71821-5

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No. 71821-5-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

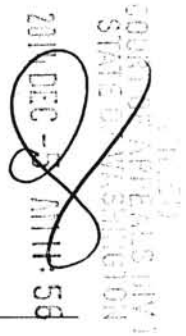
STATE OF WASHINGTON,

Respondent,

v.

MICHAEL L. PHILLIPS,

Appellant.



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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The special allegation statute, RCW 9.94A.836, fails to provide ascertainable standards to protect against arbitrary, ad hoc, discriminatory, or unfettered exercise of prosecutorial discretion, in violation of due process and equal protection.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. A criminal statute is unconstitutionally vague in violation of the due process clauses of the Fourteenth Amendment and Article I, section 3 when it fails to provide ascertainable standards to protect against arbitrary, ad hoc, or discriminatory enforcement. Where a prosecutor has discretion to file a predatory offense special allegation, but the statute does not provide any standards or guidelines to inform the exercise of that discretion, is the special allegation statute unconstitutionally vague?

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 means to protect against disparate treatment. Where a prosecutor has discretion to file a predatory offense special allegation, but statute does not provide any limits to the exercise of that discretion, does the special allegation statute violate equal protection?

C. 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 was matched to that of Michael L. Phillips. 3/19/14 RP 103, 105-11, 115, 135. On April 11, 2011, Mr. Phillips was charged with rape of a child in the first degree, in violation of RCW 9A.44.073, 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.

On June 28, 2012, the Washington Supreme Court decided *State v. Rice*, in which the Court ruled the filing of a predatory offense special allegation was discretionary, regardless of the statutory language providing "the prosecuting attorney shall file a special allegation that the offense was predatory, whenever sufficient admissible evidence exists." 174 Wn.2d 884, 892-908, 279 P.3d 849 (2012).

On March 5, 2014, the State filed an amended information in this case that added one count of child molestation in the first degree, in violation of RCW 9A.44.083, also charged as a predatory offense. CP 39-40.

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

Mr. Phillips moved to dismiss the predatory offense special allegation on the grounds the first allegation was filed prior to *Rice*, at which time prosecutors understood filing the special allegation was mandatory rather than discretionary. 3/5/14 RP 69; CP 6-8. He also moved to dismiss the special allegation on the grounds that the statute was unconstitutionally vague for failure to define the term "know," and that the statute constituted cruel and unusual punishment. CP 8-15. The motions were denied. 3/5/14 RP 71-76; CP 89-92.

A jury found Mr. Phillips guilty of both offenses as charged and, by special verdict, the jury also answered "yes" to the special allegations. CP 72-75. At sentencing, the court vacated the conviction for child molestation on double jeopardy grounds. CP 76. 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 25 years based on the special allegation. 4/11/14 RP 15; CP 78, 80.

D. ARGUMENT

The absence of any standards in RCW 9.94A.836 to guide or limit prosecutorial discretion to file a special allegation deprived Mr. Phillips of his constitutional rights to due process and equal protection.

1. A criminal statute is unconstitutionally vague when it fails to provide ascertainable standards to protect against arbitrary enforcement.

"The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Accordingly, under the due process clauses of the Fourteenth Amendment and Article I, section 3, a criminal statute is unconstitutionally vague when it fails to sufficiently define the offense so citizens understand 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). Thus, due process requires that a criminal statute provide minimal guidelines and workable standards to ensure non-arbitrary enforcement. *State v. Evans*, 177 Wn.2d 186, 207, 298 P.3d 724 (2013); *City of Spokane v. Neff*, 152 Wn.2d 85, 91, 93 P.3d 158 (2004); *State v. Worrell*, 111 Wn.2d 537, 544, 761 P.2d 56 (1988); "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 (1884).

2. <u>The special allegation statute violates due process by failing to provide ascertainable standards to protect against arbitrary, ad hoc, or discriminatory exercise of prosecutorial discretion</u>.

