No. 98201-5

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

v.

JERRY L. PETERSON

THIRD SUPPLEMENTAL BRIEF OF RESPONDENT

Thomas E. Weaver
WSBA #22488
Attorney for Respondent

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

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A. Counterstatement of Issues

1. Does Ms. Peterson have a prior drug offense that subjects her to the doubling provisions of RCW 69.50.408?
2. Are the sentencing provisions of RCW 69.50.410, which have already been invalidated by this Court, unseverable from the remainder of the statute, such that the entire statute should be found invalid?
3. Should RCW 69.50.410 be declared invalid under the doctrine of desuetude?
4. Does the unusual legislative history of RCW 69.50.410 indicate a desire by the legislature to repeal the statute by implication?
5. Does RCW 69.50.410 violate Washington's Privileges and Immunities Clause under Article 1, Section 12 of the Washington Constitution?
6. Should this Court reverse the Court of Appeals and remand for resentencing under the SRA?

B. Procedural History of this Appeal

This Court has invited argument on whether RCW 69.50.410 (Sale of Controlled Substances for Profit) is unconstitutional pursuant to Article 1, section 12 of the Washington Constitution and, assuming its invalidity,

how that affects the Uniform Controlled Substances Act as a whole. As argued in previous briefing to this Court, when a person engages in the sale of controlled substances for anything of value (money, services, car ride, sex, etc.), prosecutors have nearly unfettered discretion to charge a violation of either Delivery of a Controlled Substance or Sale for Profit. Despite the name of the offense, it is not necessary for the drug seller to make a profit in the transaction, only that the drugs be traded for anything of value. If the prosecutor charges the former, it is a Level II Drug Offense; if the latter, it is a Level III Drug Offense. For someone like Ms. Peterson, who has an offender score of 4, this means her offender score is goes from 20+ to 60 months up to 68+ to 100 months.

Before reaching the merits of the constitutionality of RCW 69.50.410, it is worthwhile to review briefly the unusual procedural history of this appeal. This case started as a simple sentencing dispute over how to properly interpret the sentencing provisions of RCW 69.50.410(2) and (3). The Lewis County Superior Court concluded Ms. Peterson's proper sentence under subsection (3) was 24 months, despite her standard range being 68+ to 100 months under the Sentencing Reform Act (SRA). Around the same time, a different judge in the Lewis County Superior Court reached a similar conclusion in State v. Cyr, 17-1-00220-2. The State appealed both sentences.

The *Cyr* case reached the Court of Appeals, Division II, first, and that Court concluded the trial court had erred by not applying the SRA. *State v. Cyr*, 8 Wn.App.2d 834, 441 P.3d 1238 (2019). Mr. Cyr filed a timely petition for review, which this Court granted. The Washington Association of Criminal Defense Lawyers (WACDL) filed an *amicus* brief[1] urging this Court to find that subsections (2) and (3) mean what they say and to reverse the Court of Appeals. While Mr. Cyr's case was pending in this Court, a different panel of the Court of Appeals, Division II, disagreed with the *Cyr* decision and concluded the trial court was correct. *State v. Peterson*, 12 Wn.App.2d 195, 457 P.3d 480 (2020). The State filed a timely petition for review, which Ms. Peterson timely answered, urging this Court to deny review (Answer to Petition for Review).

Meanwhile, this Court was considering the "ridiculous"[2] language of RCW 69.50.410. This Court unanimously concluded that the Lewis County Superior Court's interpretation of the applicable statute is not "reasonable." *State v. Cyr*, 195 Wn. 2d 492, 461 P.3d 360 (2020). In doing so, this Court rejected the positions urged by Mr. Cyr, WACDL and

[1] The *amicus* brief was written by undersigned counsel.

[2] *State v. Cyr*, 97323-7, Oral Argument at 24:35, Justice Gordon McCloud.

