NO. 85893-4

STATE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JENNIFER RICE,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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"There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates . . ."

Charles de Secondat
Baron de Montesquieu
***Spirit of the Laws* (1752)**

A. INTRODUCTION

The central issue in this case is whether the Legislature can divest a prosecutor of his executive power to decline to bring a criminal charge against a person even though there is sufficient evidence to prove the charge. The Court of Appeals held that such legislation does not violate the separation of powers doctrine.

Petitioner Rice submits that the ruling below opens the door to legislative usurpation of executive power in a way that threatens the basic framework of our government. Consider a few recent examples of the exercise of executive branch discretion which would be threatened if the constitutionality of such legislation is sustained.

In April of 2009, President Obama announced that the Justice Department would not prosecute any CIA agents for the crime of torture based on the use of harsh interrogation techniques such as waterboarding. *New York Times*, April 20, 2009, "Pressure Grows to Investigate Interrogations." Under the legal theory advanced by the Court of Appeals, Congress could override the President by passing legislation which directed that criminal charges of torture under 18 U.S.C. § 2340A must be

filed in every case in which Justice Department prosecutors have sufficient evidence to prove the charge.

In *California v. United States*, 104 F.3d 1086, 1090 (9th Cir. 1997) a state brought suit against federal law enforcement officials alleging that they were failing to enforce the criminal laws against illegal immigration by failing to conduct deportation proceedings and by failing to prosecute deported aliens who illegally reenter the country. The Ninth Circuit affirmed the dismissal of this lawsuit on the ground that the claims brought by the State were nonjusticiable because the decision whether or not to prosecute was an executive enforcement decision committed to the executive agency's absolute discretion. *California,* 104 F.3d at 1094, citing *Heckler v. Cheney,* 470 U.S. 821, 831, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985). Under the theory put forth by the Court below, Congress could enact a law *forcing* the Attorney General and federal immigration officials to prosecute every one of these cases.

If the Court of Appeals ruling is sustained, the Legislature could force prosecutors to prosecute every noncustodial parent who commits second degree custodial interference by intentionally retaining a child for one extra hour past the expiration of a court ordered period of child visitation; every person who drove without a driver's license, even if they were driving to a drug store to pick up medicine for a sick relative, and every

person who steals, even if he is only stealing food for his children.[1]

James Madison, writing under the name Publius, described the doctrine of separation of powers as an "essential precaution in favor of liberty," and condemned the "accumulation" of legislative and executive power "in the same hands" as "the very definition of tyranny." No. 47, *The Federalist Papers* (1778). Madison assured his readers that contravention of the principle of separation of powers was "not among the vices of [the] Constitution," because, *inter alia*, "the entire legislature, again, can exercise no executive prerogative . . ." By upholding statutes which compel prosecutors to bring criminal charges whenever the evidence is sufficient to prove them, the decision below permits the very accumulation of legislative and executive power in the same hands which the framers, such as Madison, described as an aspect of tyranny.

Prosecutors are elected officials. If a prosecutor adopts an enforcement priority that seems misguided to the electorate, an easy political remedy can be secured through the ballot. The people elected their legislators to legislate, not to choose who to prosecute; and they

[1] In Victor Hugo's novel *Les Miserables*, the prosecutor Javert is cast as a heartless villain because he chooses to prosecute Jean Valjean and to seek a prison sentence for the crime of stealing a loaf of bread. In the movie version of the book, Javert voices his belief that every single offender must be punished without regard to his circumstances saying, "It's a pity the law does not allow me to merciful." See http://www.1-famous-quotes.com/quotes/movie/Mis%C3%A9rables,+Les/pg/2. Applying the logic of Court below, the Washington Legislature could compel prosecutors to prosecute all such bread thieves, no matter how extenuating their individual circumstances might be.

elected their prosecutors to choose who to prosecute, not to be servants of the legislature. The three statutes challenged in this case seek to deprive the electorate of the right to choose prosecutors who may elect *not* to file every provable charge.

B. ARGUMENT

1. RCW 9.94A.835(1), .836(1) AND .837(1) VIOLATE THE SEPARATION OF POWERS DOCTRINE BECAUSE, IN ENACTING THESE STATUTES, THE LEGISLATURE USURPED THE DISCRETIONARY CHARGING POWER OF THE PROSECUTOR'S OFFICE.

