NO. 39600-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JENNIFER L. RICE,

Petitioner.

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

The Honorable D. Gary Steiner, Judge

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# REPLY BRIEF OF APPELLANT

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## A. ARGUMENT IN REPLY

### 1. THE STATE'S ARGUMENT THAT PROSECUTING ATTORNEYS HAVE NO DISCRETION OR PREROGATIVES WHICH CANNOT BE ELIMINATED BY THE LEGISLATURE IS INCONSISTENT WITH THE SEPARATION OF POWERS DOCTRINE.

The state correctly concedes that the Washington Constitution, in establishing a government with three different branches, created a separation of powers doctrine; and correctly sets out the test for determining whether an action violates the doctrine: "the Appellate Court looks to whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another." Brief of Respondent (BOR) at 7-8 (citing *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994) and *Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975)). The state, however, neither identifies the prerogatives of prosecuting attorneys nor applies the *Carrick* test to determine whether RCW 9.94A.835, .836 and .837 violate the separation of powers doctrine. The state ultimately argues instead that the separation of powers doctrine does not apply to prosecuting attorneys and that the Legislature is constitutionally free to remove a prosecutor's "prerogatives" at will. BOR 11.

The state's argument thus completely ignores the prosecuting attorney's well-established discretion, under the separation of powers

doctrine, to charge or not charge a particular crime defined by the Legislature. *See State v. Meacham.* ___ Wn.2d ___. ___ P.3d _____, 2010 WL 436459 (Wash.App. Div. 2) at ¶ 10 ("The prosecuting attorney is an officer in the executive branch of the government having great discretion to charge offenses") (citing *State v. Walsh*, 143 Wn.2d 1, 10, 17 P.3d 591 (2002) (Alexander, C.J., concurring) ("Under principles of separation of powers, the charging decision is for the prosecuting attorney")); *State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990) (prosecutors have discretion in filing charges); *State v. Korum*, 157 Wn.2d 614, 655, 141 P.3d 13 (2006) (J.M. Johnson, J. concurring) (prosecutor's discretion to file charges is an executive function)).

The state focuses entirely on the Legislature's authority to set the *duties* of the prosecutor and the *area* in which the prosecutor can act: "Although the statute [RCW 36.27.020] grants the prosecuting attorney many duties and authority, they are limited to those granted by the Legistature." BOR at 9. The two cases cited in support of this assertion, *In re Detention of Martin*, 163 Wn.2d 501, 509, 182 P.3d 951 (2008), and *Bates v. School District #10 of Pierce County*, 45 Wash. 498, 501, 88 P. 944 (1907), demonstrate the state's fundamental failure to consider the curtailment of the prosecutor's executive discretion in charging crimes and plea bargaining which is at issue on this appeal. The *Martin* court held that,

under the relevant statute, only the prosecutor in the county where the person was convicted of a crime could file a sexually violent predator charge against him; *Martin* said nothing about the prosecutor's charging discretion for crimes committed in that prosecutor's county. In *Bates* the court held that the fact that a prosecutor was required by statute to give legal advice and draw contracts for school officers did not require the prosecutor to prosecute or defend litigation on behalf of the school officials.

The facts that a prosecutor may not charge people with an offense which has not been enacted as a crime by the Legislature, cannot charge a person with an offense committed outside the state or county in which he has been elected or cannot undertake unauthorized litigation is a distinctly different matter than whether a prosecutor, not the Legislature, has the discretion to determine when an individual should be charged with a particular crime and whether that individual ultimately should be allowed to enter a guilty plea to a lesser or different crime.

The state also lists a number of statutes which prescribe further duties of the prosecutor beyond charging and prosecuting crime: collecting costs awarded where a judgment is entered against a corporation (RCW 7.56.110); prosecuting violations of publication requirements imposed on county commissioners (RCW 36.77.070); enforcing penalties for failure to permit persons to examine records (RCW 38.44.060); restraining illegal

subdivisions (RCW 58.17.200); recovering costs of uncontrolled fires (RCW 76.04.750); and prosecuting suits for non-performance of duty by county officers (RCW 84.09.040).[1] BOR 9-10. The fact of these additional duties, again, is not relevant to the issue of the prosecutor's prerogative to charge crimes or enter plea bargains in carrying out his or her duties. Moreover, RCW 9.94A.411 and RCW 13.40.077, which are listed by the state, do not, as argued, require the prosecuting attorney to file charges any time sufficient evidence exists. These statutes provide that the prosecutor is not required to charge a crime and provides some non-enforceable guidelines for exercise of discretion in deciding whether or not to charge.

