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SUPREME COURT
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Jan. 18 Jan-20, 2012, 10:58 am
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NO. 85893-4

STATE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JENNIFER RICE,

Petitioner.

SECOND SUPPLEMENTAL BRIEF OF PETITIONER

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A. INTRODUCTION

On January 5, 2012, this court issued a decision in the case of *State v. Gresham*, Supreme Court No. 84148-9 (consolidated with No. 84150-1). That case, like the present case, involved a separation of powers issue. In *Gresham*, this Court finds a violation of the separation of powers doctrine, and holds RCW 10.58.090 unconstitutional because it conflicts with ER 404(b) regarding a procedural matter which is within the prerogatives of the judicial branch of government. *Slip Opinion*, at 28. The *Gresham* opinion then discusses the question of whether this separation of powers violation was harmless error as to defendant Gresham.

The *Gresham* opinion states that the *nonconstitutional* harmless error standard, rather than the more rigorous constitutional harmless error standard, applies to the separation of powers violation in that case. The opinion then goes on to hold that the error was not harmless under the lower harmless error standard. Since the State could not even satisfy the lower nonconstitutional harmless error standard, it was unnecessary to consider whether the higher constitutional harmless error standard applied, and thus the statement that the constitutional harmless error standard did not apply was merely *dictum*.

Petitioner Rice respectfully submits that the higher constitutional harmless error standard does apply to separation of powers violations, and

that this Court should disavow the *dictum* of *Gresham*. Here, as in *Gresham*, Petitioner Rice submits that the State cannot satisfy even the lower *nonconstitutional* harmless error standard. If this Court agrees, then it would not be necessary to decide whether the higher constitutional harmless error standard applies. However, if this Court concludes that the State *can* meet the lower harmless error standard in this case, then it would be necessary to decide whether the higher constitutional harmless error standard applies. To cover that possibility, this supplemental brief addresses the issue of which harmless error standard applies.

Petitioner urges this Court to hold that *all* violations of the separation of powers doctrine must be tested against the higher constitutional harmless error standard. In the alternative, Petitioner Rice submits that in a case like hers, where, unlike *Gresham*, (1) the error is not a trial error, (2) there has been no violation of any state evidentiary rule such as ER 404(b), and (3) there is no established harmless error standard for such a violation, as there is for ER 404(b) violations, the constitutional harmless error standard should apply. In such cases, certainly the *nonconstitutional* harmless error test cannot be met.

B. ARGUMENT

- 1. GRESHAM ERRONEOUSLY STATES THAT WHILE A SEPARATION OF POWERS VIOLATION CAUSES DAMAGE TO A BRANCH OF GOVERNMENT, IT DOES NOT DIRECTLY INJURE PRIVATE PARTIES SUCH AS A CRIMINAL DEFENDANT. BUT SEVERAL U.S. SUPREME COURT DECISIONS EXPLICITLY HOLD TO THE CONTRARY, THAT SEPARATION OF POWERS VIOLATIONS DO DEPRIVE INDIVIDUALS OF THEIR LIBERTY.**

Relying upon a sentence in the earlier case of *Carrick v. Locke*,¹ the *Gresham* opinion states:

“Unlike many other constitutional violations, which directly damage rights retained by the people, the damage caused by a separation of powers violation accrues directly to the branch invaded.” 125 Wn.2d at 136. In this circumstance, the fact that evidence was admitted pursuant to an unconstitutional statute does not necessarily mean that we are to apply the constitutional harmless error doctrine.

Slip Opinion, at 29.

But while it is true that separation of powers violations cause damage to a branch of government, that does not mean that such violations do not also harm individuals. On the contrary, the United States Supreme Court has consistently held that the constitutional requirement of separation of powers was deliberately designed to protect the liberty of individuals:

The Framers’ inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This

¹ 125 Wn.2d 129, 882 P.2d 173 (1994).

plan serves not only to make Government accountable *but also to secure individual liberty*. [Citations omitted]. Because *the Constitution's separation-of-powers structure*, like the substantive guarantees of the Fifth and Fourteenth Amendments, [citation omitted], *protects persons* as well as citizens, foreign nationals *who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles*, [citation omitted].

