor to bring a criminal charge where the evidence available to the prosecution is not sufficient to support a conviction. It has long been recognized that prosecutors should not bring charges when they have no basis for believing that they can prove the charges. For example, under the heading "Discretion in Charging Decision" 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 (3d ed. 1993). Accordingly, it is meaningless to speak of "leaving" prosecutors with the "discretion" not to charge people for whom the evidence is *not* sufficient to convict. Since it is unethical to bring charges that one has no reasonable chance of proving, there is no such thing as prosecutorial "discretion" to harass people by bringing charges against them in that situation. The only meaningful discretion to decline to charge which prosecutors do have – the discretion not to charge *despite* the sufficiency of evidence to support the charge – is the discretion which the three challenged statutes take away from prosecutors.

For all practical purposes then, the three statutes at issue here take away virtually all prosecutorial discretion. The statutes make it clear, and

the Court of Appeals expressly acknowledges the fact that, if there is sufficient evidence to convict the prosecutor *must* file these special allegations.

c. <u>The Decision Below Ignores The Fact That Prosecutors Have Always Had The Discretion To Choose Not to Charge People *Even Though* there is Sufficient Evidence to Prove The Charges. The Three Statutes At Issue Here Deprive the Executive Branch of this Power</u>.

The decision below erroneously assumes that the *only* type of discretion prosecutors have is the discretion to evaluate evidentiary sufficiency and to make charging decisions based on that criterion alone:

> [A] prosecutor evaluates whether the evidence supports various outcomes and then, ***based on that evaluation,*** files or does not file charges and/or special allegations believed appropriate.

Rice, 159 Wn. App. At ¶ 15 (emphasis added).

But prosecutors have always had the discretionary power to decide not to bring criminal charges for reasons *other* than evidentiary insufficiency or the low likelihood of being able to secure a conviction. The *American Bar Association Standards for Criminal Justice Relating to the Prosecution Function* § 3.9(b) recognizes this discretionary power:

> ***The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may*** in some circumstances and for good cause consistent with the public interest ***decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction***. . . .

(Emphasis added).

The U.S. Supreme Court cited to this prosecutorial standard with approval in *United States v. Lovasco*, 431 U.S. 783, 794 (1977), noting that the decision to file charges requires consideration of many other factors besides the strength of the evidence of guilt. In *State v. Pettit,* 93 Wn.2d 288, 295, 609 P.2d 1364 (1980), this Court cited with approval to *Lovasco* and to the ABA Criminal Justice Standards, for the proposition that a prosecutor has discretion not to bring a charge even though he has the evidence to prove it.

Prosecutors also have broad discretion not to charge, in spite of evidentiary sufficiency, by dismissing charges as part of the plea bargaining process. *State v. Michielli*, 132 Wn.2d 229, 245, 937 P.2d 587 (1997). These statutes eliminate the prosecutor's discretion not to charge by eliminating the authority to dismiss the allegations as part of a plea bargain. The charges, once filed, can be dismissed only if the trial judge finds "an error *in the initial charging decision*" or "*evidentiary problems which make proving the special allegation doubtful.*" RCW 9.94A.835(3), .836(3), .837(3) (italics added).

The three statutes at issue here deny the prosecuting attorney the discretion to consider other things than evidentiary sufficiency when deciding whether to file charges and the discretion not to charge an allegation even when there is sufficient evidence to prove it.

d. <u>The Decision Below Is In Direct Conflict With *State v. Pettit*, Where This Court Held that a Prosecutor Abused His Discretion By Following a Policy of Charging Habitual Criminal Status In Every Case Where The Evidence Was Sufficient to Prove That Status</u>.

In *Pettit* this Court held that Lewis County Prosecuting Attorney's mandatory internal policy of always filing a habitual criminal charge whenever there was sufficient evidence to support it was an abuse of *prosecutorial* discretion. *Id.* at 295.

The Court of Appeals purported to distinguish *Pettit* by reasoning that *Pettit* involved a prosecutorial charging policy which required a particular charge be brought "in every case," whereas this case involves statutes that "only" require charging the special allegation in those cases where there is sufficient evidence to support the special allegation:

> In *Pettit*, our Supreme Court held that a "fixed formula which requires a particular action *in every case* upon the happening of a specific series of events constitutes an abuse of the discretionary power lodged in the prosecuting attorney." 93 Wn.2d at 296, 609 P.2d 1364.

Rice, 159 Wn. App. at ¶ 30, citing *Pettit*, 93 Wn.2d at 296 (italics added by the *Rice* Court).

But the Court of Appeals simply lifts this quote out of context. This Court's *Pettit* decision struck down the Lewis County Prosecutor's charging policy because it mandated a habitual criminal charge "in every

case" *where the prosecutor had the evidence to prove that allegation.* The opinion clearly states:

> At a hearing pursuant to petitioner's motion to dismiss the supplemental information, the prosecutor testified that once the prior convictions were clearly established by the record, he had no choice but to file a supplemental information.

Id. at 290. Thus *Pettit* held that a policy of charging in every case where the evidence was sufficient to prove the habitual criminal allegation – which means in every case where the prosecutor could prove two prior felony convictions – was an unlawful charging policy.

The charging policy in *Pettit* was therefore identical to the charging policy required by RCW 9.94A.835, .836 and .837. In both situations, "in every case" where the evidence is sufficient to support the charge, the charge must be filed. Since the prosecutor himself cannot lawfully adopt a mandatory policy of exercising *his* discretionary charging power by always bringing a charge whenever there is sufficient evidence to support it, *a fortiori* the legislature cannot compel a prosecutor to implement such a mandatory charging policy. In sum, *Pettit* is not distinguishable and the decision in this case is in direct conflict with this Court's decision in *Pettit*.

The three statutes at issue in this case purport to divest prosecutors of their discretionary power to decline to file charges even though the

evidence is sufficient to support them. These statutes mandate that the *only* time that prosecutors can ever decline to prosecute these special allegations is when they do not have the evidence necessary to prove them. This is contrary to *Pettit*, *Lovasco*, and also to RCW 9.94A.411.[4]

F. CONCLUSION

The three statutes that Rice challenges constitute a legislative incursion into a "core executive constitutional function." *Armstrong*, 517 U.S. at 465; *United States v. Bass*, 536 U.S. 862, 864 (2002). "Prosecutors [not legislators] are vested with wide discretion in determining whether to charge suspects" and "the exercise of this discretion involves consideration of the public interest as well as the strength of the case which could be proven." *State v. Judge*, 100 Wn.2d 706, 713, 675 P.2d 219 (1984), citing *Pettit*, *Lovasco*, and *Bordenkircher*. The three special allegation statutes at issue in this case purport to curtail prosecutorial charging discretion so as to limit prosecutors to consideration of *only* the sufficiency of the evidence to convict. When a statute "threatens the independence or integrity or invades the prerogatives

[4] RCW 9.94A.411 tracks the ABA standard quoted above, and explicitly states: "A prosecuting attorney may decline to prosecute, *even though technically sufficient evidence to prosecute exists,* in situations where prosecution would serve no public purpose, would defeat the underlying purpose of the law in question, or would result in decreased respect for the law." (Italics added). RCW 9.94A.411 goes on to list nine examples of reasons why a prosecutor might properly exercise her discretion by deciding not to bring a charge notwithstanding the availability of sufficient evidence to obtain a conviction.

of another branch [of government], it violates the separation of powers." *Waples v. Yi,* 169 Wn.2d 152, 158, 234 P.3d 187 (2011) (internal quotation marks omitted). Here it is one of the "prerogatives" of the executive branch of government to decide whether a criminal charge should be brought. As the U.S. Supreme Court has said, "the decision of a prosecutor in the Executive Branch not to indict -- [is] a decision which has long been regarded as the special province of the Executive Branch . . .." *Heckler,* 470 U.S. at 832. Since these statutes seek to take away that prerogative of the executive branch, they violate the separation of powers.

For these reasons stated above petitioner asks this Court to grant review of the decision below, to hold the three special allegation statutes violate the doctrine of separation of powers, and to remand her case with directions that she be resentenced without the special allegation sentencing enhancements.

DATED this 7th day of April 2011.

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APPENDIX A

C

Court of Appeals of Washington,
Division 2.
STATE of Washington, Respondent,
v.
Jennifer Leigh RICE, Appellant.

No. 39600-9-II.
Jan. 19, 2011.

