FILED
Sep 15, 2015
Court of Appeals
Division I
State of Washington

Supreme Court No. 92323-0
Court of Appeals No. 71821-5-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL L. PHILLIPS,

Petitioner.

FILED
OCT 05 2015
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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

PETITION FOR REVIEW

SARAH M. HROBSKY
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER

Michael L. Phillips, petitioner here and appellant below, requests this Court grant review of the decision designated in Part B of the petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4, Mr. Phillips requests this Court grant review of the decision of the Court of Appeals, No. 71821-5-I (August 31, 2015). A copy of the decision is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. A criminal statute is unconstitutionally vague in violation of the due process clauses of the Fourteenth Amendment and Article I, section 3 either when it either fails to provide notice to citizens of prohibited conduct or when it fails to provide ascertainable standards to protect against arbitrary, ad hoc, or discriminatory enforcement. A prosecutor has discretion to file a predatory offense special allegation, RCW 9.94A.836, but the statute provides no standards or guidelines to inform the exercise of that discretion. The Court of Appeals ruled the statute does not violate due process because it "contains ascertainable *standards of guilt* which prevent arbitrary enforcement." (Emphasis added). Does this ruling, which conflates the two requirements of the vagueness analysis, conflict with decisions by this Court and the United States Supreme Court regarding the proper analysis for a vagueness challenge, raise a significant question of

law under the state and federal constitutions, and involve an issue of substantial public interest that should be determined by this Court?

2. A criminal statute violates the equal protection clauses of the Fourteenth Amendment and Article I, section 12 when it authorizes unfettered prosecutorial charging discretion with no "rational basis" for disparate treatment of similarly situated persons. A prosecutor has discretion to file a predatory offense special allegation, but statute provides no limits to the exercise of that discretion, which resulted in a grossly disparate sentence in the present case. The Court of Appeals ruled the statute does not violate equal protection, without any reference to the "rational basis" test, or how the grossly disparate sentence was rationally related to a legitimate state interest. Does this ruling conflict with decisions by this Court and by the United States Supreme Court regarding an equal protection analysis, raise a significant question of law under the state and federal constitutions, and involve an issue of substantial public interest that should be determined by this Court?

D. STATEMENT OF THE CASE

Seven-year old L.G. was forcibly taken into a store restroom and sexually assaulted by a man she did not know. 3/13/14 RP 68-76; 3/17/14 RP 64-65, 88, 3/19/14 RP 43, 58, 61, 63-64; Ex. 37. DNA collected from L.G. and her clothes matched that of Michael L. Phillips. 3/19/14 RP 103,

105-11, 115, 135. Mr. Phillips was charged with rape of a child in the first degree, with a special allegation that the offense was predatory because Mr. Phillips was a stranger to the L.G., pursuant to RCW 9.94A.030(38),[1] 9.94A.030(50),[2] and 9.94A.836(a). CP 1-5.

A jury found Mr. Phillips guilty as charged and, by special verdict, the jury also answered "yes" to the special allegation. CP 72-75. Based on his offender score of '3,' Mr. Phillips faced a standard range sentence of 120 to 160 months. However, the Court imposed a "statutory minimum" sentence of 300 months based on the special allegation. 4/11/14 RP 15; CP 78, 80.

On appeal, Mr. Phillips argued the special allegation statute is unconstitutionally vague for failure to provide ascertainable standards or guidelines to inform prosecutorial discretion in filing the allegation, in violation of due process. Br. of App. at 4-11. He also argued the statute resulted in a gross disparity in his sentence, without a rational basis for the disparity, in violation of equal protection. Br. of App. at 11-12. The Court of Appeals upheld the statute and affirmed Mr. Phillips' sentence.

[1] Formerly RCW 9.94A.030(37).
[2] Formerly RCW 9.94A.030(49).

E. ARGUMENT

1. The Court of Appeals erroneously conflated the two requirements of the vagueness doctrine to support its conclusion that the special allegation statute does not violate due process.

