NO. 39600-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JENNIFER L. RICE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable D. Gary Steiner

No. 07-1-04202-6

Brief of Respondent

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B. STATEMENT OF THE CASE.

1. Procedure

On August 13, 2007, the Pierce County Prosecuting Attorney (the State) charged Jennifer Rice, hereinafter referred to as the defendant, with one count of kidnapping in the first degree. CP 1. The Information also alleged that the crime was sexually motivated. *Id.* RCW 9.94A.030. On

September 12, 2007, the State filed an amended Information charging one count of kidnapping in the first degree with sexual motivation and alleging the aggravating factor of multiple offenses. The State also charged the defendant with six counts of rape of a child in the first degree, adding the aggravating factor of multiple offenses, four counts of child molestation in the first degree, all alleging the aggravating factor of multiple offenses, and one alleging that the offense was predatory. The State also charged two counts of rape of a child in the third degree with the aggravating factor of multiple offenses. CP 51-52.

The defendant filed a motion to dismiss the allegations that the offenses were predatory and aggravated. CP 10-22. The trial court denied the motion, and entered findings of fact and conclusions of law. CP 44-50.

After negotiation with the State (CP 58-59), the defendant waived her right to a jury trial (CP 67) and proceeded to trial on stipulated facts. CP 60-64. The court found her guilty of all the charges and also found the allegations that Count IV was predatory, and the aggravating factor in the other counts. CP 53-54.

On July 24, 2009, the court sentenced the defendant. CP 68-83. The court sentenced her to 60 months in prison for rape of a child in the third degree (counts XII and XII), and 25 years to life, including the 25 year mandatory minimum, for kidnapping in the first degree and child

molestation in the first degree (counts I and IV). CP 74. After being sentenced, the defendant filed a timely notice of appeal on the same day. CP 87.

2. Facts

The facts in this case will be taken from the stipulation entered by the parties at trial:

> 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 RCW 9.94A.030, 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 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 Jennifer 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.

CP 62-64.

C. ARGUMENT.

1. THE PROVISIONS OF RCW 9.94A.835, 836, AND 837 DO NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

a. The statutory provisions.

When a defendant is charged with rape of a child in the first or second degree, or child molestation in the first degree, and when sufficient evidence exists, the prosecuting attorney is required to allege that the offense is "predatory". Once the allegation is filed, it may not be withdrawn except in certain limited circumstances.

An offense is considered "predatory" if

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

RCW 9.94A.030(35).

The procedure for alleging that an offense is "predatory" is set forth in RCW 9.94A.836, which reads as follows:

> (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.

"A statute is presumed to be constitutional, and the party challenging its constitutionality bears the burden of proving its unconstitutionality beyond a reasonable doubt." ***State v. Abrams***, 163

Wn.2d 277, 282, 178 P.3d 1021 (2008), quoting ***State v. Thorne***, 129 Wn.2d 736, 769-70, 921 P.2d 514 (1996).

b. Separation of powers in Washington.

The federal separation of powers doctrine does not apply to state governments. *See*, ***Sweezy v. State of New Hampshire***, 354 U.S. 234, 255, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957) ("the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments"); ***Hughes v. Superior Court***, 339 U.S. 460, 467, 70 S. Ct. 718, 94 L. Ed. 985 (1950) ("the Fourteenth Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches"); ***Chromiak v. Field***, 406 F.2d 502, 505 (9th Cir. 1969) (federal constitutional doctrine of separation of judicial and executive powers applies only to operation of federal government and is not binding upon the states).

The defendant's separation of powers argument must then rest on the Washington State Constitution. The State Constitution does not have a formal separation of powers clause. ***Brown v. Owen***, 165 Wn. 2d 706, 718, 206 P.3d 310 (2009). However, the structure of the government into different branches results in the functional equivalent. *Id.*, citing ***Carrick v. Locke***, 125 Wn. 2d 129, 882 P.2d 173 (1994).