The special allegation statute provides no ascertainable standards or guidelines to inform prosecutorial discretion in filing the allegation. 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).

A defendant such as Mr. Phillips who is convicted of rape of a child in the first degree must be sentenced as a sex offender. RCW 9.94A.507(1)(i). When sentencing a sex offender, the court must impose a minimum term and a maximum term of confinement. RCW 9.9A.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).

Rape of child in the first degree is a Class A felony with a maximum term of life imprisonment. RCW 9A.20.021(1)(a); 9A.44.073. Based on Mr. Phillips' offender score of '3,' he faced a standard range sentence of 120 to 160 months. CP 78. Based on the special verdict that his offense was predatory, however, the court imposed a "statutory minimum" sentence of 300 months. CP 78.

In *Rice*, the petitioner challenged the predatory offense special allegation statute on the grounds that the Legislature's use of the term "shall" imposed a mandatory duty on the prosecutor to charge the special allegation and thereby infringed on a prosecutor's inherent charging discretion, in violation of the separation of powers doctrine. 174 Wn.2d at 888-89. The Court ruled the statute withstood the challenge on the grounds the term "shall," as used in the statute, was discretionary rather than mandatory because 1) the statute did not provide any consequences for non-compliance with the statute, 2) prosecuting attorneys have broad, statutory charging discretion, and 3) mandatory charging statues are unconstitutional. *Id.* at 895-907.

By ruling that "shall" means "may" in this context, the 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.

Nineteen years prior to *Rice*, in *State v. Halstien*, 122 Wn.2d 109, 857 P.2d 270 (1993), the Court considered 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 prosecutor to add a special allegation of sexual motivation in criminal cases other that sex offenses.[3] The Court primarily focused on the first requirement of the vagueness test, and determined that the phrase "sexual motivation" was sufficiently definite to warn ordinary persons of what motivation was proscribed. *Id.* at 118-121.

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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.

(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.

The Court also 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 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. The Court noted the statute provides 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, the Court did not address the lack of limitations or guidelines to inform when a prosecutor *may* file the special allegation. In the absence of any limitations or guidelines to inform when a prosecutor *may* file a

special allegation, the special allegation statute is unconstitutionally vague.

3. The special allegation statute violates equal protection by inviting grossly disparate sentences for similarly situated defendants.

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), (citing *Harmon v. McNutt*, 91 Wn.2d 126, 130, 587 P.2d 537 (1978)). 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. *See, e.g.*, *Rinaldi v. Yeager*, 384 U.S. 305, 308-09, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966) (law establishing reimbursement for indigent appeals irrationally discriminated between persons who were confined for offenses and those that were not).

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.

4. The proper remedy is reversal of Mr. Phillips's sentence and remand for sentencing within the standard range.

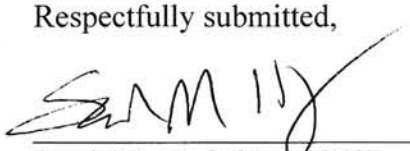
When a defendant is sentenced pursuant to an unconstitutional statute the proper remedy is to remand for resentencing. *State v. Hunley*, 175 Wn.2d 901, 915-16, 287 P.3d 584 (2012). Because the special allegation statute violates due process and equal protection, Mr. Phillips is entitled to resentencing without the enhancement and within the standard range.

E. CONCLUSION

RCW 9.94A.836 violates due process for failure to provide objective guidelines to guard against unfettered prosecutorial discretion. Additionally, the statute violates equal protection for failure to provide a means to assure consistent treatment regarding the decision to file the special allegation. For the foregoing reasons, Mr. Phillips requests this court rule RCW 9.94A.836 is unconstitutional and remand his case for resentencing within the standard range.

DATED this 3rd day of December 2014.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71821-5-I
v.	)	
	)	
MICHAEL PHILLIPS,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF DECEMBER, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] MICHAEL PHILLIPS 373179 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF DECEMBER, 2014.

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