Boumediene v. Bush, 553 U.S. 723, 742-43, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008) (emphasis added).²

Similarly, the U.S. Supreme Court's recent opinion in *Bond v. United States*, ___ U.S. ___, 131 S.Ct. 2355, 180 L.Ed.2d 269 (2011), in the course of addressing a Tenth Amendment claim, forcefully reaffirms the proposition that the separation of powers doctrine protects the liberty of individuals. *Bond* involved a criminal defendant who argued that the statute under which she was prosecuted violated the Tenth Amendment. The Government contended that she had no standing to raise this claim because the Tenth Amendment was designed to protect the rights of the States, and *Bond* was a human being and not a State. Analogizing the Tenth Amendment claim to a separation of powers claim, the Supreme Court rejected this argument, holding that both the Tenth Amendment and

² *Accord Clinton v. City of New York*, 524 U.S. 417, 450, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers"); *Loving v. United States*, 517 U.S. 748, 756, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996) ("Even before the birth of this country, separation of powers was known to be a defense against tyranny"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S.Ct. 863, 96 L.Ed. 1153 (1952)

the doctrine of separation of powers were designed to protect individual rights, as well as to police the boundaries between different units of government:

The recognition of an injured person's standing to object to a violation of a constitutional principle that allocates power within government is illustrated, in an analogous context, by cases in which *individuals sustain discrete, justiciable injury from actions that transgress separation-of-powers limitations*. Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. *The structural principles secured by the separation of powers protect the individual as well.*

In the precedents of this Court, *the claims of individuals – not of Government departments – have been the principal source of judicial decisions concerning separation of powers and checks and balances*. For example, the requirement that a bill enacted by Congress be presented to the President for signature before it can become law gives the President a check over Congress' exercise of legislative power, See U.S. Const., Art. I, § 7. *Yet individuals, too, are protected by the operations of separation of powers and checks and balances*, and they are not disabled from relying on those principles in otherwise justiciable cases and controversies. In *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), it was an individual who successfully challenged the so-called legislative veto – a procedure that Congress used in an attempt to invalidate an executive determination without presenting the matter to the President. *The procedure diminished the role of the Executive, but the challenger sought to protect not the prerogative of the Presidency as such but rather his own right to avoid deportation under an invalid order*. Chadha's challenge was sustained. *A cardinal principle of*

(Jackson, J., concurring) (“[T]he Constitution diffuses power the better to secure liberty”).

separation of powers was vindicated at the insistence of an individual, indeed one who was not a citizen of the United States but who was still a person whose liberty was at risk.

Bond, 131 S.Ct. at 2365 (emphasis added).

The *Bond* Court reasoned that Tenth Amendment claims and separation-of-powers claims were similar in this respect: both types of claims were premised upon the contention that the required constitutional structure of government was being violated. In one case the proper boundary between the powers of the federal government and the powers of the States was being transgressed. In the other case the proper boundary between the powers of coordinate branches of government – legislative, executive and judicial – was being violated. But in both cases, maintenance of the proper constitutional structure of government was designed to protect individual liberty as well as the rights of some government or government agency. Therefore:

If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object.

Just as it is appropriate for an individual in a proper case to invoke separation of powers or checks-and-balances constraints, so too may a litigant, in a proper case, challenge a law as enacted in contravention of constitutional principles of federalism. That claim need not depend on the vindication of a State's constitutional interests, even if the a State's constitutional interests are also implicated.

Bond, 131 S.Ct. at 2365 (emphasis added).

Inevitably, when a separation of powers violation occurs, individuals do suffer as a direct result. The *Gresham* case provides a perfect example. As this Court's opinion notes, RCW 10.58.090 provided that evidence which was inadmissible against Gresham under ER 404(b), had to be admitted anyway "notwithstanding Evidence Rule 404(b)." *Slip Opinion*, at 24. Thus, Gresham was directly harmed by the trial judge's application of RCW 10.58.090.

In *Boumediene* the statute in question, the Detainee Treatment Act, prohibited prisoners at the Guantanamo Bay naval base from seeking a writ of habeas corpus from a federal court. As the Supreme Court noted, "the writ of habeas corpus is itself an indispensable mechanism for monitoring separation of powers." 171 L.Ed.2d at 77. By purporting to cut off Boumediene's access to the federal courts, the Act violated the separation of powers doctrine and this constitutional violation directly harmed Boumediene.