Background: Defendant was convicted following a bench trial on stipulated facts in the Superior Court, Pierce County, Gary Steiner, J., of first degree kidnapping involving a minor less than 15 years old, predatory first degree child molestation, and two counts of third degree child rape, for which defendant was sentenced to two concurrent life sentences with a minimum 25 years of confinement and two concurrent 60 month sentences. Defendant appealed.

Holdings: The Court of Appeals, Quinn-Brintnall, J., held that:
(1) sentencing statutes setting forth special allegations for certain enumerated sex offenses when such offense was predatory, victim was under 15 years of age, or defendant had a sexual motivation did not violate separation of powers doctrine;
(2) sentencing statutes setting forth special allegations for certain enumerated sex offenses when such offense was predatory, victim was under 15 years of age, or defendant had a sexual motivation did not improperly involve the trial court in plea bargaining;
(3) sentencing statutes setting forth special allegations for certain enumerated sex offenses when such offense was predatory, victim was under 15 years of age, or defendant had a sexual motivation, did not violate defendant's due process or Eighth Amendment rights;
(4) imposition of victim age sentencing enhancement on defendant convicted of first degree kidnapping based on predicate offense of first degree child molestation did not violate double jeopardy;
(5) sentencing court, was required to imposed mandatory minimum sentences of 25 years in prison on convictions for first degree kidnapping involving a minor less than 15 years old and predatory first degree child molestation; and
(6) imposition of two concurrent life sentences with a mandatory minimum sentence of 25 years of confinement on defendant's convictions for first degree kidnapping involving a minor less than 15 years old, predatory first degree child molestation was not inconsistent with Sentencing Reform Act's intent to appropriately use state resources to protect children.

Affirmed.

West Headnotes

[1] Constitutional Law 92 ⚿2390

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)3 Encroachment on Executive
92k2390 k. In general. Most Cited Cases

Indictment and Information 210 ⚿113

210 Indictment and Information
210V Requisites and Sufficiency of Accusation
210k113 k. Matter of aggravation in general. Most Cited Cases

Sentencing statutes setting forth special allegations for certain enumerated sex offenses when such offense was predatory, victim was under 15 years of age, or defendant had a sexual motivation did not violate separation of powers doctrine on basis that they encroached on executive power by limiting a prosecutor's discretion, as the statutes gave prosecutors discretion as to when to file the special allegations, in that statutes required a prosecutor to evaluate the individual circumstances of the case to determine whether a special allegation is

warranted, but they did not require prosecutor to bring the special allegations each and every time he filed charges of one of the enumerated sex offenses. West's RCWA Const. Art. 11, § 5; West's RCWA 9.94A.836, 9.94A.837; West's RCWA 9.94A.835 (2008).

[2] Criminal Law 110 ⚿1023.5

110 Criminal Law
110XXIV Review
110XXIV(D) Right of Review
110k1023.5 k. Right to review in general. Most Cited Cases

An aggrieved party, for appeal purposes, must have a present substantial interest in the subject matter of the appeal and must be aggrieved in a legal sense. RAP 3.1.

[3] Criminal Law 110 ⚿273.1(2)

110 Criminal Law
110XV Pleas
110k272 Plea of Guilty
110k273.1 Voluntary Character
110k273.1(2) k. Representations, promises, or coercion; plea bargaining. Most Cited Cases

Defendant does not have a constitutional right to a plea bargain.

[4] District and Prosecuting Attorneys 131 ⚿8(6)

131 District and Prosecuting Attorneys
131k8 Powers and Proceedings in General
131k8(6) k. Charging discretion. Most Cited Cases

The decision to determine and file appropriate charges is vested in the prosecuting attorney as a member of the executive branch.

[5] Constitutional Law 92 ⚿2620

92 Constitutional Law
92XX Separation of Powers
92XX(D) Executive Powers and Functions
92k2620 k. Nature and scope in general. Most Cited Cases

Deciding whether to plea bargain with a criminal defendant is a function delegated entirely to the executive branch.

[6] Constitutional Law 92 ⚿990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In general. Most Cited Cases

Constitutional Law 92 ⚿1004

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1001 Doubt
92k1004 k. Proof beyond a reasonable doubt. Most Cited Cases

Constitutional Law 92 ⚿1030

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)4 Burden of Proof
92k1030 k. In general. Most Cited Cases

Appellate court presumes that a statute is constitutional and the burden rests on the challenging party to prove beyond a reasonable doubt its unconstitutionality.

[7] Constitutional Law 92 ⚿975

92 Constitutional Law
92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions
92VI(C)2 Necessity of Determination
92k975 k. In general. Most Cited Cases

The appellate court does not make determinations on constitutional issues unless necessary to the determination of a case.

[8] Constitutional Law 92 ⚿2340

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)1 In General
92k2340 k. Nature and scope in general. Most Cited Cases

The legislature has the power to define crimes and fix penalties for crimes.

[9] Criminal Law 110 ⚿273.1(2)

110 Criminal Law
110XV Pleas
110k272 Plea of Guilty
110k273.1 Voluntary Character
110k273.1(2) k. Representations, promises, or coercion; plea bargaining. Most Cited Cases

Indictment and Information 210 ⚿113

210 Indictment and Information
210V Requisites and Sufficiency of Accusation
210k113 k. Matter of aggravation in general. Most Cited Cases

Sentencing statutes setting forth special allegations for certain enumerated sex offenses when such offense was predatory, victim was under 15 years of age, or defendant had a sexual motivation, pursuant to which prosecutor must seek trial court approval to dismiss these special allegations, did not improperly involve the trial court in plea bargaining; while trial court was prohibited by statute and certain rules from participating in any discussions between the state and defendant regarding plea agreements, there was no conflict between prohibiting trial court from participating in plea bargain discussions, yet allowing trial court to determine whether a special allegation should be dismissed from the charges. West's RCWA 9.94A.421, 9.94A.836, 9.94A.837; West's RCWA 9.94A.835 (2008).

[10] Constitutional Law 92 ⚿4705

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)6 Judgment and Sentence
92k4704 Matters Considered in Sentencing
92k4705 k. In general. Most Cited Cases

Indictment and Information 210 ⚿113

210 Indictment and Information
210V Requisites and Sufficiency of Accusation
210k113 k. Matter of aggravation in general. Most Cited Cases

Sentencing and Punishment 350H ⚿1461

350H Sentencing and Punishment
350HVII Cruel and Unusual Punishment in General
350HVII(D) Prosecutions
350Hk1461 k. Grand jury and filing of accusatory instrument. Most Cited Cases

Sentencing statutes setting forth special allegations for certain enumerated sex offenses when such offense was predatory, victim was under 15 years of age, or defendant had a sexual motivation, did not violate defendant's due process or Eighth Amendment rights on basis that they limited prosecutorial discretion in charging crimes by preventing a prosecutor from taking into account mitigating circumstances, as prosecutors maintained discretion under the statutes in charging both underlying crimes and the special allegations, in that prosecutor could assess any mitigating or aggravating

factors before filing charges, and even if prosecutor determined that the individual circumstances of the case warranted charging offenses that required consideration of filing the special allegations, the statutes afforded the prosecutor latitude in whether to file them following such consideration. U.S.C.A. Const.Amends. 8, 14; West's RCWA 9.94A.836, 9.94A.837; West's RCWA 9.94A.835(2008).

[11] Double Jeopardy 135H ⚿30

135H Double Jeopardy
135HII Proceedings, Offenses, Punishments, and Persons Involved or Affected
135Hk29 Sentencing Proceedings; Cumulative Punishment
135Hk30 k. Enhanced offense or punishment. Most Cited Cases

Imposition of victim age sentencing enhancement on defendant convicted of first degree kidnapping based on predicate offense of first degree child molestation did not violate double jeopardy. U.S.C.A. Const.Amend. 5; West's RCWA 9.94A.837.

[12] Sentencing and Punishment 350H ⚿651

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk651 k. Operation and effect of guidelines in general. Most Cited Cases

Sentencing enhancements increase the presumptive or standard sentencing range, but they do not require a finding of an aggravating factor that allows the trial court to consider imposing an exceptional sentence outside the presumptive or standard sentencing range.

