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No. 98201-5

THE SUPREME COURT OF WASHINGTON

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**STATE OF WASHINGTON,**

Petitioner,

vs.

**JERRY L. PETERSON,**

Respondent.

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Review from Court of Appeals, Division Two, Case No. 52183-1-II

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**Petitioner's Response to Brief of Amicus Curiae  
WACDL, ACLU-WA and WDA**

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JONATHAN L. MEYER  
Lewis County Prosecuting Attorney



By:

\_\_\_\_\_  
SARA I. BEIGH, WSBA No. 35564  
Deputy Prosecuting Attorney

Lewis County Prosecutor's Office  
345 W. Main Street, 2nd Floor  
Chehalis, WA 98532-1900  
(360) 740-1240

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## **I. INTRODUCTION**

Framed by a misunderstanding and mischaracterization of the legislative and jurisprudential history of Sale of a Controlled Substance for Profit, amicus curia, the Washington Association of Criminal Defense Lawyers, American Civil Liberties Union of Washington, and Washington Defenders Association (hereafter Amicus), contends RCW 69.50.410 is a statute that no longer serves the purpose for which it was created, a criminal statute promoting rehabilitation rather than retribution. Amicus asserts a prosecutor's ability to choose to prosecute an individual pursuant to RCW 69.50.410 or for Delivery of Controlled Substance, violates article I, section 12 due to the disparity in the possible sentences.

Amicus argues RCW 69.50.410 has been repealed by implication because the purpose of the statute and its internal sentencing structure was contrary to the SRA. Amicus fails to explain how an act titled "Controlled Substances - - Mandatory Substances" is a rehabilitative act. Amicus also asserts RCW 69.50.410 is invalid under the rarely used civil doctrine of desuetude.

The following is a brief that addresses all the issues raised by Amicus that the State identified. In short, an accurate historical, legislative, and jurisprudential understanding of RCW 69.50.410; a background regarding the operation of state institutions; and the plain language of RCW

69.50.410 lead to only one conclusion, the statute is still constitutional and valid.

## II. ARGUMENT

### A. **The Newly Raised Issues By Amicus Should Not Be Considered For The First Time By This Court.**

This Court has a long-standing practice of not deciding issues solely raised by amicus. *Noble Manor v. Pierce County*, 133 Wn.2d 269, 272, n.1, 943 P.2d 1378 (1997). *Wash. State Bar Assn. v. Great W. Union Fed. Sav. & Loan Assn.*, 91 Wn.2d 48, 60, 586 P.2d 870 (1978); *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962); *Walker v. Wiley*, 177 Wash. 483, 491, 32 P.2d 1062 (1934). Amicus raises a constitutional challenge based upon Const. article 1, section 12 that has never been addressed during any prior litigation of Peterson's case. Peterson did not, in any prior briefing or hearing, raise an equal protection, article I, section 12 argument. This Court has previously declined to consider constitutional claims not raised by litigants. *Long*, 60 Wn.2d at 154 (internal quotations and citations omitted).

Further, the State is the petitioner in this matter. Peterson, had two opportunities to cross-petition, one of which was supplemental briefing solely regarding how this Court's decision in *State v. Cyr*, 195 Wn.2d 492, 461 P.3d 360 (2020), and declined to do so. RAP 13.4(d). Therefore, the only issues properly before the Court are the ones raised by the State and accepted by the Court for review. RAP 13.7(b). The Court should decline

to consider Amicus’s argument regarding invalidation of the statute by implication and the doctrine of desuetude for the same reasons.<sup>1</sup>

**B. A Historical Overview Of RCW 69.50.410, Selling A Controlled Substance For Profit.**

Washington State has continually regulated controlled substances since 1909, when it enacted its comprehensive criminal code. Laws of 1909, ch. 249. The first comprehensive controlled substance act was in 1951, the Uniform Narcotics Drug Act. Laws of 1951, 2<sup>nd</sup> Ex. Sess., ch. 22.<sup>2</sup> The Uniform Narcotics Drug Act was amended several times between 1951 and 1971, when the legislature repealed it and enacted the Uniform Controlled Substances Act (UCSA). Laws of 1971, 1<sup>st</sup> Ex. Sess. ch. 308.<sup>3</sup> The UCSA was enacted while Washington State was still utilizing an indeterminate sentencing structure. *See, State v. Cyr*, 195 Wn.2d 492, 499, 461 P.3d 360 (2020) (quotations and citations omitted).

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<sup>1</sup> Peterson did argue the statute was invalid based upon this Court’s ruling in *Cyr* (an interpretation of *Cyr* the State disagrees with) not based on legislative invalidity by implication due to legislative enactment. Such argument by Peterson was improper. RAP 13.7(b). Peterson’s failure to adhere to rules should not be a license for Amicus to submit briefing outside the issues previously raised presented and accepted.