RCW 9.94A.835(1), .836(1), and .837(1) violate the separation of powers doctrine because the legislature, in each provision, unambiguously requires the prosecutor to charge the allegations in every case if there is enough evidence to support it. This mandatory charging legislation takes away the prosecutor's exclusive executive discretion *not* to charge even where there is sufficient evidence to support a conviction. Such statutes invade the prerogative of the prosecutor's office by taking away its charging discretion, threaten the independence and integrity of the office, and violate the separation of powers doctrine.

The legislature has the power to define crimes and set punishment. It does not have the power to require the prosecutor to charge a crime. The decision to charge or not charge in a particular case is an executive function. When the legislature goes beyond defining a criminal allegation

or enhancement to telling the prosecutor that the allegation must always be charged, it violates the separation of powers doctrine.

2. RCW 9.94A.835(1), .836(1) AND .837(1) ARE MANDATORY CHARGING STATUTES; IN EACH STATUTE THE LEGISLATURE REQUIRES THE PROSECUTOR TO CHARGE AN ENHANCEMENT IN EVERY CASE WHERE THERE IS SUFFICIENT EVIDENCE TO SUPPORT IT.

By enacting RCW 9.94A.835(1), .836(1) and .837(1), the legislature plainly requires the prosecutor to charge the enhancement created in each statute in every case where there is sufficient evidence to obtain a conviction. Further, the prosecutor may not dismiss an enhancement through plea bargaining:

RCW 9.94A.835(1) provides that:

> ***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) similarly provides that:

> 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) also provides that:

> 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) precludes the prosecutor from dismissing the allegation unless there are evidentiary problems or an error in the initial charging decision:

> ***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).[2]

The statutes are clear and unambiguous, if there is evidence sufficient to obtain a conviction in light of the most reasonably foreseeable defense, the enhancements must be charged. The only exception is where there is a possibility of losing a conviction on the underlying offense because of the victim's concern about the enhancement – an issue which is outside of the control of the prosecutor. RCW 9.94A.836 and .837.

The fact that these statutes leave prosecutors with the "discretion" to decline to charge an allegation when they know they do not have the evidence to prove it – that is, when it would be unethical to bring such a charge -- does not suffice to save these statutes from their unconstitutionality. The "discretion" to act unethically is not a meaningful form of "discretion." Bringing charges that the prosecutor knows he probably cannot prove simply amounts to a form of illegal harassment. The Rules of Professional Conduct specifically state: "The prosecutor in a

[2] 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.

criminal case shall (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause . . ." RPC 3.8(a). Similarly, 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).

Consequently, the Court of Appeals rationale that these statutes leave the prosecutor a measure of "discretion" to decline to file charges where the evidence to support them doesn't exist simply ignores the fact that the prosecutor never had such discretion in the first place. A prosecutor who deliberately files a criminal charge knowing that he does not have sufficient evidence to prove it is doing something for which he can (and should) be *disbarred.* RPC 3.8(a). The "discretion" to engage in unethical conduct for which one can be disbarred is a totally meaningless type of "discretion." No ethical prosecutor ever exercises this type of "discretion." The only meaningful type of discretion – the discretion not to bring a charge for which there *is* sufficient evidence to support a conviction – is taken away from prosecutors by the three statutes at issue.

If there is sufficient evidence to obtain a finding, and if charging the allegation does not jeopardize a conviction on the underlying offense, the

prosecutor must charge the enhancement and may not dismiss it on any grounds other than evidentiary insufficiency as found by a judge. Consequently, the three statutes are mandatory charging statutes in every real and practical sense. In Ms. Rice's case, because she was a teacher and because her alleged victim was her student, the statutes required the prosecutor to file the predator enhancement and the victim under 15 enhancement. RCW 9.94A.836(1); RCW 9.94A.030(35). Given the underlying charge of rape of a child, the prosecutor had no discretion under the statutes to elect not to charge these special allegations as well.

3. THE PROSECUTOR'S OFFICE HAS DISCRETION AS PART OF THE EXECUTIVE BRANCH TO CHOOSE NOT TO FILE A CHARGE EVEN WHEN THERE IS SUFFICIENT EVIDENCE TO PROVE IT.

Prosecutors have always had the discretion 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, 97 S. Ct, 2044, 52 L. Ed. 2d 752 (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 *Lovasco* with approval, and to the ABA Criminal Justice Standards, for the proposition that a prosecutor has discretion not to bring a charge even though he or she 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). RCW 9.94A.835(1), .836(1), and .837(1), eliminate the prosecutor's discretion to plea bargain, by providing that the allegations, 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).

In Washington, the prosecutor not only has discretion to refrain from filing charges even when there is sufficient evidence to obtain a conviction, the prosecutor's office must exercise this discretion. 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.