Under the due process clauses of the Fourteenth Amendment and Article I, section 3, a criminal statute is unconstitutionally vague when it fails to provide sufficient notice of what conduct is prohibited, or when it fails to provide ascertainable standards to protect against arbitrary, ad hoc, or discriminatory enforcement. *In re Detention of Danforth*, 173 Wn.2d 59, 74, 264 P.3d 783 (2011); *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). Although a statute is unconstitutional if either requirement of the vagueness doctrine is not satisfied, the United States Supreme Court has determined that the second requirement is the more important.

> [W]e have recognized recently that the more important aspect of the vagueness doctrine is not actual notice, but the other principle element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.

Kolender v. Lawson, 461 U.S. 352, 357-58, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) (internal quotations and citations omitted). As this Court has noted, "What is forbidden by the due process clause are criminal statutes

that contain no standards and allow police officers, judge, and jury to subjectively decide what conduct the statute proscribes or what conduct will comply with a statute in a given case." *State v. Maciolek*, 101 Wn.2d 259, 267, 676 P.2d 996 (1984).

The predatory special allegation provides no ascertainable guidelines or workable standards to prevent arbitrary, ad hoc enforcement. RCW 9.94A.836 provides:

> Special allegation--Offense was predatory--Procedures
> (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.

The definition of "predatory" is extremely expansive.

> "Predatory" means: (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; (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; or (iv) a teacher, counselor, volunteer, or other person in authority providing home-based instruction and the victim was a student receiving home-based instruction while under his or her authority or supervision. For purposes of this subsection: (A) "Home-based instruction" has the same meaning as defined in RCW 28A.225.010; and (B) "teacher, counselor, volunteer, or other person in authority" does not include the parent or legal guardian of the victim.

RCW 9.94A.030(38). In addition, "stranger" is defined as:

> "Stranger" means that the victim did not know the offender twenty-four hours before the offense.

RCW 9.94A.030(50).

When sentencing a sex offender, the court must impose a minimum term and a maximum term of confinement. RCW

9.94A.507(3)(a). The maximum term is the statutory maximum for the offense. RCW 9.94A.507(3)(b). In general, the minimum term shall be within the standard range for the offense. RCW 9.94A.507(3)(c)(i). However, if the jury finds the offense was predatory pursuant to RCW 9.94A.836, the minimum term is the high end of the standard range or 25 years, whichever is greater. RCW 9.94A.507(3)(c)(ii).

This Court has ruled the term "shall," as used in the special allegation statute, is discretionary, rather than mandatory. *State v. Rice*, 174 Wn.2d 884, 895-907, 279 P.3d 849 (2012). However, by ruling that "shall" means "may" in this context, this Court eliminated the legislative directive and opened the door to arbitrary, ad hoc, or discriminatory filing of the special allegation. The statute does not set forth any guidelines or limitations to inform the exercise of prosecutorial discretion. Instead, the prosecutor has unfettered charging discretion.

At trial, the prosecutor acknowledged the special allegation had been filed only one other time since 2006. 3/5/14 RP 72-73. The court expressed surprise and noted, "I know there are more of these cases than one since 2006." *Id.* Thus, given the expansiveness of the definition of "predatory," the very rarity of filing the special allegation demonstrates the arbitrary and ad hoc exercise of prosecutorial discretion.

Nonetheless, the Court of Appeals ruled the statute "contains ascertainable *standards of guilt* which prevent arbitrary enforcement." Opinion at 7 (emphasis added). This ruling erroneously conflates the two requirements of the vagueness analysis. Mr. Phillips does not challenge the notice requirement. Rather, he challenges the lack of ascertainable standards for the exercise of prosecutorial discretion.