[13] Infants 211 ⚿20

211 Infants
211II Protection
211k20 k. Criminal prosecutions under laws for protection of children. Most Cited Cases

Kidnapping 231E ⚿41

231E Kidnapping
231Ek41 k. Sentence and punishment. Most Cited Cases

Sentencing court, in sentencing defendant who was convicted of first degree kidnapping involving a minor less than 15 years old and predatory first degree child molestation, was required to impose mandatory minimum sentences of 25 years in prison for each offense, as statute governing sentencing court's authority for certain enumerated sex offenses provided that offenses of which defendant had been convicted required a 25-year mandatory minimum sentence, thereby expressly limiting sentencing court's authority for defendant's convictions. West's RCWA 9.94A.712(3)(c)(i, ii) (2007).

[14] Criminal Law 110 ⚿1042.3(1)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1042.3 Sentencing and Punishment
110k1042.3(1) k. In general. Most Cited Cases

Illegal or erroneous sentences may be challenged for the first time on appeal.

[15] Sentencing and Punishment 350H ⚿654

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk654 k. Effect on judicial discretion. Most Cited Cases

A trial court may exercise discretion in sentencing only where the Sentencing Reform Act (SRA) authorizes discretion. West's RCWA 9.94A.010 et seq.

[16] Sentencing and Punishment 350H ⚿850

350H Sentencing and Punishment
350HIV Sentencing Guidelines

350HIV(F) Departures
350HIV(F)3 Downward Departures
350Hk850 k. In general. Most Cited Cases

Sentencing and Punishment 350H ⚿870

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)3 Downward Departures
350Hk870 k. Other particular grounds. Most Cited Cases

Purposes enumerated in the Sentencing Reform Act (SRA) are not in and of themselves mitigating factors in sentencing and may only provide support for exceptional sentences downward once the trial court identifies a mitigating circumstance. West's RCWA 9.94A.010.

[17] Sentencing and Punishment 350H ⚿870

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)3 Downward Departures
350Hk870 k. Other particular grounds. Most Cited Cases

Merely citing to the purposes of the Sentencing Reform Act (SRA) as grounds for a downward sentence is not enough to justify a downward departure. West's RCWA 9.94A.010.

[18] Constitutional Law 92 ⚿2605(2)

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)6 Advisory Opinions
92k2603 Particular Issues and Applications
92k2605 Criminal Law
92k2605(2) k. Sentencing and punishment. Most Cited Cases

Criminal Law 110 ⚿1134.24

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)3 Questions Considered in General
110k1134.24 k. In general. Most Cited Cases

Court of Appeals would not address purported problems with defendant's offender score that might occur on remand to ensure that her sentence was proportionate to the seriousness of her offense, with respect to defendant's convictions for first degree kidnapping involving a minor less than 15 years old, predatory first degree child molestation, and two counts of third degree child rape, which resulted in imposition of two concurrent life sentences with a minimum 25 years of confinement and two concurrent 60 month sentences, as the Court did not consider what might happen on a speculative remand, nor did it issue advisory opinions. West's RCWA 9.94A.010(1).

[19] Criminal Law 110 ⚿1128(2)

110 Criminal Law
110XXIV Review
110XXIV(G) Record and Proceedings Not in Record
110XXIV(G)16 Matters Not Apparent of Record
110k1128 In General
110k1128(2) k. Matters appearing otherwise than by record. Most Cited Cases

Court of Appeals would not consider on defendant's appeal of her sentences for first degree kidnapping involving a minor less than 15 years old, predatory first degree child molestation, and two counts of third degree child rape, issue of whether her sentence did not serve to protect the public on basis of several independent evaluators' determinations that defendant was unlikely to reoffend, as the evaluators' determinations were outside the record on appeal. West's RCWA 9.94A.010(4).

[20] Criminal Law 110 ⚿1128(2)

110 Criminal Law
110XXIV Review
110XXIV(G) Record and Proceedings Not in Record
110XXIV(G)16 Matters Not Apparent of Record
110k1128 In General
110k1128(2) k. Matters appearing otherwise than by record. Most Cited Cases

Court of Appeals would not consider on defendant's appeal of her sentences for first degree kidnapping involving a minor less than 15 years old, predatory first degree child molestation, and two counts of third degree child rape, issue of whether her sentences deprived her of the opportunity to improve herself because treatment programs in correctional centers prioritize admittance based on how close an offender is to completing her sentence, as defendant's argument relied on matters outside the record that Court could not consider. West's RCWA 9.94A.010(5).

[21] Infants 211 ⚿20

211 Infants
211II Protection
211k20 k. Criminal prosecutions under laws for protection of children. Most Cited Cases

Kidnapping 231E ⚿41

231E Kidnapping
231Ek41 k. Sentence and punishment. Most Cited Cases

Sentencing and Punishment 350H ⚿775

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(D) Multiple Offenses or Counts
350Hk775 k. Continuing offenses. Most Cited Cases

Sentencing and Punishment 350H ⚿776

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(D) Multiple Offenses or Counts
350Hk776 k. More than one victim. Most Cited Cases

Imposition of two concurrent life sentences with a mandatory minimum sentence of 25 years of confinement on defendant's convictions for first degree kidnapping involving a minor less than 15 years old, predatory first degree child molestation was not inconsistent with Sentencing Reform Act's intent to appropriately use state resources to protect children, where defendant abused her position as a public elementary school teacher to engage in multiple inappropriate sexual contacts with two child victims over a period of several months. West's RCWA 9.94A.010(6).

[22] Criminal Law 110 ⚿1128(2)

110 Criminal Law
110XXIV Review
110XXIV(G) Record and Proceedings Not in Record
110XXIV(G)16 Matters Not Apparent of Record
110k1128 In General
110k1128(2) k. Matters appearing otherwise than by record. Most Cited Cases

Court of Appeals would not consider on defendant's appeal of her sentences for first degree kidnapping involving a minor less than 15 years old, predatory first degree child molestation, and two counts of third degree child rape, issue of whether her sentence did not comport with purpose of Sentencing Reform Act (SRA) to reduce the risk of reoffending in the community, on basis that independent medical evaluators determined that defendant was not likely to reoffend, as this evidence was outside the record, such that the Court could not consider it. West's RCWA 9.94A.010(7).

***237** Rita Joan Griffith, Attorney at Law, James Elliot Lobsenz, Carney Badley Spellman, Seattle, WA, for Appellant.

Thomas Charles Roberts, Attorney at Law, Tacoma, WA, for Respondent.

QUINN-BRINTNALL, J.

¶ 1 At a bench trial on stipulated facts, the trial court found former Tacoma Public School District elementary school teacher **Jennifer Rice** guilty of (1) first degree kidnapping, which involved special allegations of sexual motivation under former RCW 9.94A.835 (2006) and a victim less than 15 years old under RCW 9.94A.837; (2) first degree child molestation, with a special allegation of being predatory under RCW 9.94A.836; and (3) two counts of third degree child rape. The trial court imposed two concurrent life sentences with a minimum 25 years of confinement and two concurrent 60 month sentences.

¶ 2 Rice challenges the constitutionality of the special allegation statutes and the resulting sentencing enhancements, asking us to remand for resentencing. Rice argues that RCW 9.94A.836, .837, and former RCW 9.94A.835 violate the separation of powers doctrine, improperly involve the trial court in plea bargaining, and impinge on her due process and Eighth Amendment rights. Rice also challenges the imposition of. a sentencing enhancement that mirrors an element in her underlying crime as a violation of her right to be free from double jeopardy. In a statement of additional grounds (SAG),[FN1] Rice contends that the sentencing court imposed*238 an illegal sentence and that her sentence violates all the stated purposes of the Sentencing Reform Act of 1981(SRA), ch. 9.94A RCW. We discern no error and affirm.

FN1. RAP 10.10.