Ms. Peterson, as well as the position taken by the Court of Appeals in *State v. Peterson.*

Having decided that no reasonable jurist could conclude that RCW 69.50.410 authorized the sentences imposed by the Lewis County Superior Court (despite the fact that two trial judges and three Court of Appeals judges concluded otherwise), this Court requested supplemental briefing in Ms. Peterson's case. The State filed a Supplemental Brief urging this Court to summarily reverse based upon *Cyr*, saying it "directly applies to Peterson's case, overturns Division Two's faulty conclusions that Peterson must be sentenced to a two-year mandatory sentence pursuant to RCW 69.50.410(3)(a), and requires this Court to grant review and reverse." Petitioner's Supplemental Brief, 5. Ms. Peterson urged this Court to simply deny review. (First Supplemental Brief). Ms. Peterson also argued the doubling provision of RCW 69.50.408 does not apply in her case because she does not have a prior offense "under this chapter," all of her prior offenses being simple drug possession offenses under RCW 69.50.4013. This Court granted review. The issue of whether Ms. Peterson is subject to the doubling provision remains to be decided by this Court.

In her Second Supplemental Brief, Ms. Peterson raised the issue of the severability of the statute. Ms. Peterson argued that, given that the

sentencing provisions of RCW 69.50.410 are invalid, the rest of the statute is likewise invalid. The grammar, function, and volition of RCW 69.50.410 demonstrate the legislature did not intend for the sentencing provisions to be severable from the rest of the statute. Ms. Peterson also raised the issue of desuetude given that 99.96% of all drug deliveries in this state are charged pursuant to RCW 69.50.401, and not RCW 69.50.410. These issues remain to be decided by this Court.

At that point, WACDL, WDA and ACLU filed a joint *amicus* brief raising yet another concern: whether RCW 69.50.410 violates Article 1, Section 12 of the Washington Constitution. The Article 1, Section 12 section of the brief included a *Gunwall* analysis. The *amicus* brief also reiterated the unusual legislative history of the statute, arguing that history indicated a desire by the legislature to repeal the statute by implication. Both of these issues remain to be decided by this Court. The State objected to the filing of the *amicus* brief, arguing it raised issues for the first time by *amici*. This Court granted leave of *amici* to file the brief. Ms. Peterson filed an answer to the brief adopting the arguments of *amici* as her own. (Answer to Amicus Brief). This Court responded by requesting yet more supplemental briefing. That is what this Court is now reading. (Third Supplemental Brief.) In this brief, Ms. Peterson expands on the arguments raised in the *amici* briefs and argues RCW 69.50.410 is

unconstitutional pursuant to Washington's Privileges and Immunities Clause. Assuming this Court agrees with Ms. Peterson, the statute to which Ms. Peterson pleaded guilty is unconstitutional and her case needs to be dismissed.

Finally, should this Court reject all of the arguments of Ms. Peterson and *amici*, there remains the issue for which this Court originally granted review: should Ms. Peterson's case be remanded for resentencing pursuant to the SRA?

C. RCW 69.50.410 violates the Privileges and Immunities Clause of Article 1, Section 12 of the Washington Constitution.

This Court has long recognized that when the legislature creates two offenses with the same elements but substantially different penalties, it violates Article 1, Section 12 of the Washington Constitution. Article 1, section 12 reads: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." In *Olson v. Delmore*, 48 Wn.2d 545, 295 P.2d 324 (1956), this Court relied on Article 1, Section 12 to find that two statutes criminalizing the carrying of a concealed pistol, one a felony and one a misdemeanor, violated this provision. Similarly, in *State v. Zornes*, 78 Wn.2d 9, 475 P.2d 109 (1970), this Court held that Possession of a

Dangerous Drug and Possession of a Narcotic Drug overlapped and violated Article 1, Section 12.

Both *Delmore* and *Zornes* purport to rely both on the Privileges and Immunity Clause of Article 1, Section 12 and on the Equal Protection Clause of the Fourteenth Amendment. This Court has been content in the past to rely on both clauses without distinguishing its analysis. That is no longer possible, however, given the United States Supreme Court's decision of *United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979). In *Batchelder* the Court concluded that the Equal Protection Clause is not offended when two overlapping statutes criminalize the same behavior, but prescribe different punishments, saying "This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." *Batchelder* at 123-24, citing *United States v. Beacon Brass Co.*, 344 U.S. 43, 73 S.Ct. 77, 97 L.Ed. 61 (1952); *Rosenberg v. United States*, 346 U.S. 273, 73 S.Ct. 1152, 97 L.Ed. 1607 (1953) (opinion of Justice Clark joined by five members of the Court); *Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962); *Securities and Exchange Commission v. National Securities*, 393 U.S. 453, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969); *United States v. Naftalin*, 441 U.S. 768, 99 S.Ct. 2077, 60 L.Ed.2d 624 (1979). *Oyler v. Boles*