Relying on *dicta* in *State v. Halstien*, 122 Wn.2d 109, 857 P.2d 270 (1993), the Court of Appeals ruled the statute was not unconstitutionally vague. Opinion at 4-7. In *Halstien*, decided nineteen years prior to *Rice*, the petitioner brought a vagueness challenge to the juvenile sexual motivation special allegation statute, RCW 13.40.135, which is structured substantially similarly to the predatory offense special allegation statute and authorizes a special allegation of sexual motivation in juvenile adjudications other that sex offenses.[3] Unlike Mr. Phillips, the

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[3] RCW 13.40.135 provides:

Sexual motivation special allegation--Procedures

(1) The prosecuting attorney shall file a special allegation of sexual motivation in every juvenile offense other than sex offenses as defined in RCW 9.94A.030 when sufficient admissible evidence exists, which, when considered with the most plausible, reasonably consistent 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 juvenile case wherein there has been a special allegation the state shall prove beyond a reasonable doubt that the juvenile committed the offense with a sexual motivation. The court shall make a finding of fact of whether or not the sexual motivation was present at the time of the commission of the offense. This finding shall not be applied to sex offenses as defined in RCW 9.94A.030.

petitioner challenged the statute under the first requirement of the vagueness test only. Specifically, the petitioner argued the term "sexual motivation" was too vague to give notice of what conduct was prohibited, and the statute criminalized a person's private thoughts, in violation of the right to privacy and to free speech. *Id.* at 117-18. This Court disagreed and determined the phrase provided sufficient notice. Although not raised by the petitioner, in *dicta*, this Court made a relatively cursory determination that the statute met the second requirement of the vagueness test:

> The statute also meets the second part of the vagueness test: it contains ascertainable standards of guilt which prevent arbitrary enforcement. As noted above, the State must present evidence of some conduct during the course of the offense as proof of the defendant's sexual purpose. The State carries this burden of proof and must establish the sexual motivation allegation beyond a reasonable doubt. RCW 13.40.135(2). In addition, the prosecutor's charging discretion is guided and limited by the statute. The prosecutor may not file the allegation unless "sufficient admissible evidence exists" which would justify a finding of sexual motivation by a "reasonable and objective fact-finder", and the prosecutor must weigh that evidence against the most plausible defense. RCW 13.40.135(1). The

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(3) The prosecuting attorney shall not withdraw the special allegation of "sexual motivation" without approval of the court through an order of dismissal. The court shall not dismiss the 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.

> trial court must also enter a finding of fact whether or not the sexual motivation was present. RCW 13.40.135(2). These standards protect against arbitrary, ad hoc, or discriminatory enforcement.

Id. at 121. This Court noted the limitations and guidelines to inform when a prosecutor *may not* file the special allegation. However, because the term "shall" had not yet been interpreted to mean "may" in this context, this Court did not address the lack of limitations or guidelines to inform when a prosecutor *may* file the special allegation. The Court of Appeals' reliance on *Halstien* is misplaced.

The Court of Appeals conducted a flawed vagueness analysis and improperly relied on *dicta* in *Halstien*. Accordingly, its ruling conflicts with decisions by this Court and the United States Supreme Court regarding a vagueness analysis, raises a significant question of law under the state and federal constitutions, and involves an issue of substantial public interest that should be determined by this Court. Pursuant to RAP 13.4(b)(1), (3) and (4), this Court should accept review.

2. The Court of Appeals erroneously ruled the special allegation was not arbitrary and capricious in the present case, to support its conclusion that the allegation did not violate equal protection.

The equal protection clauses of the Fourteenth Amendment and Article I, section 12 require that similarly situated person receive similar treatment. *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); *In re Personal Restraint of Mota*, 114 Wn.2d 465, 473, 788 P.2d 538 (1990). A statute that implicates physical liberty interests is reviewed pursuant to the "rational basis" test, that is, whether the statute is rationally related to achieve a legitimate state objective. *State v. Coria*, 120 Wn.2d 156, 170-71, 839 P.2d 890 (1992). If there is a disparity in the treatment of individuals accused of the same crime, equal protection requires, at minimum, a rational basis for such disparity. *Rinaldi v. Yeager*, 384 U.S. 305, 308-09, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966).