FACTS

¶ 3 At trial, the parties stipulated to the following substantive facts,

> Jennifer Leigh Rice was born on November 30, 1975. O.E. was born on October 30, 1996. **Jennifer Rice** and O.E. are not and have never been married to each other. During the entire period between December 1, 2006 and February 28, 2007, **Jennifer Rice** was a 4th grade teacher, as contemplated in the definition of "predatory" as set forth in [former] RCW 9.94A.030 [(2006)], at McKinley elementary school, which is a public school in the Tacoma Public School District. During the entire period between December 1, 2006 and February 28, 2007, O.E. was a 4th grade student of the school (McKinley Elementary) and was under Jennifer Leigh Rice's authority and supervision, as contemplated in the definition of "predatory" as set forth in [former] RCW 9.94A.030.
>
> During the period between December 1, 2006 and February 28, 2007, Jennifer Leigh Rice had sexual contact with O.E. by rubbing O.E.'s penis with her hand for purposes of their mutual sexual gratification. This act occurred in the residence of Jennifer Leigh Rice in Yelm, Washington. Furthermore, this act was unlawful and felonious. O.E. was 10 years old and Jennifer Leigh Rice was his teacher at that time, as set forth above.
>
> Jennifer Leigh Rice, who resided in Yelm, Washington, had parked her car near O.E.'s residence in Tacoma, Washington during the evening of August 10, 2007. During the morning hours of August 11, 2007, O.E. left his house and met Jennifer Leigh Rice in her parked car. During the period between the 10th day of August 2007 and the 11th day of August 2007, Jennifer Leigh Rice did thereby unlawfully and feloniously, with intent to facilitate the crime of rape of a child in the first degree, intentionally abduct O.E. The abduction was accomplished by Jennifer Leigh Rice restraining O.E. in her car and driving him to Ellensburg, WA. At a rest stop near Ellensburg WA, **Jennifer Rice** engaged in penile-vaginal sexual intercourse with O.E. Jennifer Leigh Rice restricted O.E.'s movements without lawful authority and in a manner that interfered substantially with O.E.'s liberty. This was accomplished by O.E.'s acquiescence, as O.E. was 10 years of age at the time, and his parent, guardian, or other person or institution having lawful control or custody of O.E. had not acquiesced to any of these acts. Because O.E. was secreted and held in Jen-

nifer Leigh Rice's moving car, O.E. was in a place and under circumstances where he was unlikely to be found, especially by those persons directly affected by the child's disappearance such as O.E.'s parents and siblings. O.E.'s parents and siblings did not know where O.E. was until O.E. was returned home during the afternoon of August 11, 2007. During this entire time, Jennifer Leigh Rice and O.E. were in the State of Washington. One of the purposes for which Jennifer Leigh Rice committed the crime of Kidnapping was for the purpose of her sexual gratification.

R.E., who is O.E.'s older brother, was born on March 2, 1992. R.E. is not currently and never has been married to Jennifer Leigh Rice. That during the period between the 11th day of July 2007 and the 20th day of July, 2007, Jennifer Leigh Rice did engage in penile-vaginal sexual intercourse with R.E. on two separate occasions occurring on two separate dates and at two separate locations. Each act of intercourse occurred in the State of Washington. R.E. was 15 years of age at the time, and the defendant was more than 48 months older than R.E.

Clerk's Papers (CP) at 62-64.

¶ 4 On August 13, 2007, the State charged Rice with first degree kidnapping of O.E. This charge included a sexual motivation special allegation under former RCW 9.94A.835.[FN2] ***239** On September 12, the State filed an amended information adding six counts of first degree child rape related to various sexual encounters with O.E. between April 2007 and August 2007; four counts of first degree child molestation related to various sexual encounters with O.E. between December 2006 to August 2007; and two counts of third degree child rape related to sexual encounters with R.E. in July and August of 2007. One of the first degree child molestation counts (count IV) included a predatory[FN3] offense special allegation under RCW 9.94A.836.[FN4] All of the counts in the amended information included requests for an aggravating exceptional sentence based on the number of current crimes and a concern that the length of any sentence would permit some crimes to go unpunished. Former RCW 9.94A.535(2)(2005).[FN5]

FN2. Former RCW 9.94A.835 states,

> (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 [former RCW 9.94A.030(42)(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 [former RCW 9.94A.030(42)(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.

FN3. Former RCW 9.94A.030(35) (2006) defines "predatory" in relevant part as,

> (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.

FN4. RCW 9.94A.836 states,

> (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.

FN5. Former RCW 9.94A.535(2) states in relevant part,

> The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:
>
> ....
>
> (c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

¶ 5 On May 15, 2008, Rice moved to dismiss the predatory offense special allegation and the State's requests for an aggravating exceptional sentence. The trial court denied the motion to dismiss the predatory offense special allegation and reserved judgment on the aggravating exceptional sentence issue.

¶ 6 On April 20, 2009, the trial court held a hearing that began with the State filing a second amended information containing only four charges from the first amended information, including (1) the first degree kidnapping of O.E. charge, with a sexual motivation special allegation under former RCW 9.94A.835, ***240** and a new additional special allegation that the victim was less than 15 years old, under RCW 9.94A.837 (count I); [FN6] (2) a first degree child molestation charge for sexual contact with O.E., which included a predatory offense special allegation under RCW 9.94A.836 (count IV); and (3) the two counts of third degree

child rape for sexual contact with R.E. (counts XII and XIII). In the second amended information, the State dropped the request for an aggravated exceptional sentence under former RCW 9.94A.535(2), but it requested sentencing under the nonpersistent offenders sentencing statute, former RCW 9.94A.712 (2006).[FN7] Rice had notice of the second amended information.

FN6. RCW 9.94A.837 states,

> (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.

FN7. In 2008, the legislature amended and recodified former RCW 9.94A.712 at RCW 9.94A.507 as the sentencing of sex offenders statute. LAWS OF 2008, ch. 231, § 56.

¶ 7 Next at the hearing, Rice waived her right to a jury trial and entered into an agreement with the State wherein she stipulated to the aforementioned underlying facts, stipulated that the facts were sufficient to support convictions for the charges and special allegations in the second amended information, and waived her right to challenge the convictions on sufficiency of evidence grounds on appeal. The trial court accepted the stipulated agreement as a knowing, intelligent, and voluntary decision. Based on the stipulated facts, the trial court entered guilty verdicts for all four counts and the corresponding special allegations that were included in the second amended information.

¶ 8 Last, at this hearing, after entering the guilty verdicts, the trial court accepted an amendment to the stipulated agreement. The amendment clarified that, after a successful appeal, during any remand and resentencing without the special allegations, Rice could argue for a minimum sentence at the low end of the standard sentencing range and that the State could argue for a sentence at the high end of the standard sentencing range.

[1] ¶ 9 On July 24, 2009, the trial court sentenced Rice to two concurrent life sentences with a mandatory minimum term of 25 years confinement

on the first degree kidnapping with sexual motivation conviction involving a victim less than 15 years old and the predatory first degree child molestation (counts I and IV). The trial court ordered indefinite community custody based on these convictions. The trial court also sentenced Rice to two concurrent 60 month sentences on the two third degree child rape convictions (counts XII and XIII). Rice timely appeals.

ANALYSIS

SEPARATION OF POWERS

[2][3] ¶ 10 Rice contends that RCW 9.94A.836 , .837, and former RCW 9.94A.835 violate the separation of powers doctrine. Specifically, she argues that the legislature encroached on executive power by enacting statutes that limit a prosecutor's discretion by requiring a prosecutor to charge these ***241** special allegations in specific instances such that the statutes prohibit a prosecutor from plea bargaining.[FN8] The State argues that the legislature did not violate the separation of powers doctrine because article XI, section 5 of the Washington Constitution grants the legislature authority to define the duties and authorities of prosecuting attorneys.[FN9] Because the plain language of the challenged statutes continues to give a prosecutor discretion as to when to file the special allegations, Rice has failed to meet her burden of proving the unconstitutionality of these statutes beyond a reasonable doubt and her claim fails.

FN8. As an initial matter, we note a concern about Rice's standing to bring this challenge. "Only an aggrieved party may seek review by the appellate court." RAP 3.1. An aggrieved party must have a present substantial interest in the subject matter of the appeal and must be aggrieved " 'in a legal sense.' " *State v. Mahone,* 98 Wash.App. 342, 347-48, 989 P.2d 583 (1999) (quoting *State ex rel. Simeon v. Superior Court for King Cnty.,* 20 Wash.2d 88, 90, 145 P.2d 1017 (1944)). Here, Rice asserts as grounds for remand and resentencing that the statutes infringe on a prosecutor's ability to plea bargain with her. But a criminal defendant does not have a constitutional right to a plea bargain. *State v. Yates,* 161 Wash.2d 714, 741, 168 P.3d 359 (2007), *cert. denied,* 554 U.S. 922, 128 S.Ct. 2964, 171 L.Ed.2d 893 (2008); *State v. Tracer,* 155 Wash.App. 171, 190, 229 P.3d 847, *review granted,* 169 Wash.2d 1010, 236 P.3d 205 (2010); *see Weatherford v. Bursey,* 429 U.S. 545, 560-61, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977). Accordingly, because Rice has no right to a plea bargain, she may not be aggrieved in a legal sense by any separation of powers violations if they exist. Moreover, the record shows that in spite of the State filing these special allegations in this case, the State and Rice did reach an agreement wherein the State dropped several of the charges in exchange for Rice stipulating to the facts and their sufficiency to prove the remaining charges. But neither party asked us to address questions regarding Rice's standing and we note that, by the nature of her stipulated agreement, Rice preserved the right to challenge the constitutionality of these statutes on appeal.

