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**SUPREME COURT OF THE  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JENNIFER RICE, PETITIONER

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

No. 07-1-04202-6  
Court of Appeals # 39600-9-II, 159 Wn. App. 545 (2011)

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**SECOND SUPPLEMENTAL BRIEF OF RESPONDENT**

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MARK LINDQUIST  
Prosecuting Attorney

By  
THOMAS C. ROBERTS  
Deputy Prosecuting Attorney  
WSB # 17442

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

**ORIGINAL**

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A. ISSUES PERTAINING TO PETITIONER'S SECOND SUPPLEMENTAL BRIEF.

1. Whether the principle of harmless error applies to the challenge to the constitutionality of these statutes, where the defendant asserts that the statutes affected the discretionary charging powers of the prosecuting attorney, not a trial error affecting the verdict?
2. Whether RCW 9.94A.507(3)(c)(ii) and the severability provision of RCW 9.94A.924 would permit a prosecuting attorney to plead and prove the same sentencing aggravators addressed in RCW 9.94A.835-837, effecting the same result in this case?

B. STATEMENT OF THE CASE.

1. Procedure

Shortly before this case was argued to this Court, the Court issued the opinion in *State v. Gresham*, - Wn. 2d -, - P.3d - (2012)(#84148-9, 2012 WL 19664). The defendant filed a Second Supplemental Brief. The Court permitted the State to file a Second Supplemental Brief to discuss the issues raised by the defendant. This Court heard argument, without the current additional issues, on January 17, 2012.

C. ARGUMENT.

1. THE PRINCIPLE OF HARMLESS ERROR, AS DISCUSSED IN *STATE V. GRESHAM*, DOES NOT APPLY TO THE PRESENT CASE.

a. The doctrine of harmless error.

The doctrine of harmless error applies to the conduct or results of a trial. See, e.g., *Rose v. Clark*, 478 U.S. 570, 576-578, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). There, the United States Supreme Court observed:

[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.

*Id.*, at 579.

So, some constitutional errors are also subject to a harmless error analysis. For example, in *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), the United States Supreme Court held that the constitutional violation of a coerced confession was subject to a harmless error analysis. *Id.*, at 310 (opinion of Rhenquist, C.J.). This was because it was a “classic trial error.” *Id.*, at 309.

In *State v. Gresham*, - Wn. 2d -, - P.3d – (2012)(#84148-9, 2012 WL 19664), the Washington Supreme Court examined a trial error: the

admission of evidence of the defendants' prior sexual conduct. That evidence was admitted under RCW 10.58.090.

The Court found that RCW 10.58.090 to be unconstitutional. The statute could not be harmonized with ER 404(b), which had been promulgated under the rule-making authority of the Supreme Court. Therefore, enactment of the statute violated the separation of powers under the Washington Constitution. *Id.*, slip op. at 27.

Both RCW 10.58.090 and ER 404(b) governed the admissibility of evidence; specifically evidence of a defendant's prior acts. Where the Court found that the evidence of the defendant's prior sexual conduct was admitted erroneously, the Court engaged in a harmless error analysis to determine if, even absent the error, the defendant would have been convicted. *Id.*, slip op., at 28.

In Ms. Rice's case, the evidence was stipulated; thereby obviating any issues regarding the admission of evidence. Ms. Rice waived jury, making the court the sole fact-finder, making instructions unnecessary and avoiding the potential legal issues often accompanying them. Thus, no "trial error" is presented for a harmless error analysis as contemplated by *Clark* and *Fulminante*, *supra*.

Ms. Rice instead challenges the constitutional validity of the sentencing provisions of RCW 9.94A.835-837. She specifically asserts that the prosecuting attorney cannot be forced or required to charge or allege the provisions of RCW 9.94A.507. With certain exceptions, this

does not present an issue of a “harmless error” analysis, but one of statutory construction.

2. ASSUMING, *ARGUENDO*, THAT THE MANDATORY LANGUAGE OF RCW 9.94A.835-837 VIOLATES THE CONSTITUTION, THE RESULT OF THE TRIAL AND THE SENTENCE IN THIS CASE REMAIN THE SAME.

a. The effect of statute invalidity.