In the present case, the mandatory charging provisions in the sentencing enhancement statutes precluded the county prosecutor from exercising his discretion not to charge these enhancements, and thus dictated that Rice had to be charged with these sentencing enhancement

allegations.

Thus, in all three cases, *Gresham*, *Boumediene*, and the present case, the separation of powers violations caused harm to the individual litigants.

2. THE GRESHAM DECISION READS TOO MUCH INTO A SENTENCE FROM CARRICK. CARRICK DID NOT HOLD THAT THE SEPARATION OF POWERS DOCTRINE DOES NOT SERVE TO PROTECT INDIVIDUAL LIBERTY.

The *Gresham* dictum that the nonconstitutional harmless error rule applies to meritorious separation of powers claims raised by individuals is based upon the following single sentence from *Carrick v. Locke*:

Unlike many other constitutional violations, which directly damage rights retained by the people, the damage caused by a separation of powers violation accrues directly to the branch invaded.

Carrick, 125 Wn.2d at 136. But Petitioner Rice respectfully submits that this Court read too much into that sentence. It is true and accurate to state that a violation of the separation of powers doctrine directly causes damage to the branch invaded. It is also true that this makes separation of powers violations “unlike many other constitutional violations.” But it is *not* true that separation of powers violations *only* cause harm to the branch of government whose prerogatives are invaded, and the sentence from *Carrick* does *not* say that separation of powers violations cause no injury to individual liberty. Read correctly, the sentence in *Carrick* simply acknowledges that while most constitutional violations cause damage to

individual rights, separation of powers violations *also* cause damage to one of the three branches of government.³

To misread *Carrick* as stating that separation of powers violations do not cause any damage to individual liberties not only places Washington State separation of powers doctrine in conflict with the federal separation of powers doctrine, it also flies in the face of the entire theoretical rationale for the existence of the doctrine. As James Madison noted, the separation of powers doctrine was designed to function 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). It would

³ *Carrick* also cites to *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851, 106 S.Ct. 3245, 3257, 92 L.Ed.2d 675 (1986). *Schor* involved a claim that Congress had violated the command of Article III, § 1 that the judicial power of the United States be vested in courts created by Congress, and staffed by judges who possess life tenure and whose compensation cannot be reduced while they are in office. Congress had passed a law giving an administrative agency the power to adjudicate state law counterclaims. *Schor* argued that this law violated Article III, § 1. The *Schor* decision notes that “Article III, § 1 not only preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States, but also serves as ‘an inseparable element of the constitutional system of checks and balances.’ [Citations omitted]. Article III, § 1 safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts ‘to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating’ constitutional courts, [citation], and thereby preventing ‘the encroachment or aggrandizement of one branch at the expense of the other.’” *Schor*, 478 U.S. at 850.

Carrick cited *Schor* as holding that this function of serving as a safeguard against legislative encroachment on the judiciary served by Article III, § 1 “*protects institutional, rather than individual interests.*” *Carrick* 125 Wn.2d at 136 (emphasis added). *But Schor actually says the exact opposite.* The *Schor* opinion explicitly states that the Supreme Court had consistently held that “Article III, § 1’s guarantee of an independent and impartial adjudication by the federal judiciary of matters within the

make no sense to view the doctrine as protecting the “liberty” of the executive branch to be free from the “tyranny” of the legislative branch. The liberty which the doctrine serves to protect is the liberty of individuals. Indeed, as the Court recently recognized, the doctrine even protects “one who was not a citizen of the United States but who was still a person whose liberty was at risk.” *Bond*, at 2365, citing to *Chadha*.⁴

3. IF VIOLATIONS OF THE SEPARATION OF POWERS DOCTRINE ARE DEEMED NOT TO HARM INDIVIDUALS AT ALL, THEN *GRESHAM* WAS WRONGLY DECIDED BECAUSE INDIVIDUALS LIKE *GRESHAM* WOULD LACK STANDING TO RAISE SEPARATION OF POWERS CLAIMS.

