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Apr 22, 2015  
Court of Appeals  
Division I  
State of Washington

No. 71821-5-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL L. PHILLIPS,

Appellant.

---

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

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT

**1. The special allegation statute fails to provide ascertainable standards to protect against arbitrary, ad hoc, or discriminatory exercise of prosecutorial discretion, in violation of Mr. Phillips' right to due process.**

The special allegation statute, RCW 9.94A.836, provides no ascertainable standards or guidelines to inform prosecutorial discretion in filing the allegation, in violation of the due process clauses of the Fourteenth Amendment and Article I, section 3. *See, e.g., In re Detention of Danforth*, 173 Wn.2d 59, 74, 264 P.3d 783 (2011) (a criminal statute is unconstitutionally vague when it fails to provide ascertainable standards to protect against arbitrary, ad hoc, or discriminatory enforcement).

The special allegation statute directs the prosecutor “shall” file the allegation whenever sufficient evidence exists. The Washington Supreme Court ruled the term “shall,” as used in the special allegation statute, was discretionary rather than mandatory. *State v. Rice*, 174 Wn.2d 884, 895-907, 279 P.3d 849 (2012). By ruling that “shall” means “may” in this context, the Court 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.

The vagueness doctrine encompasses two principles; sufficient notice of prohibited conduct and ascertainable standards to protect against arbitrary governmental enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357-58, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). Mr. Phillips' vagueness challenge focuses on the second principle, that is, the statute's failure to provide standards to guide the prosecutor's exercise of discretion. Therefore, the State's position that Mr. Phillips' vagueness challenge should not be addressed for failure to argue vagueness as to his conduct is inapt. *See* Br. of Resp. at 9.

*State v. Halstien*, 122 Wn.2d 109, 857 P.2d 270 (1993), decided nineteen years before *Rice*, did not address the issue presented here. Because the term "shall" had not yet been interpreted to mean "may" in this context, the *Halstien* Court did not address the lack of limitations or guidelines to inform the exercise of prosecutorial discretion.

The State argues the statute guides and limits the exercise of prosecutorial discretion. Br. of Resp. at 11. At trial, however, the prosecutor asserted 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, the very rarity of filing the special allegation demonstrates the arbitrary and ad hoc exercise of prosecutorial discretion.

In the absence of any limitations or guidelines to protect against arbitrary, ad hoc, or discriminatory filing of the special allegation, the special allegation statute is unconstitutionally vague.

**2. The special allegation statute invites grossly disparate sentences for similarly situated defendants, in violation of Mr. Phillips' right to equal protection.**

In the absence of 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.<sup>1</sup> *See, e.g., State v. Coria*, 120 Wn.2d 156, 170-71, 839 P.2d 890 (1992) (an equal protection challenge to a statute that implicates physical liberty interests is reviewed pursuant to the “rational basis” test). In addition, a sentencing court does not have discretion to dismiss a special allegation, even if it finds substantial and compelling reasons considering the purpose of the Sentencing Reform Act. RCW 9.94A.836(3). *Cf.* RCW 9.94A.537(6) (a court retains discretion to impose standard range sentence even where jury has found aggravating or mitigating factors, when it finds substantial and compelling reasons considering the purposes of the Sentencing Reform

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<sup>1</sup> Mr. Phillips faced a standard range sentence of 120 to 160 months. CP 78. Based on the special finding, however, the court imposed a “statutory minimum” sentence of 300 months. CP 78.

Act). By eliminating judicial discretion, and by failing to link the exercise of prosecutorial discretion to legislative purpose, the special allegation statute confers prosecutors with unfettered discretion to selectively file the special allegation in violation of the constitutional right to equal protection.

As discussed, the special allegation has been filed only one other time since 2006, even though, as the trial court noted, additional cases that fell within the criteria during that time frame. Therefore, the State's contention that there was no suggestion "that Mr. Phillips was subjected to arbitrary enforcement of the law," is unsupported by the record. *See Br. of Resp.* at 13.

In the absence of judicial review and discretion, and the failure to link the exercise of prosecutorial discretion to a legislative purpose, the special allegation confers prosecutors with unfettered discretion to selectively file the special allegation, thereby exposing similarly situated defendants to vastly disparate punishments, in violation of the constitutional right to equal protection.

B. CONCLUSION

Because the special allegation statute violates due process and equal protection, Mr. Phillips is entitled to resentencing within the standard range. *See State v. Hunley*, 175 Wn.2d 901, 915-16, 287 P.3d 584 (2012) (when defendant sentenced pursuant to unconstitutional statute the proper remedy is remand for resentencing). For the foregoing reasons and for the reasons set forth in the Brief of Appellant, Mr. Phillips requests this court remand his case for resentencing within the standard range.

DATED this 21<sup>st</sup> day of April 2015.

Respectfully submitted,

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22<sup>ND</sup> DAY OF APRIL, 2015, I CAUSED THE ORIGINAL **REPLY 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:

<p>[X] AMY MECKLING, DPA [paoappellateunitmail@kingcounty.gov] [amy.meckling@kingcounty.gov] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>( ) ( ) (X)</p>	<p>U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL</p>
<p>[X] MICHAEL PHILLIPS 373179 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

**SIGNED** IN SEATTLE, WASHINGTON THIS 22<sup>ND</sup> DAY OF APRIL, 2015.

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