FN9. Article XI, section 5 of the Washington Constitution states,

> *The legislature,* by general and uniform laws, shall provide for the election in the several counties of boards of county commissioners, sheriffs, county clerks, treasurers, *prosecuting attorneys* and other county, township or precinct and district officers, as public convenience may require, *and shall prescribe their duties,* and fix their terms of office.
>
> (Emphasis added.)

[4][5] ¶ 11 The decision to determine and file appropriate charges is vested in the prosecuting at-

torney as a member of the executive branch. *State v. Walsh,* 143 Wash.2d 1, 10, 17 P.3d 591 (2001) (Alexander, C.J., concurring); *State v. Tracer,* 155 Wash.App. 171, 182, 229 P.3d 847 (citing *State v. Lewis,* 115 Wash.2d 294, 299, 797 P.2d 1141 (1990)), *review granted,* 169 Wash.2d 1010, 236 P.3d 205 (2010); *State v. Meacham,* 154 Wash.App. 467, 471, 225 P.3d 472 (2010); *see also State v. Korum,* 157 Wash.2d 614, 655, 141 P.3d 13 (2006) (J.M. Johnson, J., concurring in part) (prosecutor's discretion to file charges is an executive function). Deciding whether to plea bargain with a criminal defendant is a function delegated entirely to the executive branch. *State v. Crawford,* 159 Wash.2d 86, 102, 147 P.3d 1288 (2006); *Tracer,* 155 Wash.App. at 187, 229 P.3d 847; *see State v. Moen,* 150 Wash.2d 221, 227, 76 P.3d 721 (2003).

[6] ¶ 12 We review the constitutionality of a statute de novo. *State v. Abrams,* 163 Wash.2d 277, 282, 178 P.3d 1021 (2008). We presume that a statute is constitutional and the burden rests on the challenging party, here Rice, to prove beyond a reasonable doubt its unconstitutionality. *State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp.,* 142 Wash.2d 328, 335, 12 P.3d 134 (2000) FN10

> FN10. Our Supreme Court recently discussed the appropriate language and understanding of the standard of review in challenges to the constitutionality of a statute. *Sch. Dists.' Alliance for Adequate Funding of Special Ed. v. State,* 170 Wash.2d 599, 244 P.3d 1 (2010). A majority of our Supreme Court agreed that the "beyond a reasonable doubt" standard, insofar as this standard means that an appellate court is "fully convinced, after a searching legal analysis, that the statute violates the constitution," is the appropriate standard of review. *Sch. Dists.',* slip. op. at 1-2, --- Wash.2d at ----, 244 P.3d 1 (Stephens, J., concurring).

We do not understand this rephrasing of the standard to be a material departure from the previous standard of review. If it were, it would eradicate the precedential value of all prior cases upholding the constitutionality of a statute, open the floodgates to revive prior statutory constitutional challenges on collateral attack, and raise significant separation of powers concerns. Moreover, such a rephrasing of the standard is not particularly new and the same conceptual understanding of the standard has persisted despite the standard's exact iteration at any single point in time. *See, e.g., Tunstall v. Bergeson,* 141 Wash.2d 201, 220, 5 P.3d 691 (2000) (describing the beyond a reasonable doubt standard of review in. challenges to the constitutionality of statutes as a "demanding standard of review"); *Island Cnty. v. State,* 135 Wash.2d 141, 147, 955 P.2d 377 (1998) (applying a beyond a reasonable doubt standard to a challenge of the constitutionality of a statute and stating that "we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution"); *Grant v. Spellman,* 99 Wash.2d 815, 819, 664 P.2d 1227 (1983) ("When interpreting a statute, every presumption favors validity of an act of the Legislature, all doubts must be resolved in support of an act, and it will not be declared unconstitutional unless it clearly appears to be so."); *State v. Leek,* 26 Wash.App. 651, 658, 614 P.2d 209 ("[A] statute is presumed constitutional and will not be judicially declared otherwise unless its repugnance to the constitution clearly appears."), *review denied,* 94 Wash.2d 1022, 1980 WL 153251 (1980); *see also In re Young,* 122 Wash.2d 1, 59, 857 P.2d 989 (1993) (holding that the basic statutory scheme for civilly committing

sexually violent predators does not violate substantive due process "after a searching inquiry.").

***242** [7] ¶ 13 But we do not make determinations on constitutional issues unless necessary to the determination of a case. *State v. Hall,* 95 Wash.2d 536, 539, 627 P.2d 101 (1981). We review the construction of a statute de novo. *State v. Wentz,* 149 Wash.2d 342, 346, 68 P.3d 282 (2003). Our primary duty in interpreting statutes is to determine and implement the legislature's intent. *State v. J.P.,* 149 Wash.2d 444, 450, 69 P.3d 318 (2003). If the statute's plain language and ordinary meaning is clear, we look only to the statute's language to determine intent. *Wentz,* 149 Wash.2d at 346, 68 P.3d 282.

¶ 14 We do not directly address Rice's separation of powers arguments because they rely on the faulty premise that RCW 9.94A.836, .837, and former RCW 9.94A.835 limit a prosecutor's discretion to file the corresponding special allegations. Former RCW 9.94A.835(1) states that for certain charged sex offenses, "[t]he prosecuting attorney *shall* file a special allegation of sexual motivation ... *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.) The other challenged RCWs contain substantially similar language.[FN11]

FN11. In RCW 9.94A.836(1) and .837(1), the first "when" is replaced with "whenever" and the final prepositional phrases are transposed stating, "[W]ould justify a finding by a reasonable and objective fact-finder [that the offense was predatory/that the victim was under fifteen years of age at the time of the offense]."

¶ 15 Despite the use of the words "shall" and "when"/"whenever," under these three statutes, a prosecutor retains discretion to file or not file the special allegations. Under the statutes, a prosecutor must evaluate the admissibility of evidence and determine the strength of that evidence for obtaining a finding on the special allegation. Accordingly, a prosecutor takes the same actions when deciding whether to file a special allegation as he/she does when determining and deciding what crimes to charge. In both instances, a prosecutor evaluates whether the evidence supports various outcomes and then, based on that evaluation, files or does not file charges and/or special allegations believed appropriate.

¶ 16 RCW 9.94A.836 and .837 include additional language that further delineates the discretion that a prosecutor has for filing the predatory and victim age special allegations. These two statutes provide that the prosecuting attorney "shall file a special allegation ... *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." RCW 9.94A.836(1), .837(1) (emphasis added). Accordingly, even if a prosecutor believes the evidence is strong enough for a reasonable fact finder to enter a finding on either of these two special allegations, he or she can choose (i.e., exercise discretion) not to file the special allegations under certain circumstances. For example, a child victim might refuse to testify at a trial involving a predatory special allegation for fear of consequences to a close family friend being denominated as a "predator." In such an ***243** instance, the statute affords a prosecutor the discretion *not* to file the predatory special allegation.

¶ 17 Contrary to Rice's interpretation of these statutes, a prosecutor must evaluate the individual circumstances of the case to determine whether a special allegation is warranted and is not required to bring the special allegations each and every time he or she files charges of one of the enumerated sex offenses. A plain reading of the statutes belies Rice's argument that the legislature eviscerated the exercise of prosecutorial discretion necessary be-

fore filing these special allegations.

[8] ¶ 18 Moreover, the legislature has the power to define crimes and fix penalties for crimes. *State v. Varga,* 151 Wash.2d 179, 193, 86 P.3d 139 (2004); *State v. Bryan,* 93 Wash.2d 177, 181, 606 P.2d 1228 (1980) ("Determination of crimes and punishment has traditionally been a legislative prerogative, subject to only very limited review in the courts."). Here, the legislature merely requires the prosecutor to *sometimes* file these special allegations *when evidence supports them.* We draw an analogy to the aggravated murder statute where the legislature has prescribed that *when evidence supports and results in* an aggravated first degree murder conviction, the sentence *must* be either death or life without the possibility of parole and not simply a life sentence. Former RCW 10.95.030 (1993).