<sup>2</sup>Laws of 1951, 2<sup>nd</sup> Ex. Sess., ch. 22, is available on the Code Reviser’s website at <http://leg.wa.gov/CodeReviser/documents/sessionlaw/1951ex2c22.pdf> (last visited 9/25/20).

<sup>3</sup> Laws of 1971, 1<sup>st</sup> Ex. Sess., ch. 308. is available on the Code Reviser’s website at <http://leg.wa.gov/CodeReviser/documents/sessionlaw/1971ex1c308.pdf> (last visited 9/25/20). The Act includes a comprehensive list all the prior statutes being repealed, dating back to the early 1909 controlled substance laws.



Two years after the enactment of the UCSA, the legislature drafted a bill titled, “Controlled Substances - - Mandatory Sentences.” Laws of 1973, 2<sup>nd</sup> Ex. Sess., ch. 2.<sup>4</sup> The legislature created a new crime, Sale of a Controlled Substance for Profit. Laws of 1973, 2<sup>nd</sup> Ex. Sess., ch. 2, § 2. The legislature was concerned about the lax penalties for the sale of certain controlled substances for profit and the impact drugs were having on the citizens of Washington. House Journal 43d Legislature (1973) at 1632, 1742-47, 1752-56.<sup>5</sup> In the last floor discussion, prior to the passage vote, it was questioned whether the bill would have any practical effect on reducing the drug problem. House Journal 43d Legislature (1973) at 1755. Representative Kelley responded, “I would take exception to Representative Swayze’s remarks for several reasons. Number one, there was a great deal of testimony in the first hearing before the committee addressing itself to exactly what would happen if we had mandatory drug sentences there.” *Id.* After Representative Kelley further explained himself, the House voted and passed the bill. *Id.* at 1755-56.

Sale of a Controlled Substance for Profit, as originally enacted, stated,

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<sup>4</sup> Laws of 1973, 2<sup>nd</sup> Ex. Sess., ch. 2, is available on the Code Reviser’s website at <http://leg.wa.gov/CodeReviser/documents/sessionlaw/1973ex2c2.pdf> (last visited 9/25/20).

<sup>5</sup> The State is attaching an appendix with all sections of the journal that include floor activity regarding SHB323.

(1) Except as authorized by this chapter it shall be unlawful for any person to sell for profit any controlled substance...

(2) Any person convicted of a violation of subsection (1) of the is section shall receive a sentence of not more than five years in a correctional facility of the department of the social and health services for the first offense...

(3) Any person convicted of a violation of subsection (1) of the is section by selling heroin shall receive a mandatory sentence of two years in a correctional facility of the department of the social and health services and no judge of any court shall suspend or defer the sentence imposed for such violation. Any person convicted on a second or subsequent sale of heroin, having transpired after prosecution and conviction on the first cause of the sale of heroin shall receive a mandatory sentence of ten years in a correctional facility of the department of the social and health services and no judge of any court shall suspend or defer the sentence imposed for this second or subsequent violation: PROVIDED, That the board of prison terms and paroles under RCW 9.95.040 shall not reduce the minimum term imposed for a violation under this subsection...

(5) Any person, addicted to the use of controlled substances who voluntarily places himself in the custody of the department of social and health services for the purpose of participating in a rehabilitation program of the department for addicts of controlled substances shall be immune from prosecution for subsection (1) offenses unless a filing of information or indictment against such person for a violation of subsection (1) is made prior to his voluntary participation in the program of the department of social and health services...

Laws of 1973, 2<sup>nd</sup> Ex. Sess., ch. 2, § 2. The mandatory penalties reflected the legislature's desire to more harshly punish those who sold controlled substances (except cannabis) for profit. Yet, for those who recognized they had a substance abuse problem and sought treatment prior to the filing of an

information or indictment, the law created an avenue for immunity from prosecution.

The legislature enacted the Sentencing Reform Act (SRA) in 1981, which was to apply to all felonies committed on or after July 1, 1984. Laws of 1981, ch. 137, § 7.<sup>6</sup> The legislature created the sentencing structure two years later, the sentencing grids and seriousness levels. Laws of 1983, ch. 115, §§ 1, 3-4.<sup>7</sup> One year later, Selling Heroin for Profit, RCW 69.50.410, was added to the sentencing grid in the SRA as a level VIII offense. Laws of 1984, ch. 209, § 17.<sup>8</sup> The legislature later moved controlled substance crimes to their own sentencing grid, including placing Selling a Controlled Substance for Profit on that grid as a level III offense. Laws of 2002, ch. 290, § 9.<sup>9</sup> Therefore, the legislature has included Sale of a Heroin for Profit in the SRA sentencing structure since it began in July 1984.