specifically made clear that its holding was based upon the Supreme Court's reading of the Fourteenth Amendment's Equal Protection Clause. The only case cited for the proposition that overlapping statutes violate the Fourteenth Amendment was a dissenting opinion from 1956 that opined such statutes raise "serious constitutional questions." *Batchelder* at 124, citing *Berra v. United States*, 351 U.S. 131, 137, 76 S.Ct. 685, 100 L.Ed. 1013 (Justice Black, dissenting). It is worth noting of the five cases cited in the *Batchelder* string cite, this Court had the benefit of all but one when it decided *Zornes* and two of the them were decided prior to *Delmore*.

This Court now recognizes that the *Batchelder* case overrules the Fourteenth Amendment Equal Protection analysis of *Delmore/Zornes*. *Kennewick v. Fountain*, 116 Wn.2d 189, 802 P.2d 1371 (1991). This Court did not undertake to do a separate Article 1, Section 12 analysis in *Fountain*, however, holding that "even applying *Zornes*, Fountain would have suffered no equal protection violation" because the two statutes at issue in that case did not have the same elements. *Fountain* at 193. *See, also, In re Boot*, 130 Wn.2d 553, 573, 925 P.2d 964 (1996) (recognizing the *Fountain* decision was limited to "analysis under the Fourteenth Amendment."). This Court has recognized that the continued viability of *Delmore/Zornes* under Washington's Privileges and Immunities Clause in Article 1, section 12 remains an unresolved issue. *State v. Kirwin*, 165

Wn.2d 818, 202 P.3d 1044 (2009) (Justice Madson, concurring) ("The Court has not overruled the cases to the extent they rely on article 1, section 12"). *See, also, State v. Eakins*, 73 Wn.App. 271, 275-76, 869 P.2d 83 (1994) (Court declines to analyze issue pursuant to Article 1, Section 12, given the absence of *Gunwall* analysis).

This Court should conclude that *Delmore/Zornes* remain good law under Article 1, Section 12 of the Washington Constitution. In doing so, it should review the constitutional provision pursuant to the six factors of *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). The six *Gunwall* factors to be considered are: (1) The textual language of the State Constitution; (2) Significant differences in the texts of parallel provisions of the federal and state constitutions; (3) State constitutional and common law history; (4) Preexisting state law; (5) Differences in structure between the federal and state constitutions; (6) Matters of particular state interest or local concern.

1. The textual language and significant differences in the parallel provisions.

For ease of analysis, the first and second *Gunwall* factors will be addressed together. As noted above, Article 1, Section 12's Privilege and Immunities Clause reads, "No law shall be passed granting to any citizen, . . . privileges or immunities which upon the same terms shall not equally

belong to all citizens. . ." The Fourteenth Amendment Privileges and Immunities Clause reads, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United State." It is not an exaggeration to say that no two similarly worded clauses from the United States and Washington Constitutions have been interpreted more differently than their respective Privileges and Immunities Clauses. The federal Privileges and Immunities Clause, which appears in Section 1 of the Fourteenth Amendment alongside the Due Process and Equal Protection Clauses, was rendered defunct almost from its inception. Just four years after ratification, the United States Supreme Court held that the Privileges and Immunities Clause was a substantial intrusion into the traditional balance of power between the federal and state governments and refused to enforce its language. *The Slaughterhouse Cases*, 83 U.S. 36, 21 L.Ed. 394 (1872). While this approach to the Fourteenth Amendment Privileges and Immunities Clause has been heavily criticized for over a century-and-a-half, it remains the law of the land. *McDonald v. Chicago*, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010). Although the *Slaughterhouse Cases* have never been overruled, the intended effect of the Privileges and Immunities Clause has been largely followed under the guise of the Equal Protection Clause and the

development of the Substantive Due Process Doctrine. *See McDonald* at 811-12 (Justice Thomas, concurring).