The state argues that the Legislature has the power to establish the criminal code and determine punishment. BOR 10. This argument, again, fails to address the issue of whether the prosecutor has discretion to charge or whether it is indeed the prerogative of the prosecutor, not the Legislature, to determine whether a crime should be charged in a particular case. Ultimately, the state simply argues that a prosecutor has no "prerogatives" which the Legislature cannot remove. BOR at 11. This is contrary to *Carrick, Meacham, Lewis* and *Korum*, and the extensive authority cited by appellant in her Opening Brief of Appellant (AOB).

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[1] RCW 18.04.370, a statute listed by the state (BOR 9), simply sets out penalties for a violation of a statute and imposes no duty.

Thus, according to the state's argument in this case, the Legislature could completely strip the prosecuting attorney of all discretion and limit the office to a purely ministerial role in determining whether there are sufficient facts in a given case to charge a crime. No authority is cited for this conclusion and appellant is unaware of any such authority. Given that Article 11, § 5 provides that the Legislature "shall provide for the election of county commissioners, sheriffs, county clerks, treasurers" as well as prosecuting attorneys and "shall prescribe their duties," under the state's theory, the Legislature could also limit the executive branch of county government and effectively undermine the separation of powers doctrine in even more extensive ways.

Contrary to the state's argument, as set out in the Opening Brief of Appellant, 7-20, Washington has a separation of powers doctrine that "serves . . . to insure that the fundamental functions of each branch remain inviolate.: *Brown v. Owen*, 165 Wn.2d 708, 718, 206 P.3d 310 (2009). Even though the federal constitutional separation of powers doctrine applies only to the federal government, Washington courts rely on federal precedent to interpret our constitutional separation of powers doctrine. *Carrick*, 125 Wn.2d at 135, n.1. Under federal and state authority, a prosecutor's power to decide

whether to charge crimes is a core function of prosecuting attorneys as part of the Executive Branch of government. AOB 916. Legislative action to usurp these core executive functions violates the separation of powers doctrine. *See*, AOB at 16-20.

The Legislature may have the power to set the elections for and define duties of county prosecutors; but, once elected, the prosecutor has the executive discretion to carry out its mandated duties.

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

The State argues that mandatory charging statutes do not violate due process or the Eighth Amendment by precluding consideration of mitigation because a prosecutor can consider mitigation before deciding to charge a defendant with a crime which would support a special sentencing allegation under RCW 9.94A.835-.837 just as it currently considers mitigation before charging a crime which would lead to a sentence of life without parole under the Persistent Offender Act (POAA).

> Under RCW 9.94A.835-.837, as with the old habitual criminal statute (former RCW 9.92.080), and currently the POAA, the prosecuting attorney retains the discretion to charge the crime. The prosecutor retains the ability to consider the circumstances of each case and to negotiate an agreed resolution. It is common for prosecutors and defense counsel to structure a resolution where a defendant enters a plea to several counts, even a legal fiction [citation omitted], resulting in a specific lengthy sentence, in order to avoid a life sentence under the POAA.

BOR at 14-15. This argument overlooks the essential difference between the POAA and RCW 9.94A.835-.837.

The POAA is a unique sentencing statute. Upon conviction of a third strike offense, a sentence of life without parole is imposed. Because it is based on past convictions, no persistent offender allegation has to be included in the information or proved to a jury. Further, the POAA does not provide any requirement that a strike offense be charged simply because the evidence would permit such a charge. RCW 9.94A.030(34); RCW 9.94A.570. Unlike the POAA, RCW 9.94A.835-.837, as the state concedes, requires that "when sufficient evidence exists, the prosecuting attorney is required to allege that the offense is 'predatory' [or sexually motivated or the victim was under 15] ." BOR at 5.

Under RCW 9.94A.835, the sexual motivation allegation, the allegation is required "in *every criminal felony, gross misdemeanor, or misdemeanor*, other than sex offenses . . . when sufficient admissible evidence exists. . ." (emphasis added). There are no crimes which the prosecutor could charge to avoid this allegation or conviction for a sex offense. Under RCW 9.94A.836, the allegation must be filed in every prosecution involving rape of a child or child molestation where it might apply. Under RCW 9.94A.837, the under fifteen years of age allegation must be filed in any case involving rape, indecent liberties by forcible

compulsion or first degree kidnapping with sexual motivation.

Even though the parties *might* be able to find a way around charging the RCW 9.94A.836-.837 allegations as they apparently do to avoid charging a third strike, this solution works only for defendants who wish to enter guilty pleas rather than exercise their rights to trial. In fact, the consequences of being charged with one of the allegations are so dire, that the prosecutor's wielding of the possibility of charging one or more of them is unfair and coercive to defendants who wish to go to trial.[2]

Finally, the state limits its argument that RCW 9.94A.835-.837 do not violate the Eighth Amendment and Washington's cruel punishment clause to consideration of whether the sentences set forth in those statutes are arbitrary and shocking to the sense of justice. BOR at 16-17.