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<sup>6</sup> Laws of 1981, ch. 137, is available on the Code Reviser's website at <http://leg.wa.gov/CodeReviser/documents/sessionlaw/1981c137.pdf> (last visited 10/2/20).

<sup>7</sup> Laws of 1983, ch. 115, is available on the Code Reviser's website at <http://leg.wa.gov/CodeReviser/documents/sessionlaw/1983c115.pdf> (last visited on 10/20/20).

<sup>8</sup> Laws of 1984, ch. 209, is available on the Code Reviser's website at <http://leg.wa.gov/CodeReviser/documents/sessionlaw/1984c209.pdf> (last visited 9/28/20).

<sup>9</sup> Laws of 2002, ch. 290, is available on the Code Reviser's website at <http://lawfilesext.leg.wa.gov/biennium/2001-02/Pdf/Bills/Session%20Laws/House/2338-S2.sl.pdf> (last visited 9/28/20).

**C. RCW 69.50.410 Does Not Violate Article I, Section 12.**

Selling a Controlled Substance, RCW 69.50.410, does not violate article I, section 12 of the Washington State Constitution. Contrary to Amicus's assertion, RCW 69.50.410 does not unconstitutionally allow for prosecutors to arbitrarily prosecute individuals under identical circumstances using different criminal statutes with severities of punishment. RCW 69.50.410 allows for the prosecution of the sale of a controlled substance (other than cannabis) for profit and classifies the offense as a Class C felony.

Amicus argues that prosecution for Sale of a Controlled Substance for Profit is identical to prosecution for Delivery of a Controlled Substance under RCW 69.50.401 and therefore violates article I, section 12 because the prosecutor may choose Sale of a Controlled Substance for Profit, which has a higher penalty. The statutes are not identical. Sale of a Controlled Substance for Profit requires a person to pass a controlled substance to another and obtain anything of value in exchange for that controlled substance. RCW 69.50.410. Whereas, Delivery of a Controlled Substance requires a person to transfer a controlled substance to another, and depending on what controlled substance it is will determine the class of felony offense. RCW 69.50.401(i); RCW 69.50.410. Every Sale of a Controlled Substance for Profit includes a delivery of drugs, not every

Delivery of Controlled Substance includes a sale for profit. This distinction requires prosecutors to evaluate the evidence and determine which statute he or she has sufficient evidence to proceed with a prosecution under. “When the crimes have different elements, the prosecutor's discretion is not arbitrary but is constrained by which elements can be proved under the circumstances.” *State v. Armstrong*, 143 Wn. App. 333, 338, 178 P.3d 1048 (2008). Because a set of facts could be charged under either statute does not require this court to conclude RCW 69.50.410 violates article I, section 12. *State v. Presba*, 131 Wn. App. 47, 54, 126 P.3d 1280 (2005).

The Washington State Supreme Court has previously determined the privilege and immunities clause, article I, section 12 of the Washington State Constitution “requires an independent constitutional analysis from the equal protection clause of the United State Constitution.” *Madison v. State*, 161 Wn.2d 85, 94, 163 P.2d 757 (2007), citing *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 811, 83 P.3d 419 (2004) (*Grant County II*).<sup>10</sup> Therefore, it is unnecessary to engage in a

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<sup>10</sup> *Madison* is a plurality opinion. Yet, a majority of the court determined this Court had already determined article I, section 12 required an independent state constitutional analysis and no *Gunwall* analysis was necessary. See, the lead opinion, authored by Justice Fairhurst, concurred by Justice Owens and Justice Bridge (from which this quotation is taken) and Justice J.M. Johnson’s concurrence that was joined by Justice Sanders. *Id.* at 118.

*Gunwall* analysis to rejustify to this Court to perform a separate and independent analysis of article I, section 12. *Madison*, 161 Wn.2d at 94.<sup>11</sup>

Amicus's argument rests on the continued viability of the article I, section 12 analysis held in *Olsen v. Delmore*, 48 Wn.2d 545, 295 P.2d 324 (1956) and *State v. Zornes*, 78 Wn.2d 9, 475 P.2d 109 (1970). Amicus at 13-17. Amicus provided a *Gunwall* analysis, in part asserting in the specific context of their article I, section 12 challenge, the preexisting state law interpreting equal protection was broader than the Fourteenth Amendment. Amicus at 12. Yet, Amicus fails to acknowledge the historical context of the article I, section 12 cases it cites.