Generally, a facially invalid statute is “a nullity.” See *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P. 3d 875 (2004). There, the Court held that mandatory suspension of driver’s license under RCW 46.20.289 unconstitutional. “The remedy for holding a statute facially unconstitutional is to render the statute totally inoperative.” *Id.*, citing *In re Detention of Turay*, 139 Wn.2d 379, 417, 986 P. 2d 790 (1999). A statute which is void for conflicting with the Constitution “is of no force and effect.” *City of Seattle v. Grundy*, 86 Wn.2d 49, 541 P. 2d 994 (1975). There, a prosecution under Seattle’s “prowling” ordinance was dismissed where a similar ordinance had been found unconstitutional, and therefore void, in *Bellevue v. Miller*, 85 Wn.2d 539, 536 P.2d 603 (1975).

b. The effect of a severability provision.

Where there is a severability section, portions of a statute may continue to be valid where another portion has been found to be unconstitutional. In *State v. Abrams*, 163 Wn.2d 277, 285, 178 P. 3d 1021



(2008), the Supreme Court held that part of RCW 9A.72.010, the perjury statute, was unconstitutional. The offending provision required the trial judge to determine the materiality of the false statement as a matter of law. However, the remainder of the statute was upheld as valid because of the severance provision of RCW 9A.04.010(4).

In *McGowan v. State*, 148 Wn.2d 278, 60 P. 3d 67 (2002), I-732, §2(1)(a)<sup>1</sup> mandated a cost of living adjustment for school district employees. The Supreme Court found that section unconstitutional. However, the remainder of Initiative 732 was valid because of its severability provision. *Id.*, at 294-295.

If the defendant is correct that RCW 9.94A.835-837 unconstitutionally requires the prosecuting attorney to charge the sentencing enhancements, that is not the end of the inquiry. The sentencing act, RCW 9.94A, contains a severability section: 9.94A.924. The Court must look to see if the challenged statutes survive after the offending provisions have been removed.

- c. The validity of the sentencing provisions of RCW 9.94A.507 remain unchanged.

There is no question that, subject to constitutional limitations, the Legislature has plenary authority to determine what acts shall be deemed

criminal and the sentences to be imposed for the violation of the criminal code. *See, e.g., State v. Varga*, 151 Wn.2d 179, 193, 86 P. 3d 139 (2004); *State v. Ammons*, 105 Wn.2d 175, 180, 713 P. 2d 719 (1986). The Legislature, therefore, has the power to enact the sentencing provisions or enhancements described in RCW 9.94A.507(3)(c)(ii)<sup>2</sup> that were imposed in this case.

Therefore, if the offensive mandatory provisions in RCW 9.94A.835(1), 836(1), and 837(1) are stricken, or even changed to permissive or advisory, the result in this case is the same. 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 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.
- (2) In a criminal case wherein there has been a special allegation the state shall prove beyond a reasonable doubt that the accused committed the crime with a sexual motivation. The court shall make a finding of fact of whether or not a sexual motivation was present at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not the defendant committed the crime with a sexual motivation. This finding shall not be applied to sex offenses as defined in RCW 9.94A.030.
- (3) The prosecuting attorney shall not withdraw the special allegation of sexual motivation without approval of the

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<sup>1</sup> Parts of which were later codified as RCW 28A.400.205.

<sup>2</sup> Formerly RCW 9.94A.712.

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.

Sections (1), (2), and (3) of .836 and .837 are similar, but not identical.

If the Court strikes section (1), the remaining sections (2) and (3) would still be valid under severance. In the remaining sections, the Legislature provides procedures for the intent of these statutes and RCW 9.94A.507 to be carried out. None of those provisions violate the constitutional principles argued here.

In the present case, the court, as fact-finder, followed the procedures as required in RCW 9.94A.835(2), .836(2), and .837.(2). The court's findings are supported by the stipulated facts. Those findings, which support the sentence imposed, are unchanged even if the first section is stricken as unconstitutional. Therefore, Ms. Rice's judgment and sentence would remain unchanged.

Under RCW 9.94A507, the prosecuting attorney always had, and continues to have, the authority to allege the enhancements, resulting in the same sentence for the defendant. The record in this case does not demonstrate that, absent the provisions of RCW 9.94A.835 – 837, the prosecuting attorney would not have included the enhancements.

D. CONCLUSION.

This Court need not revisit *State v. Gresham*, nor engage in a harmless error analysis in this case. The structure and provisions of RCW 9.94A.507, 9.94A.835-837, and 9.94A.924 permit the same allegations and resulting sentence for Ms. Rice, even if the Court finds that the mandatory language of RCW 9.94A.835-837 is unconstitutional.

DATED: January 30, 2012

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



THOMAS C. ROBERTS  
Deputy Prosecuting Attorney  
WSB # 17442

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.

1.30.12   
Date Signature