¶ 19 Accordingly, the three challenged statutes do not unconstitutionally limit prosecutorial discretion nor do they mandate filing special allegations regardless of the individual circumstances of a case. The plain language of the statutes reveals that the legislature did not usurp the prosecutor's charging powers, a core function of the executive branch, when enacting the three challenged statutes. Rice has failed to meet her burden of proving that the statutes are unconstitutional beyond a reasonable doubt and her claim fails.

TRIAL COURT INVOLVEMENT IN PLEA BARGAINING

[9] ¶ 20 Next, Rice argues that RCW 9.94A.836, .837, and former RCW 9.94A.835 improperly inject the judiciary into the plea bargaining process. Specifically, Rice argues that RCW 9.94A.421 prohibits a trial court from participating in the plea bargaining process, whereas the three challenged statutes require the trial court to actively engage in the plea bargaining process. In addition, Rice argues that the three challenged statutes conflict with our decision in *State v. Pouncey,* 29 Wash.App. 629, 630 P.2d 932, *review denied,* 96 Wash.2d 1009 (1981), adopting American Bar Association (ABA) standards restricting a trial court's involvement in plea bargaining. We disagree.

¶ 21 We review statutory construction de novo. *Wentz,* 149 Wash.2d at 346, 68 P.3d 282. Our primary duty in interpreting statutes is to determine and implement the legislature's intent. *J.P.,* 149 Wash.2d at 450, 69 P.3d 318. If the statute's plain language and ordinary meaning is clear, we look only to the statute's language to determine intent. *Wentz,* 149 Wash.2d at 346, 68 P.3d 282. We read provisions of a statute together to determine the legislative intent underlying the entire statutory scheme to achieve a harmonious and unified statutory scheme. *State v. Chapman,* 140 Wash.2d 436, 448, 998 P.2d 282, *cert. denied,* 531 U.S. 984, 121 S.Ct. 438, 148 L.Ed.2d 444 (2000). We read statutes relating to the same subject as complementary, instead of in conflict with each other. *Chapman,* 140 Wash.2d at 448, 998 P.2d 282.

¶ 22 Here, the three challenged statutes and RCW 9.94A.421 are complementary and do not conflict regarding the trial court's role in the plea bargaining process. A trial court cannot "participate in any discussions" between the State and a criminal defendant regarding plea agreements. RCW 9.94A.421. Under the three challenged statutes, a prosecuting attorney must seek trial court approval to dismiss any of these special allegations and the trial court cannot dismiss any of these special allegation unless it determines that it is "necessary to correct an error in the initial charging decision or [ ] there are evidentiary problems that [FN12] make proving ***244** the special allegation doubtful." RCW 9.94A.836(3), .837(3), and former RCW 9.94A.835(3).[FN13]

FN12. RCW 9.94A.836(3) and .837(3) use the word "that" whereas former RCW 9.94A.835(3) uses "which."

FN13. Former RCW 9.94A.835(3) dictates that the trial court "*shall* not dismiss this special allegation" unless one of the conditions is met, whereas RCW 9.94A.836(3)

and .837(3) dictate that the trial court "*may* not dismiss the special allegation" unless one of the conditions is met. (Emphasis added.)

¶ 23 There is no conflict between prohibiting the trial court from participating in plea bargain discussions, under RCW 9.94A.421, yet allowing the trial court to determine whether a special allegation should be dismissed from the charges, as prescribed under the three challenged statutes. Determining the State's ability to withdraw any of these special allegations is not a violation of the legislature's prohibition of a trial court's participation in plea bargain *discussions.* Although the trial court's rulings on purely legal questions may impact the parties' plea bargaining process, that the trial court makes *legal rulings* does not constitute a violation of the legislature's prohibition on a trial court participating in plea bargaining *discussions.*

¶ 24 In addition, requiring the trial court's approval before the State can withdraw a special allegation accords with other trial court powers over some aspects of prosecutorial charging decisions. For example, a trial court can reject a plea agreement that is not "consistent with the interests of justice and with the prosecuting standards." RCW 9.94A.431(1); CrR 4.2(e); [FN14] *State v. Conwell,* 141 Wash.2d 901, 909, 10 P.3d 1056 (2000). A trial court has discretion to reject any amendments to the charging information. CrR 2.1(d); [FN15] *State v. Haner,* 95 Wash.2d 858, 864-65, 631 P.2d 381 (1981); *State v. Powell,* 34 Wash.App. 791, 793, 664 P.2d 1 (1983), *review denied,* 100 Wash.2d 1035, 1984 WL 287678 (1984). Rice argues that these trial court powers are distinguishable because they "have to do with the court's duty to find probable cause that a crime has been committed and the court's duty to assure that proceedings are fundamentally fair." Reply Br. of Appellant at 9 n. 3. We disagree with Rice and see no meaningful distinction between the trial court's necessary approval for the State to withdraw a special allegation under the three challenged statutes and the trial court's discretionary authority to allow the State to amend charging information and reject plea agreements.

FN14. We note that CrR 4.2(e) cites to former RCW 9.94A.090 (1995) as the authority for a trial court to reject a plea agreement. The legislature recodified former RCW 9.94A.090 at RCW 9.94A.431. LAWS OF 2001, ch. 10, § 6.

FN15. CrR 2.1(d) states, "The court *may* permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced." (Emphasis added.)

¶ 25 For similar reasons, Rice's argument that the three challenged statutes irreconcilably conflict with ABA standards adopted by us in *Pouncey* fails. In *Pouncey,* we reviewed and adopted former ABA standards addressing a trial court's involvement in plea bargaining. 29 Wash.App. at 635-36, 630 P.2d 932. Current ABA standards state that a trial judge "should not through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered." 3 AMERICAN BAR ASS'N STANDARDS FOR CRIMINAL JUSTICE: PLEA OF GUILTY, std. 14-3.3(c) (3d ed.1999). Ruling on questions of law that influence the plea bargaining process is not the same as communicating with a defendant about whether to accept or reject any particular plea bargain offer. The language in the three challenged statutes requiring the trial court to evaluate any State requests to withdraw special allegations does not conflict with the ABA standards adopted in *Pouncey.*

¶ 26 RCW 9.94A.836, .837, and former RCW 9.94A.835 do not inappropriately involve a trial court in the plea bargaining process in violation of RCW 9.94A.421 and the ABA standards we adopted in *Pouncey.* Rather, the challenged statutes set out guidelines for a trial court to follow. Accord-

ingly, we hold that RCW 9.94A.836, .837, and former RCW 9.94A.835 do not improperly inject the judiciary into the plea bargaining process and Rice's challenges fail.

*245 DUE PROCESS AND EIGHTH AMENDMENT

[10] ¶ 27 Next, Rice contends that RCW 9.94A.836, .837, and former RCW 9.94A.835 are unconstitutional because they violate her due process rights and the Eighth Amendment. Specifically, she argues that these statutes limit prosecutorial discretion in charging crimes because they prevent a prosecutor from taking into consideration mitigating circumstances. The State argues that no due process violation exists because a prosecutor can consider mitigating circumstances and negotiate with a defendant before filing the charging information. In addition, the State argues that Rice has not met her burden of showing that her sentence rises to the level of cruel and unusual punishment. We discern no error.

¶ 28 Rice's due process and Eighth Amendment challenges fail because she relies again on the same faulty misunderstanding of the three challenged statutes that underlie her separation of powers claim. As we have already explained, under the plain language of the statutes, prosecutors maintain discretion in charging both underlying crimes and the special allegations.

¶ 29 There are at least two points where a prosecutor can review the individual circumstances of a case and exercise discretion. First, a prosecutor can assess any mitigating or aggravating factors before filing charges. A prosecutor may then choose to file charges that do not include the crimes enumerated in the three challenged statutes and, thus, avoid all of Rice's perceived constitutional violations because the challenged statutes would not apply. Second, even if the prosecutor determined that the individual circumstances of the case warranted charging offenses that required *consideration* of filing the special allegations in the challenged statutes, as we previously discussed, the statutes afford the prosecutor latitude in whether to file the special allegations following such consideration. Because the foundation of Rice's due process and Eighth Amendment challenges is rooted in the misperception that prosecutors lack discretion under the statutes, her claims fail.