*Olsen* is the seminal case in Washington State that held a statute authorizing a person to be charged and convicted of either a felony or misdemeanor for the same act was unconstitutional because it violated both the equal protection clause of Fourteenth Amendment and article I, section 12. *Olsen*, 48 Wn.2d 545. The Washington Supreme Court stated, “[a] statute which prescribes different punishments or different degrees of punishment for the same act committed under the same circumstances by persons in like situations is violative of the equal protection of the fourteenth amendment of the United States Constitution.” *Id.* at 550, citing *State v. Pirkey*, 203 Ore. 697, 281 P.2d 698 (1955). The court further

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<sup>11</sup> See *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

explained article I, section 12 was substantially identical to the Fourteenth Amendment's equal protection clause. *Id.*, citing *Texas Co. v. Cohn*, 8 Wn.2d 360, 112 P.2d 522 (1941).

The Washington Supreme Court restated, in *Boggs*, it was not a denial of a person's right to equal protection under the law for "a statute to provide alternative punishments of penitentiary or county jail imprisonment." *State v. Boggs*, 57 Wn.2d 484, 490 358 P.2d 124 (1961). Next, the court differentiated between circumstances where statutes define two distinct offenses, rather than one offense that could be charged as both a misdemeanor or a felony. *State v. Reid*, 66 Wn.2d 243, 401 P.2d 988 (1965). In *Reid*, the defendant was charged with possession of a narcotic without a prescription. *Reid*, 66 Wn.2d at 244. There was also a crime of illegal use, for which possession was prima facie evidence of intent. *Id.* at 244-45. The court determined this did not violate equal protection under article I, section 12 or the Fourteenth Amendment because the crimes had different elements. *Id.* 247-48.

In *Zornes*, the court again revisited *Olsen*. The court reviewed convictions of a husband and wife, the Zornes, for possession of marijuana. *Zornes*, 78 Wn.2d 9. The legislature changed the law regarding possession of cannabis while the Zornes's cases were pending, removing cannabis from the Narcotic Drug Act, defining it as a dangerous drug, and thereby making

possession of marijuana a misdemeanor offense. *Id.* at 10-12. At issue in the case was whether cannabis was previously classified as a dangerous drug and a narcotic drug, simultaneously creating a preexisting conflict between two statutes which resulted in different punishments. *Id.* at 12-26.

The court reiterated the rule adopted in *Olsen* was still the law,

that an act which prescribes different punishments for the same act and thereby purports to authorize the prosecutor to charge one person with a felony and another with a misdemeanor for the same act committed under the same circumstances, denies the equal protection of the law guaranteed by the fourteenth amendment to the United States Constitution and article 1, section 12, of the constitution of this state.

*Id.* at 21. The court explained its intervening decisions did not modify this rule, and the *Olsen* rule was the proper application of the Fourteenth Amendment's equal protection clause. *Id.* at 21-24. Therefore, the Zornes's convictions could not stand. *Id.* at 26.

Yet, the United States Supreme Court determined, nine years later, it did not violate the equal protection clause of the Fourteenth Amendment for a prosecutor to choose between two statutes prohibiting the same behavior, but carrying different penalties. *United States v. Batchelder*, 442 U.S. 114, 115-25, 99 S. Ct. 2198, 60 L. Ed. 755 (1979). The Supreme Court stated there was "no appreciable difference between the discretion a prosecutor exercises" when he or she decides to charge a defendant "under one of two statutes with different elements and the discretion" the



prosecutor exercises when electing “one of two statutes with identical elements.” *Batchelder*, 442 U.S. at 125. “The prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause. *Id.* The Court also noted that a defendant does not have the right to choose the particular penalty scheme he or she will be sentenced under, just as a defendant has no right to choose which statute will be the basis of their prosecution. *Id.*

The cases in Washington State all harken back to *Olsen*. The Washington Supreme Court in *Olsen* used two cases to support its equal protection analysis, *Texas Co.* and *Pirkey*. *Olsen*, 48 Wn.2d at 550, citing *Texas Co.*, 8 Wn.2d 360; *Pirkey*, 203 Ore. 697. In *Pirkey*, the Oregon Supreme Court determined the equal protection clause of the Fourteenth Amendment and its own state constitutional provision regarding equal protection were similar. 203 Ore. at 702-03. The *Pirkey* court determined the legislation in question violated the Fourteenth Amendment’s Equal Protection Clause. *Id.* at 704-07. The Washington State Supreme Court in *Olsen* simply cited to *Pirkey*, then used *Texas Co.* to support the position that article I, section 12 was substantially identical to the Fourteenth Amendment’s equal protection clause. 48 Wn.2d at 550. There was no

independent Washington State constitutional analysis regarding article I, section 12.