> 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 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.

The three statutes at issue in this case 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.[3]

4. THE POWER TO MAKE THE DISCRETIONARY CHARGING DECISION IS "EXCLUSIVELY EXECUTIVE."

If the prosecutor is to have discretion not to charge even when there is sufficient evidence to do so and to dismiss charges through plea bargain, that discretion must be the prosecutor's prerogative, not the legislature's. This Court has recognized that it is. "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).

In *State v. Korum*, 157 Wn.2d 614, 655, 141 P.3d 13 (2006) this Court referred to power of a prosecutor to make "the discretionary charging decision ***that courts have long recognized as exclusively executive.***" (Emphasis added). *See also State v. Finch*, 137 Wn.2d 792, 809, 975

[3] 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.

P.2d 967 (1999) (charging decision is executive, not adjudicatory); *State v. McDowell,* 102 Wn.2d 341, 345, 685 P.2d 595 (1984) ("it remains a prosecutorial duty to determine the extent of society's interest in prosecuting an offense."); *State v. DiLuzio*, 121 Wn. App. 822, 90 P.3d 1141 (2004)(the decision to refer a defendant to drug court is one properly committed to the discretion of an executive branch official); *State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990) (the right to charge a single or multiple counts is vested in the prosecutor).

Prosecutors, not legislators, have the discretion to charge or not to charge a crime.

5. SIMILARLY, UNDER FEDERAL SEPARATION OF POWERS PRINCIPLES, ABSENT SOME FORM OF UNCONSTITUTIONAL DISCRIMINATION SUCH AS CHARGING ONLY RACIAL MINORITIES, THE DECISION OF WHETHER OR NOT TO BRING A CRIMINAL CHARGE IS "ENTIRELY" AN EXECUTIVE DECISION OVER WHICH THE PROSECUTOR HAS "ABSOLUTE" DISCRETION.

Although the Washington Constitution does not contain a formal separation of powers clause, "[n]onetheless, the very division of our government into different branches has been presumed throughout our state history to give rise to a vital separation of powers doctrine." *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009), quoting *Carrick v. Locke,* 125 Wn.2d 129, 135, 882 P.2d 173 (1994). "The doctrine serves

mainly to insure that the fundamental functions of each branch remain inviolate." *Brown*, 165 Wn.2d at 718; *Carrick,* 125 Wn.2d at 135; *In re Salary of Juvenile Director*, 87 Wn.2d 232, 238-240, 552 P.2d 163 (1976). The discretion invested in the executive branch necessarily dictates that another branch cannot take away that discretion.

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

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

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, 105 S. Ct. 1542, 54 L. Ed. 2d 547 (1985), quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S. Ct. 663, 54 L. Ed, 2d 604(1978) (emphasis added).

Similarly, in *Heckler v. Chaney,* 470 U.S. 821, 831, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (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).[4]

In *United States v. Armstrong*, 517 U.S. 456, 116 S. Ct. 1480, 134 L.

[4] 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).

Ed. 2d 687 (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 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).

Here, the Washington Legislature violated the separation of powers doctrine by usurping the prerogative of the executive branch to decide who to charge. By enacting laws which state that a prosecutor is required to bring criminal allegations in *every* instance where sufficient proof exists the legislature went beyond merely *making* the criminal laws, it also arrogated to itself the power to *execute* them as well. It is precisely this Legislative "accumulation" of both legislative and executive power into

legislative hands which Madison characterized as "the very definition of tyranny." No. 47, *The Federalist Papers* (1778).

6. PROSECUTORS HAVE THE EXPERTISE AND EXPERIENCE TO MAKE INDIVIDUALIZED CHARGING DECISIONS. LEGISLATORS HAVE NO SUCH EXPERTISE, AND DO NOT HAVE ACCESS TO THE SPECIFIC FACTS OF THE HUNDREDS OF CASES WHERE INDIVIDUALIZED CHARGING DECISIONS MUST BE MADE.