To determine whether a particular action violates separation of powers, the Appellate Court looks to whether the activity of one branch threatens the independence or integrity or invades the prerogatives of

another. ***Carrick***, at135, citing ***Zylstra v. Piva***, 85 Wn.2d 743, 750, 539 P.2d 823 (1975). In ***Brown v. Owen***, Lt. Governor Owen, the president of the Senate, refused to forward a bill passed by a majority vote of the Senate to the House of Representatives. Senator Brown sought a writ of mandamus from the Supreme Court to require him to do so. The Supreme Court refused to interfere in the internal proceedings of the legislature. 165 Wn. 2d at 720.

In ***Carrick v. Locke***, a shoplifter died while being detained by Carrick and others. Then-King County executive Gary Locke requested that the District Court conduct a coroner's inquiry, as authorized under RCW 36.24. Carrick opposed a court inquest, asserting that determination of the cause of death was a function of the executive branch. The Supreme Court held that the County Executive and the District Court acted within the authority granted by statute and the county charter. 125 Wn. 2d at 145.

Defendant argues that the statute in question violates the separation of powers doctrine. Specifically, the defendant claims that RCW 9.94A.836 (requiring the "predatory" allegation to be filed) is a legislative encroachment into prosecutorial charging discretion, as prosecutors have broad discretion to make charging decisions.

In the Washington Constitution, Article 2, § 1 vests the legislative authority in the legislature. It also grants the people the right to propose laws through initiative or referendum. *Id.* Article 4, § 5 creates the superior courts. Prosecuting attorneys are created or acknowledged under

Art. 11, § 5, "County Government", which reads:

> 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)

In RCW 36.27.020, the Legislature grants prosecuting attorneys their authority. Although the statute grants the prosecuting attorney many duties and authority, they are limited to those granted by the Legislature. *See*, ***In re Detention of Martin***, 163 Wn. 2d 501, 509, 182 P.3d 951 (2008), citing ***Bates v. School District #10 of Pierce County***, 45 Wash. 498, 501, 88 P. 944 (1907).

Many statutes promulgated by the legislature mandate specific action by prosecuting attorneys. *See* RCW 7.56.110 (requiring the prosecuting attorney to institute proceedings to enforce judgment against a corporation), RCW 9.94A.411 (requiring the prosecuting attorney to file charges in cases involving crimes against persons where sufficient evidence exists), RCW 13.40.077 (requiring the prosecuting attorney to file charges in juvenile cases involving crimes against persons if sufficient evidence exists), RCW 18.04.370 (requiring the prosecuting attorney to bring proceedings against those who commit violations of chapter 18 RCW), RCW 36.77.070 (requiring the prosecuting attorney to prosecute

the failure to publicize construction projects), RCW 38.44.060 (requiring the prosecuting attorney to proceed to enforce penalty for failure to allow persons to examine certain records), RCW 58.17.200 (requiring the prosecuting attorney to commence action to restrain illegal subdivisions), RCW 76.04.750 (requiring the prosecuting attorney to bring action to recover costs from uncontrolled fires), RCW 84.09.040 (requiring the prosecuting attorney to prosecute suits for non performance of duty by county officers).

The superior court is established in Article 4, § 5 of the State Constitution. Its jurisdiction and basic authority is established in Article 4, § 6. Even though the State Constitution establishes the superior courts with certain powers, their authority is not unlimited. The courts have the authority to try cases, but the legislature has near plenary authority to establish the criminal code and determine what punishment shall be. *See*, ***State v. Varga***, 151 Wn. 2d 179, 193, 86 P.3d 139 (2004). The legislature has the power to completely change the sentencing code, as it did in RCW 9.94A, the Sentencing Reform Act. The SRA abolished the wide discretion the superior courts had for many years preceding. Even so, this was not a violation of the separation of powers. *See*, ***State v. Ammons***, 105 Wn. 2d 175, 180-181, 713 P.2d 719 (1986).