Indeed, all of these cases, *Olsen*, *Boggs*, *Reid*, *Zornes* use the Fourteenth Amendment as their yardstick: even though the cases cite article I, section 12, there was no independent analysis done. *Batchfelder* overruled this line of cases based on the Fourteenth Amendment analysis. Therefore, one of the following is true: (1) if *Olsen/Zorne* were correct that article I, section 12 tracks the Fourteenth Amendment, their concurrent statutes holding has been overruled by *Batchfelder*; or (2) if *Olsen/Zorne* were incorrect that article I, section 12 tracks the Fourteenth Amendment no independent analysis, as required, has ever been done to suggest this Court should deviate from the federal Constitution here. Simply stating the *Olsen/Zornes* rule is still viable is not sufficient, and Amicus fails present the Court with an independent analysis. Further, the proper place for a well-developed, independent constitutional analysis of article I, section 12, to determine if a statute potentially violates the privilege and immunity clause is not the first time in response to an amicus brief.

Even if *Olsen*, *Boggs*, *Reid*, and *Zorne* applied, their rule is met. Sale of a Controlled Substance for Profit is a different crime than Delivery of a Controlled Substance. The privilege and immunities, article I, section 12 argument fails.

**D. Sale Of A Controlled Substance For Profit Is Not Invalid Due Invalid Due To RCW 69.50.410 Being Repealed By Implication.**

Selling a Controlled Substance for Profit, RCW 69.50.410, has not been repealed by implication. Amicus's faulty legislative and jurisprudential analysis, furthered by a misreading of the statute leads in part to their incorrect conclusion that the statute is now invalid. Amicus's continually asserts, throughout its briefing RCW 69.50.410 was enacted with a "DSHS treatment-based approach for drug offenders" and the current status of the law has created a statute that is the antithesis of what the legislature intended to create. This is simply untrue. The statute is valid.

The court strongly disfavors repealing a statute by implication. *Amalgamated Transit Union Legislative Counsel of Wash. State v. State*, 145 Wn.2d 544, 552, 40 P.3d 656 (2002).<sup>12</sup> The court presumes the legislature "did not intend to repeal a statute impliedly" by the later enacted statute if there has been an express list of statutes provided by the legislature to be repealed. *Amalgamated Transit*, 145 Wn.2d at 552. This is because it is presumed the legislature is aware of its own enactments. *Id.* The court will find repeal by implication proper in two situations:

- (1) The subsequent legislation covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supersede the prior legislation on the

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<sup>12</sup> All citations to *Amalgamated Transit* will omit internal citation and will be cleaned up of any internal bracketing or other alterations.

subject, or . . . (2) the two acts are so clearly inconsistent with, and regnant to, each other that they cannot, by a fair and reasonable construction, be reconciled and both given effect.

*Id.* The first test is one of legislative intent. *Id.* The second test is self-explanatory.

RCW 69.50.410 was enacted two years after the legislature enacted Delivery of a Controlled Substance. Laws of 1971, 1<sup>st</sup> Ex. Sess., ch. 308, § 69.50.401; Laws of 1973, 2<sup>nd</sup> Ex. Sess., Ch. 2. The legislature enacted Sale of Controlled Substance for Profit as part of the “Controlled Substances - - Mandatory Sentences” bill. Laws of 1973, 2<sup>nd</sup> Ex. Sess., Ch. 2. While the drafted bill, and eventually the enacted law, included an avenue for addicts to gain immunity from prosecution by preemptively seeking treatment, this was not the impetus behind the drafting of “Controlled Substances - - Mandatory Sentences” bill. *Id.*; House Journal 43d Legislature (1973) at 1632, 1742-47, 1752-56.

Amicus is correct, the legislature, rather than funding DSHS drug treatment programs, repealed RCW 69.32.090. *State v. Barnett*, 17 Wn. App. 53, 55, 561 P.2d 234 (1977), *citing* Laws of 1975, 2d Ex. Sess., ch. 103, § 3. Therefore, it was now merely discretionary for the Secretary of DSHS to establish and maintain a drug treatment program. *Barnett*, 17 Wn. App. at 55. A person convicted of a crime does not possess a fundamental right to drug treatment. *Id.*, *citing* *Bresolin v. Morris*, 88 Wn.2d 167, 558

P.2d 1350 (1977). RCW 69.50.410 never provided a sentencing alternative of drug treatment for those convicted. RCW 69.50.410(6); Laws of 1973, 2<sup>nd</sup> Ex. Sess., Ch. 2. The section regarding availing oneself to treatment at a DSHS rehabilitation program only applied if sought prior to indictment or an information being filed and was an immunity from prosecution. *Id.* This is not a treatment based approach for drug offenders.

Further, Amicus's statement there was a "failure to fund DSHS corrections facilities" is incorrect. Amicus 3. Amicus later states the statute was enacted to provide two years of DSHS treatment for sellers of heroin, apparently reading subsection (3)(b) to require treatment not incarceration. Amicus 8. This is again, incorrect and displays a complete lack of historical knowledge and understanding of the prison system in Washington State.