Absent any guidelines or limitations to inform the exercise of prosecutorial discretion, there is no legitimate reason or rational basis to selectively file the special allegation, especially where, as here, the allegation results in a greatly increased minimum sentence. By comparison, the death penalty statute survived an equal protection challenge insofar as it requires prosecutors to "perform individualized weighing of the mitigating factors," and therefore does not confer

prosecutors with unfettered discretion. *State v. Pirtle*, 127 Wn.2d 628, 642, 904 P.2d 245 (1995); *accord State v. McEnroe*, 179 Wn.2d 32, 42, 309 P.3d 428 (2013).

Moreover, a court may not dismiss a special allegation "unless it finds that the order [of dismissal] is necessary to correct an error in the initial charging decision or that there are evidentiary problems that make proving the special allegation doubtful." RCW 9.94A.836(3). By contrast, a court retains discretion to impose the statutory aggravating or mitigating factors set forth in RCW 9.94A.535, even where a jury has found the factors have been proven beyond a reasonable doubt, when "it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.537(6). By eliminating judicial review and discretion, and by failing to link the exercise of prosecutorial discretion to legislative purpose, the special allegation further confers prosecutors with unfettered discretion to selectively file the special allegation in violation of the constitutional right to equal protection.

The Court of Appeals did not reference the "rational basis" test and did not identify a legitimate legislative interest or a rational basis for selectively filing the special allegation against Mr. Phillips, even though it resulted in a greatly increased minimum sentence. Rather, the court ruled

the statue did not violate equal protection because, *inter alia*, Mr. Phillips did not "explain how the plain text of the predatory offense statute lead to arbitrary or capricious charging in this matter." Opinion at 7. This is the incorrect. As noted, when the prosecutor acknowledged the special allegation had been filed only one other time since 2006, the trial court expressed surprise, stating, "I know there are more of these cases than one since 2006." 3/5/14 RP 72-73.

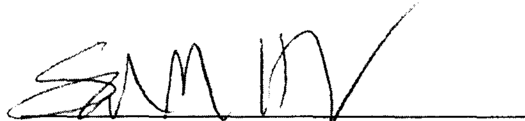
The Court of Appeals conducted a flawed equal protection analysis and ignored the fact that the very rarity of filing the special allegation demonstrates the arbitrary and ad hoc exercise of prosecutorial discretion. Accordingly, its ruling conflicts with decisions by this Court and the United States Supreme Court regarding an equal protection analysis, raises a significant question of law under the state and federal constitutions, and involves an issue of substantial public interest that should be determined by this Court. Pursuant to RAP 13.4(b)(1), (3) and (4), this Court should accept review.

F. CONCLUSION

The decision of the Court of Appeals is in violation of Mr. Phillips' right to due process and the equal protection. For the foregoing reasons, Mr. Phillips respectfully requests this Court accept review of the Court of Appeals decision in this case.

DATED this 15th day of September 2015.

Respectfully submitted,



SARAH M. HROBSKY (12352)
Washington Appellate Project (91052)
Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 71821-5-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
MICHAEL LEE PHILLIPS,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: August 31, 2015

BECKER, J. — A statute is void for vagueness if it does not provide sufficiently specific standards to prevent arbitrary enforcement. The predatory offense statute challenged in this litigation, RCW 9.94A.836, adequately defines the conduct to which it applies and sets forth detailed charging predicates that guide a prosecutor's discretion. The exceptional sentence imposed upon the appellant, Michael Phillips, is affirmed.

In this case, a child was forcibly taken into a store restroom and sexually assaulted by a man she did not know. The assailant was identified as Michael Phillips. Phillips was charged and found guilty of rape of a child in the first degree. Included in the information was a special allegation that the offense was predatory. A jury convicted Phillips as charged and found that his offense was predatory.