¶ 30 To the extent Rice's arguments rely on *State v. Pettitt*, 93 Wash.2d 288, 609 P.2d 1364 (1980), and *State v. Green*, 91 Wash.2d 431, 588 P.2d 1370 (1979), *adhered to in part on recons.*, 94 Wash.2d 216, 616 P.2d 628 (1980), these cases are distinguishable. In *Green*, our Supreme Court held that a mandatory death penalty statute was unconstitutional because it did not allow for a consideration of " 'whatever mitigating circumstances may be relevant to either the particular offender or the particular offense.' " 91 Wash.2d at 445, 588 P.2d 1370 (quoting *Roberts v. Louisiana*, 431 U.S. 633, 637, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977)). In *Pettitt*, our Supreme Court held that a "fixed formula which requires a particular action *in every case* upon the happening of a specific series of events constitutes an abuse of the discretionary power lodged in the prosecuting attorney." 93 Wash.2d at 296, 609 P.2d 1364. These cases are distinguishable because the statute and policy struck down in those cases involved mandatory actions by a prosecutor. The statutes challenged in this case do not mandate any actions, despite Rice's repeated claims to the contrary.

SENTENCING ENHANCEMENT DOUBLE JEOPARDY ISSUE

[11] ¶ 31 Rice next challenges the imposition of a sentencing enhancement on her first degree kidnapping conviction as a violation of her right to be free from double jeopardy. Specifically, Rice argues that because the predicate first degree child molestation charge used to charge first degree kidnapping in this case necessarily involves a child victim less than 15 years old, receiving a sentencing enhancement under RCW 9.94A.837, based on O.E.'s young age, constitutes a second punishment for the same offense. We disagree. RCW 9.94A.837

is akin to a sentencing enhancement statute and our Supreme Court recently rejected similar double jeopardy sentencing enhancement arguments in *State v. Kelley,* 168 Wash.2d 72, 226 P.3d 773 (2010), and *State v. Aguirre,* 168 Wash.2d 350, 229 P.3d 669 (2010).

¶ 32 Rice's conviction for first degree kidnapping resulted from her abduction of O.E. with the intent to commit a felony, to-wit: first degree child molestation. RCW 9A.40.020(*1*)(b). First degree child molestation*246 requires that a person 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." RCW 9A.44.083(1). For Rice's offender score of 9, the standard range sentence for her first degree kidnapping conviction was 149 months to 198 months (to life).

[12] ¶ 33 On a finding of the RCW 9.94A.837 special allegation, a defendant's sentence must be enhanced. Sentencing enhancements increase the presumptive or standard sentencing range, but they do not require a finding of an aggravating factor that allows the trial court to consider imposing an exceptional sentence outside the presumptive or standard sentencing range. *State v. Silva-Baltazar,* 125 Wash.2d 472, 475, 886 P.2d 138 (1994). Here, former RCW 9.94A.712(3)(c)(ii) required that, after a finding under RCW 9.94A.837 that a victim was less than 15 years old at the time of the offense, the "minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater." Accordingly, the trial court's finding related to the RCW 9.94A.837 special allegation resulted in an enhancement of Rice's standard range sentence by raising her standard minimum sentence.[FN16]

FN16. We note that Rice's Sixth Amendment jury trial rights are not implicated in this case because she waived her right to a jury trial and stipulated that sufficient evidence supports the charged special allegations.

¶ 34 In *Kelley* and *Aguirre,* our Supreme Court rejected similar double jeopardy sentencing enhancement arguments in the context of firearm and deadly weapon sentencing enhancements. The *Aguirre* and *Kelley* courts held that the imposition of a sentencing enhancement does not violate double jeopardy, even when it coincides with an underlying element of the related conviction. *Aguirre,* 168 Wash.2d at 367, 229 P.3d 669 ("[A]dding a deadly weapon enhancement to Aguirre's sentence for second degree assault, an element of which is being armed with a deadly weapon, did not offend double jeopardy."); *Kelley,* 168 Wash.2d at 84, 226 P.3d 773 ("[I]mposition of a firearm enhancement does not violate double jeopardy when an element of the underlying offense is use of a firearm."); *see also, State v. Eaton,* 143 Wash.App. 155, 160, 177 P.3d 157 (2008) (sentencing enhancements are not separate substantive criminal offenses from the underlying predicate offense), *aff'd,* 168 Wash.2d 476, 229 P.3d 704 (2010).

¶ 35 Without citing authority or analysis, Rice asserts that the *Kelley* court's sentencing enhancement double jeopardy analysis does not apply. We do not consider arguments not developed in the briefs and for which a party has not cited authority. RAP 10.3(a)(6); *State v. Thomas,* 150 Wash.2d 821, 874, 83 P.3d 970 (2004) (citing *Smith v. King,* 106 Wash.2d 443, 451-52, 722 P.2d 796 (1986)). Here, as in *Kelley* and *Aguirre,* Rice's legislatively mandated sentence enhancement does not constitute double jeopardy. Rice's claim fails.

LEGALITY OF SENTENCE

[13] ¶ 36 In her SAG, Rice argues that former RCW 9.94A.712, a statute that required the addition of two concurrent mandatory minimum 25-year sentences to her sentence, violates the trial court's general SRA discretionary sentencing authority under former RCW 9.94A.535. We disagree. Former RCW 9.94A.712, not former RCW 9.94A.535, controls Rice's sentence.

[14] ¶ 37 Generally, issues may not be raised

for the first time on appeal. RAP 2.5(a). Moreover, in the sentencing context, the general rule is that "[a] sentence within the standard sentence range ... for an offense shall not be appealed." RCW 9.94A.585(1). "Illegal or erroneous sentences, however, may be challenged for the first time on appeal." *State v. Nitsch,* 100 Wash.App. 512, 519, 997 P.2d 1000, *review denied,* 141 Wash.2d 1030, 11 P.3d 827 (2000). Accordingly, although Rice did not object at her sentencing hearing, she can challenge the legality of her sentence for the first time on appeal.

¶ 38 We review statutory construction de novo. *Wentz,* 149 Wash.2d at 346, 68 P.3d 282. Where two statutes relating to the ***247** same subject are in apparent conflict, we reconcile them, if possible, so that each may be given effect. *State v. Fagalde,* 85 Wash.2d 730, 736, 539 P.2d 86 (1975). When two statutes pertain to the same subject matter and a conflict cannot be harmonized, the more specific statute supersedes the general statute. *State v. Conte,* 159 Wash.2d 797, 810, 154 P.3d 194, *cert. denied,* 552 U.S. 992, 128 S.Ct. 512, 169 L.Ed.2d 342 (2007).

[15] ¶ 39 Former RCW 9.94A.535 establishes the general rules for when a sentencing court can deviate from SRA standard range sentences. Former RCW 9.94A.712 governs the trial court's sentencing authority for certain enumerated sex offenses and provides,

> (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 [former] RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.

(Emphasis added.) Subsection (3)(c)(ii) lists several sex offenses, including (1) first degree kidnapping with sexual motivation involving a minor less than 15 years old and (2) predatory first degree child molestation, that are subject to mandatory minimum 25-year sentences. Former RCW 9.94A.712(3)(c)(ii). Accordingly, the legislature specifically and expressly limited the trial court's sentencing authority for Rice's convictions. A trial court may exercise discretion in sentencing only where the SRA authorizes discretion. *State v. Shove,* 113 Wash.2d 83, 86-87, 776 P.2d 132 (1989). Thus, the sentencing court applied former RCW 9.94A.712 and properly imposed the mandatory minimum sentence it requires.[FN17] Rice's challenge to the legality of her sentence fails.

> FN17. Moreover, the legislature has amended RCW 9.94A.535 many times over the years, but because of the date of Rice's crime, the 2005 version of RCW 9.94A.535 applies. *Compare* LAWS OF 2005, ch. 68, §§ 3, 7 (providing for the effective date of statutory amendments upon the governor's signature, which occurred on April 15, 2005) *with* LAWS OF 2007, ch. 377, § 10 (effective July 22, 2007). In contrast, the legislature's 2006 amendments to former RCW 9.94A.712 were in effect at the time of Rice's crime. LAWS OF 2006, ch.122, §§ 5, 9 (providing for the effective date of statutory amendments on July 1, 2006). A more recent provision that is more specific than a previously enacted provision prevails. *J.P.,* 149 Wash.2d at 454, 69 P.3d 318. Here, former RCW 9.94A.712 is the more recently amended and more specific statute and controls over former RCW 9.94A.535.