In ***State v. Mannussier***, 129 Wn. 2d 652, 921 P.2d 473 (1996), the defendant challenged Initiative 593, the Persistent Offender Accountability Act (POAA), in part as a violation of the separation of

powers doctrine. The defendant argued that the POAA gave the prosecuting attorney too much power, through its charging decision, to determine which defendants would be sentenced under the strict provisions of the POAA. The Supreme Court rejected this argument. *Id.*, at 667-668. The Court found the statute constitutional.

While the principle of separation of powers prevents the judiciary from interfering in the legislative process, as in ***Brown v. Owen***, it does not prevent the legislature from limiting the authority or actions of prosecuting attorneys. All of the authority of a prosecuting attorney, unlike that of the superior court, is determined by the legislature. RCW 36.27.020. As pointed out above, Article 11, § 5 of the State Constitution provides that the legislature shall prescribe the duties of the prosecuting attorneys.

Contrary to the defendant's argument, the legislature has not "invaded the prerogatives" of the prosecuting attorney in the enactment of RCW 9.94A.835-837. The legislature controls what the prosecuting attorney is authorized to do. The legislature has the power to create or remove a prosecuting attorney's "prerogatives". Laws enacted by the legislature may be perceived or have the effect of expanding the discretion of the prosecutor, as in the POAA, or contracting it, as in RCW 9.94A.835-837. The legislature in this case has done exactly what the constitution permits. The statutes do not violate the separation of powers doctrine.

2. THE SENTENCING STATUTES IN THIS CASE DO NOT VIOLATE DUE PROCESS OR THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

a. Due Process.

The defendant argues that the statue is unconstitutional because it is mandatory and therefore does not provide for consideration of mitigation. Appellant's Brief at 22. This argument assumes that the defendant has a right to a consideration of mitigating factors. In support of this proposition, the defense cites to ***State v. Pettitt***, 93 Wn.2d 288, 609 P.2d 1364 (1980), where the Supreme Court struck down the Lewis County Prosecuting Attorney's mandatory policy of filing habitual criminal allegations. The Court held that "this 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." *Id,* at 296. However, the right to be free from an abuse of legislatively granted discretion is not the same as the right to have discretion vested in the prosecutor in the first place. The defendant does not have a right to prosecutorial discretion. Also, a defendant has no constitutional right to plea-bargain. ***State v. Yates***, 161 Wn. 2d 714, 741, 168 P.3d 359 (2007).

The defendant does not demonstrate an abuse of discretion in the charging decision, as occurred in ***Pettitt***. For example, she does not show whether efforts to resolve the case were made, which were arbitrarily rejected by the prosecuting attorney. Therefore, ***Pettitt*** does not provide authority for a due process violation in the current case.

For example, the persistent offender accountability act (POAA) mandates a sentence of life in prison without possibility of parole for certain defined offenders. *See* RCW 9.94A.570. The POAA does not allow a prosecutor to exercise discretion whether a defendant is charged as a "persistent offender", nor is the court given any discretion in sentencing. A challenge to the POAA, similar to the instant one, was considered in ***State v. Bridges***, 91 Wn. App. 102, 955 P.2d 833 (1998). There, the defendant argued that the POAA was unconstitutional because it did not allow the court to consider mitigating factors at sentencing. In dismissing the defendant's arguments, the court noted:

> [The defendant] also argues the POAA violates due process because it eliminates judicial discretion to order sentences proportionate to the defendant's criminal history, despite its own statement of purpose that punishment should be proportional to the seriousness of the crime and the defendant's history. But the POAA represents a policy decision that no mitigating circumstances will justify departing from the penalty of life in prison for offenders who repeatedly commit the most serious crimes. That policy decision does not violate due process.

Bridges, 91 Wn. App. at 108, citing ***State v. Thorne***, 129 Wn.2d 736, 921 P.2d 514 (1996).