The state does not address appellant's argument that mandatory charging statutes violate due process and the Eighth Amendment because such statutes violate the basic concept of individualized consideration. AOB at 20-24. As held in *State v. Green*, 91 Wn.2d 431, 445, 588 P.2d 1379 (1979), Washington's former death penalty statute was

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[2] It may even be that the Pierce County Prosecutor's Office is willing to take the position that it has no independent executive discretion because statutes such as the POAA and possibly RCW 9.94A.835-.837 give it a powerful advantage in plea bargaining. But this argument necessarily admits that discretion is essential, even if it is only discretion to avoid the Legislature's attempt to make the charging of a specific crime mandatory.

unconstitutional precisely because it failed to allow consideration of mitigating circumstances "relevant to either the particular offender or particular offense."

Because RCW 9.94A.835-.837 allow no room for consideration of mitigation with regard to charging or not charging the allegations it offends due process and the Eighth Amendment.

### 3. RCW 9.94A.835, .836 AND .837 CONFLICT WITH RCW 9.94A.837 AND THE ABA STANDARDS ADOPTED IN *STATE V. POUNCY* AND IMPROPERLY INVOLVE THE COURT IN THE PLEA BARGRAINING PROCESS.

The state argues that RCW 9.94A.835-.837 do not conflict with RCW 9.94A.837 or the ABA standards adopted in *State v. Pouncy,* 29 Wn. App. 629, 630 P.2d 932 (1981), or do not improperly involve the court in the plea bargaining process because .835-.837 do not "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] BOR at 20. In fact, these statutes require the trial judge, and not just the prosecutor and defendant, to be an active participant in any plea bargain that involves dismissal of one of the allegations of .835-.837. The judge

[3] The state also argues that other statutes also require the trial court to review or approve charges, citing CrR 2.1(d) and RCW 9.94A.431(1). BOR at 19. These provisions, however, 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.

must determine whether a special allegation can be dismissed as part of a plea bargain by reviewing the initial charging decision and determining whether "there are evidentiary problems that make proving the special allegation doubtful." RCW 9.94A.836(3). In other words, the trial court must be involved to the extent of assessing the strength of the state's case. If this does not communicate that a plea bargain should be accepted or a plea entered, it is only because the trial court must go further and communicate whether it actually can be accepted or whether a plea can be entered.

As set out in the Opening Brief of Appellant 25-36, RCW 9.94A.835-.837 do not concern the same subject matter and do not prevail over the more general statute, RCW 9.94A.421, which expressly prohibits trial judges from participating in plea bargaining discussions. RCW 9.94A.421 sets forth the plea bargaining rules and applies to all crimes from aggravated murder to theft, while .835-.837 in effect create additional elements of other crimes. RCW 9.94A.421 fosters the right of the parties to engage in plea negotiations without interference from the court, while RCW 9.94A.835-.837 is intended to inhibit plea bargaining and involve the court to prohibit plea bargaining between the parties. These statutes do not concern the same subject matter.

Moreover, making special statutes for individual allegations or

crimes could result in a patchwork system under which plea bargaining would be impossible; either prosecutors can engage in plea bargaining with defendants or they cannot. If the trial court becomes involved, the court will have to assume the role of assessing the evidentiary strength of the state's case and will no longer serve an impartial and independent role.

The statutes improperly involve the trial court in the plea bargaining process and conflict with the ABA standards adopted in *State v. Pouncy* and the policy of RCW 0.94A.421.

### 4. IMPOSITION OF THE VICTIM UNDER FIFTEEN ENHANCEMENT VIOLATED DOUBLE JEOPARDY.

Appellant acknowledges that the Washington Supreme Court, in *State v. Kelly*, ____ Wn.2d ___, ___ P.3d ____, 2010 WL 185947 (2010, held that it does not violate double jeopardy to impose a deadly weapon enhancement for an assault where the use of a weapon was an element of the crime.

Nevertheless, appellant argues that her case is distinguishable from *Kelly*. Her conviction of first degree kidnapping reflected an enhanced punishment because of the intent to commit a crime involving a child under the age of fifteen; the crime became first degree kidnapping because of the intent to commit child molestation in the first degree. CP 55-57; RCW 9A.44.083. Her crime should not have been enhanced a second

time with the allegation that the victim was under fifteen.

## B. CONCLUSION

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

DATED this 23rd day of March, 2010.

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CERTIFICATE OF SERVICE

I certify that on the 23rd day of March 2010, I caused a true and correct copy of the Reply Brief of Appellant to be served on the following via first class mail/delivery to his office:

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