On the other hand, this Court has repeatedly cited to the Privileges and Immunities Clause of Article 1, Section 12. *Henry v. Thurston County*, 31 Wn. 638, 72 P. 488 (1903). The language of the Washington Constitution differs materially from the Fourteenth Amendment and has never been declared invalid, unlike its Fourteenth Amendment counterpart. Therefore, the text and history Article 1, section 12 supports treating the two clauses differently.

2. State constitutional and common law history.

As noted, the United States Supreme Court rendered the Fourteenth Amendment Privileges and Immunity Clause defunct in 1872. Just a decade-and-a-half later, Washington ratified its state constitution and was granted statehood. In writing its state constitution, Washington chose to employ language more reminiscent of the inert Privileges and Immunities provision than Equal Protection provision.

The earliest discussion of privileges and immunities in Washington's history addressed the right of women to serve as jurors. In *Rosencrantz v. Washington Territory*, 2 Wn.Terr. 267, 5 P. 305 (1894) a majority of this Court recognized the right of women to serve as one of the privileges and immunities to which they were entitled. Three years later,

this Court reversed course, relying on a case from the United States Supreme Court holding that the right of women to practice law is not one of the privileges and immunities described by the Fourteenth Amendment. *Harland v. Washington Territory*, 3 Wn.Terr. 131, 13 P. 453 (1887), citing *Bradwell v. Illinois*, 83 U.S. 130, 21 L.Ed. 442, 16 Wall. 130 (1872). Meanwhile, the territorial government of Washington passed a statute granting women the right to serve as jurors, which this Court promptly invalided. *Rumsey v. Washington Territory*, 3 Wn.Terr. 332A, 21 P. 152 (1888). But three years later, after statehood and adoption of the Constitution, this Court recognized the validity of the legislative change and overturned *Harland*. *Marston v. Humes*, 3 Wn. 267, 28 P. 520 (1891). As this history shows, Washington intended its Privileges and Immunities Clause to be interpreted independently of the Fourteenth Amendment's Privileges and Immunities Clause.

3. Preexisting State Law

In this Court's early cases, analysis under Article 1, Section 12 and the Equal Protection Clause frequently overlapped, with this Court saying the former "in substance secures the same equal rights" as the latter. *McKnight v. Hodge*, 55 Wn. 289, 292, 104 P. 504 (1909). *See, also, Olsen v. Delmore*, 48 Wn.2d at 550 (commenting the two clauses are "substantially identical").

But the early cases of this Court did occasionally distinguish between the two clauses. *Henry v. Thurston County*, 31 Wn. 638, 72 P. 488 (1903). This Court also occasionally cited solely to the Washington Constitution with reference to the Fourteenth Amendment. *In re Camp*, 38 Wn. 393, 80 P. 547 (1905); *Tacoma v. Krech*, 15 Wn. 296, 46 P. 255 (1896) ("The object of the [Privileges and Immunities Clause of the] constitution was to prohibit special legislation, and substitute in its place a general law, which bore on all alike.")

At the time this Court decided *Delmore* and *Zornes*, concluding both Article 1, section 12 and the Fourteenth Amendment grant the right of defendants to object to overlapping criminal statutes, there was no case law establishing that right under the Fourteenth Amendment. In fact, as the *Batchelder* string cite amply demonstrates, the Fourteenth Amendment case law was to the contrary. Given this history, the only justification for the conclusion reached by this Court in *Delmore/Zornes* is based solely on Article 1, Section 12.

4. Differences in structure between the federal and state constitutions

The fifth *Gunwall* factor will always weigh in favor of broader protections. *Gunwall* at 66. This is true because the federal constitution is a grant of authority and the state constitution is a limitation on authority.

In the context of the Privileges and Immunities Clause, however, the differences in structure are even more stark. As noted, there has never been a single case applying the Fourteenth Amendment Privileges and Immunities Clause since its ratification a century-and-a-half ago. On the other hand, Washington began interpreting and applying Article 1, Section 12 promptly after statehood. *State v. Carey*, 4 Wn. 424, 30 P. 729 (1892).

