No. 98201-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

v.

JERRY L. PETERSON

RESPONSE OF RESPONDENT TO AMICUS BRIEF OF WACDL, ACLU, AND WDA

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A. Argument in Response to *Amicus* Brief of WACDL, ACLU, and WDA

Jerry Peterson's case is in an unique procedural posture. From the inception of this case, Ms. Peterson has argued that the sentencing provisions in RCW 69.50.410 mean what they say and should be applied in the way they were intended. This was her position in the trial court, and it was adopted by the trial court. This was her position in the Court of Appeals, and it was adopted by the Court of Appeals. This position was also promoted by *amicus* Washington Association of Criminal Defense Lawyers (WACDL). See State v. Cyr, 97323-7, Brief of WACDL as *amicus curiae*. This is no longer a viable position. Two months after the Court of Appeals issued its decision, this Court has held that the position adopted by the trial court, the Court of Appeals, and WACDL is not a reasonable interpretation of the statute. *State v. Cyr*, 195 Wn.2d 492, 505, 461 P.3d 360 (2020).

This Court's determination that the sentencing provisions of RCW 69.50.410 do not mean what they say casts uncertainty on the entire statute. When a portion of a statute is invalidated by this Court, the next step in appellate review is to determine whether the invalidated portion can be severed from the remainder of the statute. *State v. Anderson*, 81 Wn.2d 234, 501 P.2d 184 (1972). In her Supplemental Brief, Ms. Peterson argues that the legislative purposes of the statute cannot be

accomplished absent the sentencing provisions, which are grammatically, functionally, and volitionally integral to the statute as a whole. Having declared the sentencing provisions invalid, this Court should find the remaining provisions of the statute are not severable from the statute and strike down the statute as a whole.

Recognizing the import of this Court's *Cyr* decision, *amici* WACDL, along with the American Civil Liberties Union (ACLU) and Washington Defenders Association (WDA), also encourage this Court to review the statute as a whole and invalidate it. The State objects to the *amicus* brief, pointing out that this Court will not normally decide an issue raised initially by amicus. Petitioner's Opposition to Amicus Brief, 2. This Court overruled the Petitioner's Objection and allowed filing of the *amicus* brief.

Ms. Peterson hereby incorporates by reference the *amicus* brief, adopts them as her own, and urges this Court to reach the merits of the arguments contained therein. In doing so, Ms. Peterson acknowledges this Court's general rule against deciding issues raised for the first time by *amicus*. But the rules of appellate procedure are to be liberally interpreted to promote justice and facilitate the decisions of cases on the merits. RAP 1.2(a). When the ends of justice require this Court to consider arguments of *amicus*, this Court has not hesitated to do so. See *Keodalah v. Allstate*,

194 Wn.2d 339,346, fn.4, 449 P.3d 1040 (2019) ("While we do not generally consider arguments raised for the first time on review by amici, we have discretion to do so where necessary to appropriately resolve a case.").

Further, it is not true that the arguments are being initially raised by *amici*. Rather, the amicus brief does exactly what any amicus brief should do: presents argument in a manner designed to assist the appellate court in reaching the proper decision. RAP 10.6.

The first argument raised by *amici* is that the legislative and jurisprudential history of RCW 69.50.410 indicates the legislative purposes of the statute are not being satisfied. *Amici* point out the rehabilitative goal of providing treatment statute, as opposed to the punitive goal of the Sentencing Reform Act (SRA), has never been accomplished. This is consistent with the arguments raised by Ms. Peterson throughout this appellate process, both in the Court of Appeals and in this Court. See Court of Appeals Amended Brief of Respondent, 6-7; Respondent's Answer to Petition for Review, 4-6; Supplemental Brief of Respondent, 3-4.

This Court first recognized that the rehabilitative goals of the statute were not being met when it found the Department of Social and Health Services (DSHS) in contempt for not providing the treatment

contemplated by RCW 69.50.410 and its companion, RCW 60.32.090. *Bresolin v. Morris*, 86 Wn.2d 241, 543 P.2d 325 (1975) (*Bresolin I*). But this Court failed to follow through on the contempt two years later after the legislature repealed RCW 60.32.090, thereby gutting the purposes of RCW 69.50.410. *Bresolin v. Morris*, 88 Wn.2d 167, 558 P.2d 1350 (1977) (*Bresolin II*). Despite the fact that RCW 69.50.410 explicitly requires defendants convicted of the statute to serve their sentences in a DSHS treatment facility, Washington courts continued to convict defendants under the statute and sentence them to serve their time in prison facilities operated by the Department of Corrections (DOC). *State v. Leek*, 26 Wn. App. 651, 614 P.2d 209 (1980) (affirming judgment of sentence for violation of RCW 69.50.410); *State v. Kinsey*, 20 Wn.App. 299, 579 P.2d 1347 (1978) (same).

The second argument raised by *amici* is that RCW 69.50.410 violates article 1, section 12 of the Washington Constitution. *Amici* argue that when two statutes punish the same act but provide for different punishments, the Constitution requires that the more lenient statute be applied. This argument echoes the arguments made by Ms. Peterson repeatedly during this process that there is no reason why she should have been singled out for prosecution under RCW 69.50.410 (a level III drug offense) when over 99.9% of all similarly situated defendants since 1999

were prosecuted under RCW 69.50.401 (a Level II drug offense). See Respondent's Answer to Petition for Review, 1-2; Supplemental Brief of Respondent, 9-10.

The third argument of *amici* is that RCW 69.50.410 has been repealed by implication. *Amici* argue, "[I]n light of the repeal of RCW 69.32.090 and the failure to fund DSHS, te enactment of the SRA, and the holding of *Cyr*, compliance with plain language of RCW 69.50.410 is not possible." This argument essentially mirrors Ms. Peterson's severance argument: because part of the statute has been rendered invalid under *Cyr*, it is impossible to accomplish the purposes of the statute and this Court should find that the remainder of the statute cannot be severed from the invalid portions.

The final argument of *amici* is that RCW 69.50.410 is invalid under the doctrine of desuetude. Ms. Peterson specifically raised the doctrine of desuetude in her Supplemental Brief of Respondent. Supplemental Brief of Respondent, 11-12.

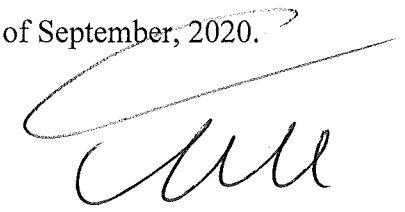
None of the arguments are raised for the first time by *amici* but are in fact arguments propery raised by the defendnt in her prior pleadings. Justice Gordon McCloud once called that this statute "ridiculous," a modifier with which Ms. Peterson concurs. State v. Cyr, 97323-7, Oral Argument at 24:35. Rather than allowing prosecutors like the Lewis

County Prosecutor's Office to arbitrarily cherry-pick defendants for prosecution under this ridiculous, severe, and inequitable statute, this Court should address the arguments raised by *amici* and invalidate it now.

B. Conclusion

This Court should find RCW 69.50.410 invalid for all the reasons cited by *amici*.

DATED this 22nd day of September, 2020.



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