If *Carrick* is misread as holding that individuals suffer no constitutional harm from a separation of powers violation, then no

judicial power of the United States *serves to protect primarily personal, rather than structural, interests.*” *Schor*, 478 U.S. at 848 (emphasis added).

⁴ The *Chadha* case is a particularly appropriate example because Chadha was harmed in much the same way that Petitioner Rice was harmed. Chadha was a British citizen who violated U.S. law by remaining in the United States after his student visa had expired. Although he was deportable, the Attorney General exercised his discretion not to deport Chadha. Under a “veto” provision of the Immigration and Nationality Act, the House of representatives passed a resolution overriding the Attorney General’s determination that Chadha not be deported. Under the federal statute, the Senate did not have to pass the resolution as well, and the House’s resolution did not have to be presented to the President for the President’s signature. Chadha challenged that statute, arguing that it violated the doctrine of separation of powers to allow enactment of a law by just one House of Congress and without presenting the law to the President for his signature.

Congress argued “that Chadha lacks standing because a consequence of his prevailing will advance the interests of the Executive Branch in a separation of powers dispute with Congress rather than simply Chadha’s private interests.” 462 U.S. at 935-36. But the Court rejected this contention noting that if Chadha was correct in arguing that the statute violated separation of powers, then he would not be deported, and therefore Chadha did have standing. *Id.* at 936. The Court then went on to hold that the law did violate the doctrine of separation of powers and was unconstitutional.

individual would have standing to raise a separation of powers claim. And yet both the U.S. Supreme Court and this Court have consistently allowed individuals to raise separation of powers claims. In *Carrick* itself, the separation of powers claim was raised by two individuals, Don Carrick and Scott Elston, who chased and caught a shoplifter who died in the course of being detained and arrested. Carrick and Elston claimed that judicial supervision of an inquest proceeding was a violation of the doctrine of separation of powers because the power to hold an inquest was an executive power. The Court decided their claim, implicitly holding that Carrick and Elston had standing to raise a separation of powers claim. This Court decided the merits of Gresham's separation of powers claim, again implicitly finding that he had standing to raise it. In fact, both the U.S. Supreme Court and this Court have consistently allowed individuals to raise separation of powers claims, because separation of powers violations *do* deprive individuals of liberty.

In sum, since separation of powers violations *do* deprive individuals of constitutionally protected liberty interests, the *constitutional* harmless error test should be employed in *all* cases where separation of powers doctrine violations are found. Accordingly, Petitioner Rice asks this Court to disavow the statements made in *Gresham* indicating that the nonconstitutional harmless error standard applies. Since the error in

Gresham was *not* harmless even under the lower standard, it was unnecessary to decide whether the higher constitutional error standard applied, and thus the statement that it did not apply was dictum which should be disavowed.

4. UNLIKE THE SITUATION PRESENTED BY *GRESHAM* WHERE EVIDENCE WAS ADMITTED IN VIOLATION OF EVIDENCE RULE 404(B), IN THE PRESENT CASE, THERE IS NO ESTABLISHED HARMLESS ERROR STANDARD.

As argued above, the injury in *Gresham* was an injury to a defendant's right to have the judiciary apply its procedural rules without interference from the legislature, not merely an erroneous evidentiary ruling. Even assuming, *arguendo*, that the error in *Gresham* was simply that evidence that was inadmissible under ER 404(b) was improperly admitted, Ms. Rice's case is distinguishable from *Gresham*. Her case does not involve an evidentiary error.

If the error in *Gresham* is considered solely as an evidentiary error, this does not necessarily mean that a constitutional error was committed. And more specifically, "[e]videntiary errors under ER 404 are not of constitutional magnitude." *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

The *Gresham* opinion correctly notes that "[i]t is well settled that the erroneous admission of evidence in violation of ER 404(b) is analyzed

under the lesser [harmless error] standard for nonconstitutional error.” *Slip Opinion*, at 29, citing *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). But it is not “well settled” that the error of forcing a criminal charge to be brought in all cases where the charge can be proved is governed by this lesser standard. On the contrary, prior to *Gresham*, no Washington case addressed this issue, and thus there simply was no established harmless error rule for this type of error.