SENTENCING CONFLICT WITH THE PURPOSE OF THE SRA

¶ 40 In the second half of her SAG, Rice argues that her mandatory minimum sentencing conflicts with each of the seven stated purposes of the SRA. We cannot consider many of Rice's arguments and otherwise discern no error.

[16] ¶ 41 The purposes of the SRA are to (1) ensure that punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history, (2) promote respect

for the law by providing punishment that is just, (3) provide commensurate punishment between offenders who commit similar offenses, (4) protect the public, (5) offer the offender an opportunity to improve herself, (6) make frugal use of state and local government resources, and (7) reduce the risk of reoffending in the community. RCW 9.94A.010. Purposes enumerated in the SRA are not in and of themselves mitigating factors in sentencing and may only provide support for exceptional sentences downward once the trial court identifies a mitigating circumstance. *State v. Calvert,* 79 Wash.App. 569, 581, 903 P.2d 1003 (1995), *review denied,* 129 Wash.2d 1005, 914 P.2d 65 (1996).

[17] ¶ 42 As an initial matter, we note that Rice did not-present any arguments or testimony at sentencing requesting a downward departure from the mandatory minimum sentence. Even if the sentencing court had discretion to impose a sentence below the mandatory minimum of 25 years, which it did not, merely citing to the purposes of the SRA as grounds for a downward sentence is not enough to justify a downward departure. *See* former RCW 9.94A.712(3)(c)(ii). Rice would have needed to show specific mitigating circumstances at the sentencing hearing for the trial court to consider. *See* ***248***State v. Freitag,* 127 Wash.2d 141, 145, 896 P.2d 1254, 905 P.2d 355 (1995) (stating that the legislature has already considered the purposes of the SRA in establishing the presumptive sentencing ranges).

[18] ¶ 43 Reaching the merits of Rice's arguments, first she asks us to entertain problems with her offender score calculation that might occur on remand to ensure her sentence is proportionate to the seriousness of her offense. RCW 9.94A.010(1); SAG at 21 ("Should my case be remanded for resentencing I will be sentenced as if I have a significant criminal record."); SAG at 23 ("There is a possibility that my case will be remanded for resentencing in the future. At that time I believe several individual factors should be considered as well as how my offender score will be calculated."). We do not consider what might happen on a speculative remand and do not issue advisory opinions. *State v. Eggleston,* 164 Wash.2d 61, 76-77, 187 P.3d 233 (declining to consider an issue concerning proceedings on remand since it was entirely speculative whether the issue would arise), *cert. denied,* --- U.S. ----, 129 S.Ct. 735, 172 L.Ed.2d 736 (2008); *State v. Davis,* 163 Wash.2d 606, 616-17, 184 P.3d 639 (2008) (declining to consider an issue that might not arise on remand).

¶ 44 Next, Rice reasserts her other SAG argument that mandatory minimum sentences conflict with a trial court's discretionary sentencing authority under the SRA and deprive her of "individualized justice." RCW 9.94A.010(2); SAG at 31. For reasons we already discussed, this argument lacks merit.

¶ 45 Rice further argues that her sentence is not commensurate with sentences imposed on others committing similar offenses. RCW 9.94A.010(3). Rice draws comparisons to less harsh sentences that Washington sex offenders received in cases where she believes the crimes were "similar" or "far more egregious." SAG at 34. But all of the cases that Rice cites are factually distinguishable because none of them involve first degree kidnapping with sexual motivation or predatory first degree child molestation convictions. *State v. Castro,* 141 Wash.App. 485, 170 P.3d 78 (2007) (involving a second degree child molestation conviction); *State v. Partee,* 141 Wash.App. 355, 170 P.3d 60 (2007) (concerning the revocation of a Special Sex Offender Sentencing Alternative (SSOSA) imposed on second degree child rape and second degree child molestation convictions); *State v. McCormick,* 141 Wash.App. 256, 169 P.3d 508 (2007) (concerning the revocation of a SSOSA imposed on a first degree child rape conviction), *aff'd,* 166 Wash.2d 689, 213 P.3d 32 (2009); *State v. Ramirez,* 140 Wash.App. 278, 165 P.3d 61 (2007) (concerning the revocation of a SSOSA imposed on a first degree child rape conviction), *review denied,* 163 Wash.2d 1036, 187 P.3d 269 (2008); *State v.*

Ramirez-Dominguez, 140 Wash.App. 233, 165 P.3d 391 (2007) (concerning a jury waiver challenge related to first degree kidnapping and first degree child molestation convictions that did not include sexual motivation or predatory special allegations); *State v. Letourneau,* 100 Wash.App. 424, 997 P.2d 436 (2000) (concerning conditions of sentencing related to a second degree child rape conviction).

¶ 46 Moreover, it is unclear in many of these cases whether a plea agreement to reduce the number of charges was a factor in the resulting convictions and sentences, making it that much harder for us to consider whether Rice's sentence on her stipulated agreement, which reduced her number of charges, is more or less severe than the cases she asserts are comparable. Finally, Rice attempts to make comparisons to sentences that sex offenders received under other states' statutory schemes. But we do not entertain comparisons with other state court rulings because the authority to fix punishments under sentencing guidelines belongs to the legislative bodies in each state and varies widely.

[19] ¶ 47 Next, Rice argues that several independent evaluators have determined that she is unlikely to reoffend and, therefore, that her sentence does not serve to "protect the public." RCW 9.94A.010(4). This argument considers evidence outside of the record on appeal. On direct appeal, we cannot consider matters outside the record. *State v. McFarland,* 127 Wash.2d 322, 338 n. 5, 899 P.2d 1251 (1995).

***249** [20] ¶ 48 Rice also contends that her sentence deprives her of the opportunity to improve herself because treatment programs in correctional centers prioritize admittance based on how close an offender is to completing her sentence. RCW 9.94A.010(5). She argues that she has tried to obtain voluntary treatment and her doctor believes that treatment outside of incarceration would be "much more appropriate." SAG at 39. The only part of the record discussing treatment programs is Rice's statement at the sentencing hearing that she would undergo voluntary treatment. Otherwise, Rice's argument relies on matters outside the record that we cannot consider. *McFarland,* 127 Wash.2d at 338 n. 5, 899 P.2d 1251.

[21] ¶ 49 Rice next argues that, in light of the economic recession, her incarceration is too cost prohibitive and goes against the SRA's stated purpose of making "frugal use of the state's and local governments' resources." RCW 9.94A.010(6). The purposes of the SRA are not in and of themselves mitigating factors in sentencing. *Calvert,* 79 Wash.App. at 581, 903 P.2d 1003. Moreover, we disagree. Under the circumstances of this case, where Rice abused her position as a public elementary school teacher to engage in multiple inappropriate sexual contacts with two child victims over a period of several months, imposing the legislatively proscribed minimum sentence is not inconsistent with the SRA's intent to appropriately use state resources to protect children.

[22] ¶ 50 Last, Rice argues that because independent medical evaluators determined that she is not likely to reoffend, her sentence does nothing to "[r]educe the risk of reoffending." RCW 9.94A.010(7). Again, Rice relies on evidence outside the record that we cannot consider. *McFarland,* 127 Wash.2d at 338 n. 5, 899 P.2d 1251.

¶ 51 We hold that RCW 9.94A.836, .837, and former RCW 9.94A.835 do not (1) violate the separation of powers doctrine, (2) improperly involve the trial court in the plea bargaining process, or (3) infringe on Rice's due process and Eighth Amendment rights. The imposition of a sentencing enhancement for Rice's victim being less than 15 years old did not violate her right to be free from double jeopardy. And the sentencing court had the authority and duty to impose the mandatory minimum 25-year sentence. Accordingly, we affirm.

We concur: HUNT, P.J., and VAN DEREN, J.

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APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JENNIFER L. RICE,

Appellant.

No. 39600-9-II

ORDER DENYING MOTION FOR RECONSIDERATION

APPELLANT moves for reconsideration of the Court's **January 19, 2011** opinion.

Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Hunt, Quinn-Brintnall, Van Deren

DATED this 16th day of March, 2011.

FOR THE COURT:

Hunt C.J.
PRESIDING JUDGE

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