The Department of Corrections has not existed in perpetuity in Washington State. In 1970, the Department of Social and Health Services "assumed the functions of the Department of Institutions." *Dawson v. Hearing Comm.*, 92 Wn.2d 391, 400, 597 P.2d 1353 (1979). Therefore, adult offenders in the 1970's would be sentenced to confinement to a correctional facility of the Department of Social and Health Services. *See, State v. Matuska*, 9 Wn. App. 850, 515 P.2d 827 (1973). It was not until the 1981 Corrections Reform Act that the Department of Corrections, as we currently know, was created to operate the prisons and handle the affairs of

the incarcerated in Washington State. Laws of 1981, ch. 136.<sup>13</sup> Therefore, a statute written in 1973 stating a person was to be confined to DSHS was not referencing a treatment facility but rather a correctional institution.

The placement of RCW 69.50.410 on the SRA sentencing grid, in particular, the drug sentencing grid, did not render the statute invalid by implication. The legislature did not repeal RCW 69.50.410 when it placed RCW 69.50.410 within the sentencing structure of the SRA. *State v. Cyr*, 195 Wn.2d 492; Laws of 2002, ch. 290, § 9; Laws of 1984, ch. 209, § 17. This Court held in *Cyr* that RCW 69.50.410 and the SRA were not in conflict because Sale of a Controlled Substance for Profit is not an independent sentencing scheme. *Cyr*, 195 Wn.2d at 507-08. RCW 69.50.410 “does not set forth standard range sentences” and the specific provisions regarding two and ten year terms (for heroin) are mandatory minimum terms, therefore the SRA sentencing ranges apply. *Id.* at 509-10.

A statute that was enacted to create “Mandatory Sentences” for certain drug offenders is not rendered invalid because the legislature placed it onto a sentencing grid giving it a specified standard range sentence. The legislature has continually included the statute within the SRA, placed it as a level III offense, ranking it over a Delivery of a Controlled Substance, a

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<sup>13</sup> Laws of 1981, ch. 136, is available on the Code Reviser’s website at <http://leg.wa.gov/CodeReviser/documents/sessionlaw/1981c136.pdf> (last visited 10/2/20).

level II offense. This is a legislative policy decision. The statute has not been repealed by implication.

**E. The Doctrine Of Desuetude Does Not Apply To RCW 69.50.410.**

Sale of a Controlled Substance for Profit, RCW 69.50.410, is not invalid under the doctrine of desuetude. Desuetude is “[t]he civil-law doctrine holding that if a statute or treaty is left unenforced long enough, it ceases to have legal effect even though it has not been repealed.” Black’s Law Dictionary, 562 (11<sup>th</sup> Ed. 2019). “If the defense of desuetude even exists, it is reserved for extreme cases.” *United States v. Jones*, 347 F. Supp. 2d 626, 629, (E.D. Wis. 2004). Amicus’s argument in support of desuetude is predicated again on a misreading and misunderstanding of the historical context of RCW 69.50.410.

Contrary to Amicus’s assertion, RCW 69.50.410 is not invalid under the doctrine of desuetude because it has never been used to sentence drug offenders to DSHS treatment facilities. Amicus 19. Amicus also asserts no one has ever been sentenced to a correctional facility of DSHS for a violation of RCW 69.50.410. As argued and explained above, RCW 69.50.410 was not a treatment based law, it was a mandatory sentencing law. Also, any person sentenced pursuant to RCW 69.50.410 prior to 1981 would have been sentenced to a DSHS correctional facility. While the State concedes the legislature has failed to change the language of the statute to

reflect DOC now runs the State correctional facilities, this is not fatal to the statute and does not support the doctrine of desuetude. The statute is not obsolete and this court should not strike it pursuant to the doctrine of desuetude.

### **III. CONCLUSION**

Amicus raises numerous arguments that have never been raised previously and these arguments should not be considered by this Court. Amicus mischaracterizes the legislative and jurisprudential history of RCW 69.50.410 uses this mischaracterization to frame all of its arguments to this Court. Sale of a Controlled Substance for Profit was never intended to be a treatment based law. The elements of RCW 69.50.410 and RCW 69.50.401, Delivery of a Controlled substance are different, therefore, there is no article I, section 12 violation. RCW 69.50.410 was not repealed by implication.



Finally, the doctrine of desuetude does not apply to Sale of a Controlled Substance for Profit. This Court should find RCW 69.50.410 is constitutional and valid.