Courts generally abstain from second-guessing a prosecutor's decision to charge or refrain from charging a crime. *United States v. Edmonson*, 792 F.2d 1492, 1497 (9th Cir. 1986), (prosecutor has discretion to charge under either a misdemeanor or felony statute); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379-380 (2nd Cir. 1973) (courts uniformly refrain from overturning decisions not to prosecute). The doctrine of separation of powers requires judicial respect for the discretion of the prosecutor. *United States v. Redondo-Lemas*, 955 F.2d 1296, 1298-1299 (9th Cir, 1992), *overruled on other grounds, United States v. Armstrong,* 48 F.3d 1508 (9th Cir. 1995). The executive branch has "exclusive and absolute discretion to decide whether to prosecute." *Edmonson*, at 1497 (citing *United States v. Nixon*, 418 U.S. 683, 693-694, 94 S. Ct. 3090, 41 L. Ed. 2d 1039) (1974)). This discretion to prosecute "carries with it the discretion to choose the statute that will be filed." *Id.* (citing *United States v. Batchelder*, 442 U.S. 114, 124, 99 S. Ct. 2198, 60

L. Ed. 2d 755 (1979))

The prosecutor's decision is comprised of many factors and not suited for broad judicial oversight. *Redondo-Lemas*, at 1298.

> [The charging decision of a prosecutor is a] decision of careful professional judgment as to the strength of the evidence, the availability of resources, the visibility of the crime and the likely deterrent effect on the part of the defendant and others similarly-situated.

Id, at 1299 (citing *Wayte*, *supra*, at 607-698)

As noted by the author Steven Reiss when discussing selective prosecution claims, there are a myriad of reasons why a prosecutor might decline to file charges in one instance and not another.

> Because of the myriad of factors that could affect a prosecutor's decision to bring charges, including the strength of the evidence, the culpability of the offense, and the need to send out various enforcement signaling, courts are generally unwilling to infer a discriminatory intent from statistics alone.
>
> .... It will often be difficult to determine [whether the charging decision was improper], this is so because of the host of reasons why a prosecutor legitimately might choose to prosecute a particular defendant.

Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedures,* 135 UPALR 1365, 1365 (July 1987).

All of the reasons why judges decline to second-guess or review the prosecutor's charging decisions apply with even greater force to legislators who also have no ability to consider a particular case or

charging decision, and are uninformed as to any of the "myriad" of factors which might rightfully influence a charging decision.

Further, the prosecutor's discretion in charging and plea bargaining allows the prosecutor and accused to benefit from mitigating information provided by the defense. *See State v. Rowe*, 93 Wn.2d 277, 609 P.2d 1348 (1980); *State v. Gilcrist*, 91 Wn.2d 603, 590 P.2d 809 (1979), *State v. Lee*, 87 Wn.2d 932, 558 P.2d 236 (1976); and *State v. Nixon*, 10 Wn. App. 355, 517 P.2d 212 (1973). In *Rowe*, the court explained:

> The written standards as thus interpreted fully provide the procedural due process recognized in [*Gilcrist, Lee* and *Nixon]*. The standards establish and employ two classes of criminal conduct, and exceptions thereto, to determine whether habitual criminal charges should be filed. As noted above, the classifications are both reasonable and logical. **Moreover, the standards provide for prosecutorial discretion, thus permitting an individualized tempering of charges. . . .** Further, although not required by *Lee*, *Gilcrist* or *State v. Cooper*, 20 Wn. App. 659, 583 P.2d 1225 (1978), ...[the standard] provides for input by defense counsel through consideration of a defendant's cooperation (which would include plea bargaining), and by allowing consideration of factors going to mercy and manifest injustice.

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

In *Pennsylvania ex rel Sullivan v. Ashe*, 302 U.S. 51, 61, 58 S. Ct. 59, 82 L. Ed. 43 (1937) the Court noted:

> For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into

> account the circumstances of the offense together with the character and propensities of the offender. His past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him.

Prosecutors, with input from the defense, have the expertise to consider the many factors which comprise the charging and plea bargaining decisions. The legislature has neither the authority nor the expertise to do so.

C. CONCLUSION

For these reasons, Petitioner Jennifer Rice asks this Court to reverse the Court of Appeals decision, to hold the three charging statutes facially unconstitutional, to strike the special allegation findings from her judgment, and to remand for resentencing without those findings.

DATED this 6th day of October, 2011.

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85893-4

STATE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JENNIFER L. RICE, Appellant.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury, under the laws of the State of Washington, hereby declares as follows:

1. I am a citizen of the United States and over the age of 18 years and am not a party to the within cause.

2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.

3. On October 10, 2011, I caused to be served a true and correct copy of the following document on:

Thomas Charles Roberts
Kathleen Proctor
Pierce County Prosecutor's Office
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(*Via E-Mail*)

Rita Griffith
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Seattle, WA 98105
(*Via E-Mail*)

Entitled exactly:

SUPPLEMENTAL BRIEF OF PETITIONER

Deborah A. Groth