Accordingly, the well established harmless error rule for the erroneous admission of evidence in violation of an evidence rule that is not of constitutional magnitude should not be extended to cases where the error committed was an unconstitutional incursion into the inherent power of the executive branch not to bring a criminal charge. Even if this Court holds that the injury in *Gresham* was not an injury to a defendant’s right to have a trial free of unconstitutional interference with the judiciary, but only an evidentiary error, this rationale cannot apply to Ms. Rice who is not raising any claim of trial error. Unlike in *Gresham*, there is no record to assess to determine the effect of the error.

5. THE NONCONSTITUTIONAL HARMLESS ERROR RULE FOR EVIDENTIARY TRIAL ERROR IS UNSUITED FOR APPLICATION TO CASES WHERE THERE HAS BEEN CHARGING ERROR.

The *Cunningham*⁵ nonconstitutional harmless error rule logically cannot be applied to cases where the error committed is a charging error and not a trial evidentiary error. In cases where a trial has been held and an evidentiary error has been committed, the existence of a record of the trial makes it possible to assess what the likely trial outcome would have been if the evidentiary error has never occurred.

But a charging error cannot be assessed in the same manner, because there is no record of how the charging decision was made, and no way of determining how the charging decision would have been made if the prosecution had not been required – by an unconstitutional statute – to bring the charge. In this case, Petitioner’s trial counsel brought a pretrial motion seeking to have the charging statutes in question declared unconstitutional. CP 10-22. That motion was denied. CP 44-50. Had the motion been granted, defense counsel would have had reason to submit a “mitigation packet” to the prosecution, and to argue that the sentencing enhancement allegations should not be charged. But since the motion was

⁵ 93 Wn.2d 823, 613 P.2d 1139 (1980)

denied, defense counsel had no reason to submit such a mitigation packet.

Moreover, even if such a futile mitigation packet had been submitted to the prosecutor's office, the contents of that packet would not appear in the trial record, and thus there would be no way for any appellate court to decide whether, within reasonable probabilities, the prosecutor's office would have made a different charging decision.

In short, the effect of the mandatory charging statutes on the outcome of the charging decision is completely unknowable. It is sheer speculation as to what arguments would have been made, and what the resulting prosecutorial charging decision would have been, if the unconstitutional charging statutes had not existed. In this situation, because there is no record of how charging decisions get made, no criminal defendant could ever prove that had the unconstitutional mandatory charging statutes not existed, the charges would not have been brought against him.

6. EVEN IF THE NONCONSTITUTIONAL HARMLESS ERROR STANDARD IS USED, THE ERROR IN THIS CASE WAS NOT HARMLESS. SINCE THE SENTENCING ENHANCEMENT STATUTES ARE UNCONSTITUTIONAL, THE STATE IS POWERLESS UNDER *PILLATOS* TO EVEN CHARGE THESE ENHANCEMENTS. SINCE RICE SHOULD NOT EVEN HAVE BEEN CHARGED WITH THESE ENHANCEMENT ALLEGATIONS UNDER THESE STATUTES, AND SINCE THEY ADDED YEARS TO HER SENTENCE, SHE CLEARLY WAS PREJUDICED BY THE APPLICATION OF STATUTES WHICH VIOLATE THE SEPARATION OF POWERS DOCTRINE.

Even if the nonconstitutional harmless error standard is applied in this case, the error cannot be harmless. If the mandatory charging provisions of RCW 9.94.835, .836 and .837 are unconstitutional, then Ms. Rice should not have been charged with the allegations set out in these statutes. Since they added years to her sentence, Ms. Rice was clearly prejudiced by being charged with the special sentencing enhancement allegations set forth in those provisions.

Absent an allegation pursuant to RCW 9.94A.836 that the offense committed was predatory in nature, no 25 year minimum term could be imposed for a conviction for child molestation in the first degree as specified by RCW 9.94A.507:

(ii) If the offense that caused the offender to be sentenced under this section was . . . child molestation in the first degree, and there has been a finding that the offense was predatory under RCW 9.94A.836, the minimum term shall be either the maximum of the standard sentence range for that offense or twenty-five years.