RESPECTFULLY submitted this 2<sup>nd</sup> day of October, 2020.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney

A handwritten signature in blue ink, appearing to be 'SIB', written over a horizontal line.

by: \_\_\_\_\_  
SARA I. BEIGH, WSBA 35564  
Attorney for Petitioner

# APPENDIX A

House Journal 43d Legislature (1973)  
selected portions: 1632, 1742-47, 1752-56

# HOUSE JOURNAL

OF THE  
First and Second Extraordinary Sessions

## Forty-Third Legislature

OF THE

# STATE OF WASHINGTON

AT

## Olympia, the State Capital

First Extraordinary Session

Convened March 9, 1973

Adjourned Sine Die April 15, 1973

Second Extraordinary Session

Convened September 8, 1973

Adjourned Sine Die September 15, 1973



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LEONARD A. SAWYER, *Speaker*  
JOHN L. O'BRIEN, *Speaker Pro Tempore*  
DEAN R. FOSTER, *Chief Clerk*  
DONALD R. WILSON, *Assistant Chief Clerk*  
LOU ANN DILLARD, *Minute Clerk*

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STATE PRINTING PLANT  OLYMPIA, WASHINGTON

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*Compiled, Edited and Indexed by*  
DEAN R. FOSTER, *Chief Clerk*  
LOU ANN DILLARD, *Minute Clerk*  
ELJO SUTHERLAND, *Journal Clerk*

Chairman; Eikenberry, Gaspard, Newhouse, Shinpoch, Smith, Sommers, Swayze.

March 28, 1973

HOUSE BILL NO. 323, Prime Sponsor: Representative Fortson, providing mandatory sentencing for certain violations involving controlled substances, reported by Committee on Judiciary.

MAJORITY recommendation: The substitute bill be substituted therefor and that the substitute bill do pass. Signed by Representatives Knowles, Chairman; Kelley, Vice Chairman; Eikenberry, Gaspard, Newhouse, Shinpoch, Sommers.

March 27, 1973

HOUSE BILL NO. 955, Prime Sponsor: Representative Kelley, implementing laws relating to financial support of committed juveniles, reported by Committee on Social and Health Services.

MAJORITY recommendation: Do pass with the following amendment:

On Page 2, section 2, line 20 after "chapter" strike "74.20" and insert "74.20A"

Signed by Representatives Adams, Chairman; Parker, Vice Chairman; Ellis, Eng, Fortson, Freeman, Hendricks, Matthews, Rabel, Wojahn, Zimmerman.

March 28, 1973

HOUSE BILL NO. 1088, Prime Sponsor: Representative Bauer, providing for reciprocal agreements with bordering states relating to the employment of workmen on public projects, reported by Committee on Labor.

MAJORITY recommendation: Do pass with the following amendments:

On page 1, section 1, line 13 after "employed" strike all of the material down to and including "subcontractors" on line 18 and insert "((; except that any contractor or subcontractor may employ not more than five persons without regard to the residency requirements stated herein in the performance of any such contract: PROVIDED; That the state of the residence of the contractor or subcontractor provides reciprocal rights to Washington contractors or subcontractors))"

On page 2, section 1, beginning on line 11 after "improvement" strike all the material down to and including "state" on line 16

Signed by Representatives Savage, Chairman; Warnke, Vice Chairman; Bausch, Beck, Freeman, Kopet, Matthews, May, Morrison.

Clemente, Curtis, Douthwaite, Eikenberry, Ellis, Eng, Erickson, Flanagan, Fortson, Gaines, Gallagher, Garrett, Goltz, Hansen, Hansey, Hoggins, Hurley, Jastad, Johnson, Julin, Kalich, Kilbury, Knowles, Kraabel, Laughlin, Leckenby, Luders, Lysen, Matthews, Maxie, May, McCormick, Moon, Morrison, Nelson, Newhouse, North F., North L., O'Brien, Pardini, Paris, Patterson, Perry, Pullen, Savage, Shinpoch, Smythe, Sommers, Thompson, Tilly, Valle, Williams, Wilson, Wojahn, Zimmerman, and Mr. Speaker.

Voting nay: Representatives Anderson, Barden, Bausch, Beck, Conner, Cunningham, Ehlers, Freeman, Gaspard, Gilleland, Haussler, Hayner, Hendricks, Jueling, Kelley, King, Kuehnle, Martinis, Parker, Polk, Randall, Schumaker, Smith, Swayze, Van Dyk, Warnke.

Not voting: Representatives Kopet, Rabel.

Engrossed Substitute House Bill No. 316, having received the constitutional majority, was declared passed. There being no objection, the title of the bill was ordered to stand as the title of the act.

HOUSE BILL NO. 323, by Representatives Fortson, Clemente, Bender, Hansen and North (Frances):

Providing mandatory sentencing for certain violations involving controlled substances.

#### MOTION

On motion of Mr. Kelley, Substitute House Bill No. 323 was substituted for House Bill No. 323, and the substitute bill was placed on the calendar for second reading.