5. Matters of particular state interest or local concern.

How and why this Court interprets its drug laws and sentencing statutes is a matter of local concern. This is evidenced by the state's differing approach to the regulation and possession of marijuana, in particular. There is a clear intention by the State of Washington to approach drug policy differently from the federal government. This Court should continue to apply the analysis of *Delmore/Zornes* without reference to the United States Supreme Court's interpretation of national statutes.

In sum, everything about the text, history, and development of Article 1, Section 12 indicates the *Delmore/Zornes* line of cases developed independent of the United States Constitution. This Court should continue to follow this analysis and conclude RCW 69.50.410 violates Article 1, Section 12 and is unconstitutional. The remedy is dismissal of Ms. Peterson's case. *Zornes* at 26.

D. The invalidity of RCW 69.50.410 affects the constitutionality of the UCSA as a whole.

The Order for the Third Supplemental Brief also asked the parties to address "whether that provision's viability affects the constitutionality of the UCSA as a whole." As has been argued in previous briefing, when the UCSA was initially passed, it was designed to have two tracks: a punitive track and a treatment track. The punitive track required prison sentences for drug possessors and deliverers while the treatment track called for rehabilitation of people who sell drugs for profit. Those who voluntarily submit to treatment are deemed immune from prosecution. RCW 69.50.410(6).

The two track system never worked, however, because the legislature was failed to fully commit to it. *Bresolin v. Morris*, 86 Wn.2d 241, 543 P.2d 325 (1975) (*Bresolin I*); *Bresolin v. Morris*, 88 Wn.2d 167, 558 P.2d 1350 (1977) (*Bresolin II*). As a result, we have a statutory scheme that has never functioned as it was intended.

This raises the question of whether RCW 69.50.410 can be severed from the entirety of the UCSA. To be severable, the invalid provision must be grammatically, functionally, and volitionally severable. *State v. Abrams*, 163 Wn.2d 277, 178 P.3d 1021 (2008); *McGowan v. State,* 148 Wn.2d 278, 295, 60 P.3d 67 (2002). The Court also looks to whether

there is a severability statute. *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 67, 109 P.3d 405 (2005). Chapter 69.50 RCW used to have a severability statute, but it was decodified in 2016. See former RCW 69.50.605.

Grammatically, RCW 69.50.410 is not severable from the remainder of the UCSA. In fact, it explicitly says so, not once, but twice. RCW 69.50.410(7) states, "(7) This section shall not apply to offenses defined and punishable under the provisions of RCW 69.50.401 through RCW 69.50.4015." In case the reader did not understand, the legislature said it again. "RCW 69.50.401 through 69.50.4015 shall not apply to offenses defined and punishable under the provisions of RCW 69.50.410." RCW 69.50.4016. Grammatically, the provisions of the UCSA are meant to be read in parallel and are not severable from each other.

Functionally, as noted above, the legislature envisioned the UCSA as having two tracks, a punitive and rehabilitative track. By failing to fund the rehabilitative track, the legislature has created a system that does not function as intended. It is comparable to a train trying to navigate a bridge with one train track removed; it cannot be done.

Volitionally, the legislature would not have created the UCSA knowing that one of its basic functions would not take effect. The UCSA was intended be a comprehensive legislative enactment and the legislature

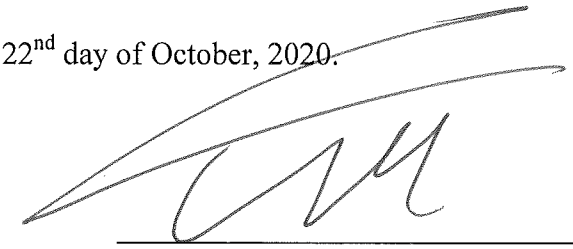
could not have envisioned the act as a whole continuing to function after one of its primary functions was declared invalid.

In sum, the UCSA is designed to function as a whole. RCW 69.50.410 cannot be severed from the remainder of the UCSA grammatically, functionally, and volitionally. The invalidity of RCW 69.50.410 renders the entire statutory scheme invalid.

E. Conclusion

This Court should remand Ms. Peterson's case to the trial court with instructions to dismiss.

DATED this 22nd day of October, 2020.



Thomas E. Weaver, WSBA #22488
Attorney for Respondent

THE LAW OFFICE OF THOMAS E. WEAVER

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