Phillips had an offender score of 3. The standard range for his offense was 10 to 13.3 years in prison. Phillips was sentenced to an exceptional sentence of 25 years based on the jury's predatory offense finding.

On appeal, Phillips contends that the predatory offense statute, RCW 9.94A.836, is unconstitutionally vague because it fails to provide ascertainable standards to protect against arbitrary enforcement.

We review determinations regarding the constitutionality of a statute de novo. State v. Watson, 160 Wn.2d 1, 5, 154 P.3d 909 (2007).

RCW 9.94A.836 provides:

> (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.

RCW 9.94A.836.

The term "predatory" means:

> (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; (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; or (iv) a teacher, counselor, volunteer, or other person in authority providing home-based instruction and the victim was a student receiving home-based instruction while under his or her authority or supervision. For purposes of this subsection: (A) "Home-based instruction" has the same meaning as defined in RCW 28A.225.010; and (B) "teacher, counselor, volunteer, or other person in authority" does not include the parent or legal guardian of the victim.

RCW 9.94A.030(39). The term "stranger" means "the victim did not know the offender twenty-four hours before the offense." RCW 9.94A.030(51).

A vagueness challenge to a statute not involving the First Amendment is evaluated as applied to the challenger, using the facts of the particular case. In re Detention of Danforth, 173 Wn.2d 59, 72, 264 P.3d 783 (2011). The predatory offense statute does not involve the First Amendment. Therefore, Phillips may not challenge the statute in all of its applications. Rather, he bears the heavy burden of proving beyond a reasonable doubt that the statute is unconstitutionally vague as applied to him. City of Spokane v. Douglass, 115 Wn.2d 171, 177, 182-83, 795 P.2d 693 (1990). Because Phillips challenges the

statute in the abstract rather than as applied to his own conduct, it is doubtful that he is entitled to review, but we will briefly address his arguments.

A statute is unconstitutionally vague if it (1) fails to define the offense with sufficient precision so a person of ordinary intelligence can understand it or (2) does not provide standards sufficiently specific to prevent arbitrary enforcement. State v. Eckblad, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004).

Phillips focuses solely on the second prong of the test for vagueness—whether the statute provides sufficient guidelines for enforcement. "The very rarity of filing the special allegation," Phillips claims, "demonstrates the arbitrary and ad hoc exercise of prosecutorial discretion."

Guidelines nearly identical to those in RCW 9.94A.836 are contained in the juvenile sexual motivation statute:

> (1) The prosecuting attorney shall file a special allegation of sexual motivation in every juvenile offense other than sex offenses as defined in RCW 9.94A.030(29) (a) or (c) when sufficient admissible evidence exists, which, when considered with the most plausible, reasonably consistent 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 juvenile case wherein there has been a special allegation the state shall prove beyond a reasonable doubt that the juvenile committed the offense with a sexual motivation. The court shall make a finding of fact of whether or not the sexual motivation was present at the time of the commission of the offense. This finding shall not be applied to sex offenses as defined in RCW 9.94A.030(29) (a) or (c).
>
> (3) The prosecuting attorney shall not withdraw the special allegation of "sexual motivation" without approval of the court through an order of dismissal. The court shall not dismiss the 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.

Former RCW 13.40.135(1)-(3) (1990). These guidelines were held sufficient to prevent arbitrary enforcement in State v. Halstien, 122 Wn.2d 109, 117-21, 857 P.2d 270 (1993), a case that did involve the First Amendment. In Halstien, the court discussed the second prong of the vagueness test in the following paragraph:

> The statute also meets the second part of the vagueness test: it contains ascertainable standards of guilt which prevent arbitrary enforcement. As noted above, the State must present evidence of some conduct during the course of the offense as proof of the defendant's sexual purpose. The State carries this burden of proof and must establish the sexual motivation allegation beyond a reasonable doubt. RCW 13.40.135(2). In addition, the prosecutor's charging discretion is guided and limited by the statute. The prosecutor may not file the allegation unless "sufficient admissible evidence exists" which would justify a finding of sexual motivation by a "reasonable and objective fact-finder", and the prosecutor must weigh that evidence against the most plausible defense. RCW 13.40.135(1). The trial court must also enter a finding of fact whether or not the sexual motivation was present. RCW 13.40.135(2). These standards protect against arbitrary, ad hoc, or discriminatory enforcement.