The defense cites to ***Pettitt*** in support of the argument that prosecutors must exercise discretion. But ***Bridges*** makes it clear that the Legislature has the authority to take away discretion. This is true because the practical effect of the POAA is to accomplish the same prosecutorial policy that the Pettitt court struck down in 1980. Under ***Pettitt***, the prosecutor had discretion to allege that an offender was a "habitual criminal". Once that discretion was given, it was required to be exercised appropriately. But under the POAA, neither the prosecutor nor the court have any such discretion; the prosecutor is not allowed or required to charge an individual as a "persistent offender", and if a person is convicted of a 3rd "strike", the court must impose a life sentence. Read together, ***Pettit*** and ***Bridges*** mean that judicial and prosecutorial discretion may be lawfully limited by the Legislature, but once given it may not be abused.

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 as a legal fiction[1], resulting in a specific lengthy sentence, in order to avoid the life sentence under the POAA. Here, the parties could have discussed the defendant's individual circumstances, and possible alternative resolutions of the case.

Because RCW 9.94A.835-837 restricts the prosecutor's authority to dismiss the allegation, once charged, the negotiation must take place before the charging decision. While the statute restricts the prosecutor's discretion, it does not eliminate it. Therefore, even under the defendant's analysis, there is no due process violation.

Both the separation of powers and the due process arguments must return to the same basic principle: that the prosecuting attorney only has such power and authority as the legislature grants or removes. The legislature has made the policy decision that no mitigating circumstances will justify departing from the penalty of a mandatory minimum of 25 years in prison for offenders who commit certain sex offenses that are "predatory". As with the POAA, such a decision does not violate due process. The defendant has failed to prove beyond a reasonable doubt that RCW 9.94A.836 is unconstitutional.

b. Eighth Amendment.

"The legislature has the power to define offenses and set punishments." ***State v. Freeman***, 153 Wn.2d 765, 771, 108 P.3d 753

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[1] *See*, ***In re Barr***, 102 Wn. 2d 265, 270, 684 P.2d 712 (1984).

(2005). "The legislature represents the people when it determines that a law is necessary, wise, or desirable, and the court is not empowered to substitute its judgment for that of the legislature." ***State v. Smith***, 93 Wn.2d 329, 337, 610 P.2d 869 (1980). When determining whether defendant's criminal penalty violates the constitutional prohibition against cruel and unusual punishment, the appellate court presumes the legislative determination or enactment is constitutional and should not invalidate defendant's penalty because it believes a less severe penalty would adequately serve the ends of public policy. *See* ***State v. Sweet***, 36 Wn. App. 377, 383, 675 P.2d 1236 (1984).

A criminal penalty is grossly disproportionate to the offense so as to constitute cruel and unusual punishment only if the conduct should never be proscribed, or the punishment is clearly arbitrary and shocking to the sense of justice. ***State v. Farmer***, 116 Wn.2d 414, 433, 805 P.2d 200 (1991); ***Smith***, 93 Wn.2d 329, 344-345. Because Washington's constitutional provision barring cruel punishment is more protective than the Eighth Amendment, the Appellate Court need not examine a defendant's claim under the Eighth Amendment if it is satisfied that defendant's sentence is proportionate under the Washington Constitution. United States Constitution, amend. VIII; Washington Constitution Article 1, § 14; ***State v. Thorne***, 129 Wn.2d 736, 772-773, 921 P.2d 514 (1996) (citing ***State v. Fain***, 94 Wn.2d 387, 617 P.2d 720 (1980)).

The defendant does not demonstrate that the punishment is disproportionate to the offense or clearly arbitrary and shocking to the sense of justice. The defendant has not overcome the presumption that the statute is constitutional.

3. IMPOSITION OF THE VICTIM UNDER FIFTEEN YEARS OF AGE ENHANCEMENT DOES NOT VIOLATE DOUBLE JEOPARDY.

The defendant argues that the "victim under age of fifteen" enhancement violates double jeopardy, arguing that in light of ***Blakely v. Washington***, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), and ***Apprendi v. New Jersey***, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), this court must reexamine the well-settled rule that a sentence enhancement imposed for being armed with a firearm does not violate double jeopardy where the use of a deadly weapon is also an element of the offense.