RCW 9.94A.507(c)(ii).

The maximum standard range sentence for first degree child molestation, a seriousness level X offense, even with an offender score of 9, is 149 to 198 months, far short of the a twenty-five year (300 month) sentence mandated by RCW 9.94A.836 and RCW 9.94A.507. RCW 9.94A.510 and .515.

Without the sexual motivation allegation, first degree kidnapping could not be the basis under RCW 9.94A.507 of a twenty-five year minimum term based on the allegation that the victim was under 15 years of age, as set out in RCW 9.94A.837. RCW 9.94A.507(a)(ii) & (c)(ii) provide:

- (1) An offender who is not a persistent offender shall be sentenced under this section if the offender
 - (a) Is convicted of:
 - ...
 - (ii) Any of the following offenses with a finding of sexual motivation . . . kidnapping in the first degree.
 - ...
 - (c)(ii) . . . If the offense that caused the offender to be sentenced under this section was . . . kidnapping in the first degree with sexual motivation, and there has been a finding that the victim was under the age of fifteen at the time of the offense under RCW 9.94A.837, the minimum term shall be either the maximum of the standard range for the offense of twenty-five years, whichever is greater.

RCW 9.94A.507(a)(ii) and (c)(ii).

Again, kidnapping in the first degree is a seriousness level X offense where the maximum standard range sentence, with an offender

score of 9, extends only to 198 months – two-thirds of a twenty-five year sentence.

There are no alternative provisions for imposing mandatory twenty-five year minimum terms for convictions for kidnapping or for child molestation.

Further, only “sexual motivation” is among the exclusive list of aggravating factors which could support an exceptional sentence under RCW 9.94A.547. This aggravating factor, if proven, together with the additional proof that the victim was under 15 years of age, could justify an exceptional sentence above 198 months, but it could not support a twenty-five year minimum term under RCW 9.94A.507.

As this Court held in *State v. Pillatos*, 159 Wn.2d 459, 465, 150 P.3d 1130 (2007), courts lack the power to fashion a sentencing remedy which was not constitutionally enacted by the legislature. “It is the function of the legislature and not the judiciary to alter the sentencing procedure.” *Pillatos*, at 469 (quoting *State v. Ammons*, 105 Wn.2d 165, 180, 718 P.2d 796 (1986), quoting *State v. Monday*, 85 Wn.2d 906, 909-910, 540 P.2d 416 (1975)).

Because Ms. Rice was prejudiced by the mandatory charging provisions of the sentencing enhancement allegation statutes, RCW 9.94A.835, .836 and .837, the error is not harmless under any harmless

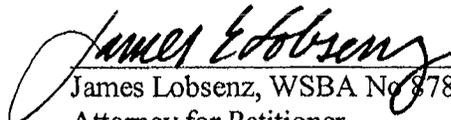
error test, and even under the nonconstitutional harmless error test she is entitled to relief.

C. CONCLUSION

For the reasons stated above, Petitioner asks this Court to disavow its statement in *Gresham* that the nonconstitutional harmless error standard applies to the type of separation of powers doctrine violation which was committed in this case. This case should be governed by the constitutional harmless error standard. Because the State cannot prove the error was harmless beyond a reasonable doubt, the sentencing enhancements in this case should be vacated and the case remanded for resentencing without them.

In the alternative, even if the nonconstitutional harmless error standard is applied, it is obvious that the application of sentencing enhancement statutes which violate the separation of powers doctrine *did* prejudice Petitioner Rice, because without these statutes these enhancements could not even have been sought. Therefore, even if the lower harmless error standard is applied, the sentencing enhancements in this case should be vacated and the case remanded for resentencing without them.

DATED this 9th day of January, 2012.


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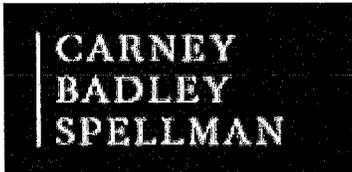
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Attached for filing: Letter of 1/18/12 to Clerk of Court; Second Supplemental Brief of Petitioner; Certificate of Service filed by James E. Lobsenz WSBA #8787 206-622-8020 lobsenz@carneylaw.com



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