Halstien, 122 Wn.2d at 121.

Phillips describes this aspect of the analysis in Halstien as "relatively cursory" and attempts to distinguish it by citing State v. Rice, 174 Wn.2d 884, 279 P.3d 849 (2012).

Phillips' argument misapplies Rice. In that case, a former public school teacher was convicted of molesting a 10-year-old student. Her conduct was found to be predatory as charged under RCW 9.94A.836. Rice attacked the statute on appeal, arguing that RCW 9.94A.836 made charging the special allegation mandatory in violation of the constitutional separation of powers

doctrine. The Supreme Court held that RCW 9.94A.836 was "directory," not "mandatory." Rice, 174 Wn.2d at 889.

> Although the statutes authorize special allegations and direct prosecuting attorneys to file them, the statutes do not attach any legal consequences to a prosecutor's noncompliance, and the legislature elsewhere in the same chapter has acknowledged that prosecuting attorneys retain broad charging discretion notwithstanding statutory language directing them to file particular charges.

Rice, 174 Wn.2d at 889.

Phillips argues that by ruling "shall" means "may" in the context of the predatory offense statute, the court "eliminated the legislative directive and opened the door to arbitrary, ad hoc, or discriminatory filing of the special allegation." This argument lacks merit. Rice does not suggest that the predatory offense statute is unconstitutionally vague, nor does it undermine the holding in Halstien that the similarly worded juvenile sexual motivation statute contains ascertainable standards of guilt. The use of seemingly mandatory language in the context of RCW 9.94A.836 "can be seen as a legislative expression of priority, meant to guide prosecuting attorneys but always subject to the prosecutor's underlying charging discretion." Rice, 174 Wn.2d at 899. The fact that prosecutors have broad charging discretion does not render a statute unconstitutionally vague. Broad prosecutorial charging discretion is "part of the inherent authority granted to prosecuting attorneys as executive officers under the Washington State Constitution." Rice, 174 Wn.2d at 903-04.

Phillips presents no other analysis to show how the predatory offense statute is vague, nor does he argue that the prosecutor failed to exercise discretion in charging him. We conclude RCW 9.94A.836 contains ascertainable standards of guilt which prevent arbitrary enforcement. Phillips' due process challenge to the statute is rejected.

Phillips also attacks the statute on equal protection grounds. He claims it violates equal protection "by inviting grossly disparate sentences for similarly situated defendants." The possibility that sentences might be disparate, he argues, is the result of the absence of guidelines or limitations to inform the exercise of prosecutorial discretion. But we have already held, as noted above, that the statute does have adequate guidelines and limitations to inform the exercise of prosecutorial discretion.

Washington's predatory offense statute, Phillips contends, also violates his right to equal protection because it allows trial courts to dismiss the allegation only in limited circumstances thereby encouraging arbitrary charging. Phillips cites no case law supporting this argument nor does he concretely explain how the plain text of the predatory offense statute led to arbitrary or capricious charging in this matter.

In short, Phillips provides no basis for striking down the statute on either vagueness or equal protection grounds.

Affirmed.

Becker, J.

WE CONCUR:

Leach, J.

COURT OF APPEALS DIV I
STATE OF WASHINGTON
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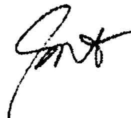
DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71821-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Amy Meckling, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[amy.meckling@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: September 15, 2015