In ***State v. Kelly***, __ Wn. 2d __, __ P.3d __ , 2010 WL 185947 (2010), the Supreme Court rejected the defendant's argument. It held that the legislature can enact statutes imposing, in a single proceeding, cumulative punishments for the same conduct. *Id.*, at 2. "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Id.*, quoting ***Missouri v. Hunter***, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L.Ed.2d 535 (1983). If the

legislature intends to impose multiple punishments, their imposition does not violate the double jeopardy clause. ***Hunter***, at 368. The Washington Supreme Court specifically rejected the ***Apprendi/Blakely*** analysis applied to double jeopardy:

> *Apprendi*, *Blakely*, and *Ring* all concern the Sixth Amendment right to a jury trial. In that context, the Court described aggravating factors that increase punishment as "the functional equivalent of an element" that must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490, 494 n. 19. Similarly, *Ring* says that aggravating factors necessary for imposition of a death penalty "operate as the 'functional equivalent of an element of a greater offense.' "*Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494 n. 19). None of these cases concern the double jeopardy clause.

Kelly, at 5.

The mandatory language of these statutes that the defendant challenges also illustrates clear legislative intent. Because the intent of the legislature is unambiguous in its desire to authorize additional punishment on crimes committed where the victim is under the age of fifteen, even when such crimes include the age as an element, double jeopardy is not violated.

4. RCW 9.94A.835, 836, AND 837 DO NOT INVOLVE THE TRIAL COURT IN PLEA BARGAINING.

A trial court is not to participate in plea negotiations. In ***State v. Pouncy***, 29 Wn. App. 629, 630 P.2d 932 (1981), the Court of Appeals adopted the ABA Standards in the absence of a state statute or court rule.

Id., at 635. Part of the ABA Standard quoted by the Court stated:

> [T]he judge should never 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.

Id. Later, under the Sentencing Reform Act, the legislature incorporated the principle that the court may not participate in plea discussions. *See*, RCW 9.94A.421.

The defendant argues that RCW 9.94A.835-837 unlawfully injects the court into the plea bargaining process. The statute requires the approval of the court to withdraw the special allegations. Court review or approval of charges is also required in other statutes and rules regarding charging and pleas. Under CrR 2.1(d), the court has the discretion to accept or reject an amended information. Under RCW 9.94A.431(1), the court is required to determine if a plea agreement is consistent with the interests of justice and with prosecuting standards. *See, also* CrR 4.2(e). If the court determines that it is not, it may reject the plea agreement. *See*, ***State v. Conwell***, 141 Wn. 2d 901, 909, 10 P. 3d 1056 (2000).

The provisions of RCW 9.94A.835-837 do not require or imply that the trial court "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." The provisions require the court to review a request to dismiss the special allegations and provide a standard for the court's decision. These provisions are all within the legislature's power to enact laws.

The defense does not make any constitutional argument in support of the claim. Rather, the defense complains that the statute should be struck down because it conflicts with a more general statute. "[I]f 'concurrent general and special acts are in pari materia and cannot be harmonized, the latter will prevail, unless it appears that the legislature intended to make the general act controlling.'" ***State v. Conte***, 159 Wn.2d 797, 803, 154 P.3d 194 (2007). In this case, the general statute mandates that the court shall not participate in plea negotiations, while the specific statute mandates that the court not dismiss the predatory allegation except in limited circumstances. To the extent that the statutes conflict, and it is not clear that they do, the specific statute controls. The defense argument again fails.

D. CONCLUSION.

The mandatory sentencing provisions of RCW 9.94A.835, 836, and 837 do not violate the Washington or United States Constitutions. The trial court applied the law as required and authorized by statute. There was no error. The State respectfully requests that the judgment and sentence be affirmed.

DATED: March 3, 2010.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

obsmz & Rita Griffith

3-3-10 Theresa Ka
Date Signature

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