Substitute House Bill No. 323 was read the second time.

Ms. Sommers moved adoption of the following amendments by Representatives Sommers, Parker, Jastad, Kopet and Hendricks:

On page 3, section 2, line 4 after "substance" and before the period insert "or counterfeit substance classified in Schedules I or II, except leaves and flowering tops of marijuana"

On page 3, section 2, strike lines 13 and 14.

Representatives Sommers and Hendricks spoke in favor of adoption of the amendments.

#### POINT OF INQUIRY

Mr. Hendricks yielded to question by Mr. Kelley.

Mr. Kelley: "You bring in here Schedules I or II. Are there any substances which to your knowledge are, what we might say, street traffic drugs, for instance barbiturates or something of that nature not covered in Schedules I or II, but which are predominately prevalent on the street?"

Mr. Hendricks: "All barbiturates and barbituric acid derivatives are found in Classes III and IV. I think we are talking about the hard narcotic drugs where there is a great level of addiction. I think that particularly heroin is the kind of drug we are after."

Mr. Kelley: "Are there barbiturates listed in Schedules I and II, or are barbiturates simply in III, IV or V?"

Mr. Hendricks: "There are no barbiturates listed in Classes I and II. They are all in Classes III and IV."

The amendments by Representative Sommers and others were adopted.

Mr. Kelley moved adoption of the following amendment by Representatives Kelley and Barden:

On page 3, section 2 (2), line 17 after "offense" insert ": PROVIDED, That any person convicted of a violation of subsection (1) of this section by selling any opiate as defined in RCW 69.50.101 (p) shall receive a mandatory sentence of five years in a correctional facility of the department of social and health services and no judge of any court shall suspend or defer the sentence imposed for such violation"

Representative Kelley spoke in favor of adoption of the amendment, and Representatives Fortson, Smith, Hayner and Charette spoke against it.

#### POINT OF INQUIRY

Mr. Charette yielded to question by Mr. Lysen.

Mr. Lysen: "Representative Charette, I am concerned about the fact that if there is a mandatory sentence, it may be the tendency of the jury or the judge to let some people off completely because of the severity, rather than giving them a milder sentence. I know you are a former prosecutor and I would appreciate your comments in this regard."

Mr. Charette: "Mr. Lysen, I think that under our system of justice (which I think is a good one, to be tried by twelve of your peers,) there is no question but that the jury takes into consideration the age of the defendant, the situation of the defendant, and all of these other things besides the evidence. And there is a possibility that in a hard case (and it is the hard case that makes bad law) the jury would turn someone loose. More importantly, I think that in each case you would have a jury trial. An attorney would be a fool to allow a client to plead guilty when he knows he is going to get five years in the penitentiary. He might as well take his chances with the jury. There is a maxim in the law; it is true; and it is part of our system of justice: 'It is better to let ninety-nine murderers go free than to convict one innocent man'."

## POINT OF INQUIRY

Mr. Barden yielded to question by Mr. Smythe.

Mr. Smythe: "Representative Barden, I am a little confused on what the last couple of speakers have spoken to. Are we talking about all drugs, or just heroin, or what? What does your amendment deal with?"

Mr. Barden: "Representative Smythe, the amendment that is under discussion deals only with the selling of heroin, or other opiates. It doesn't deal with those who may sell LSD or barbiturates or speed or hashish or amphetamines. It doesn't deal even with those who have heroin in their possession. What this amendment is directed to are those who are selling heroin--a life-destroying addicting drug. A drug that is a business with these people--where they make thousands of dollars a month selling a drug that destroys lives. We are saying by this amendment that those people should be put out of business and behind bars and only those people who sell the opiates. The bill would still provide for a sentence of from ninety days up to five years for those selling the other lesser damaging drugs."

Mr. Smythe spoke in favor of adoption of the amendment.

The amendment by Representatives Barden and Kelley to Substitute House Bill No. 323 was lost on a rising vote.

Mr. Barden moved adoption of the following amendment:

On page 3, section 2, line 20 after "of" strike "five" and insert "twenty"

Mr. Barden spoke in favor of the amendment and Mr. Swayze spoke against it.

Mr. Knowles spoke against the amendment and also against the next amendment by Mr. Barden to the same line.

## POINT OF ORDER

Mr. Barden: "Mr. Speaker, I had not put the second amendment on that page yet, and it has not yet been discussed. Representative Knowles is not speaking to the amendment which is merely to strike 'five' and insert 'twenty.' The second half will be moved and debated after this amendment is decided."

The Speaker (Mr. O'Brien presiding): "Mr. Knowles, will you adhere to the amendment by Mr. Barden which strikes 'five' and inserts 'twenty'?"

Mr. Knowles: "On my desk, the amendment is all in one."

The Speaker (Mr. O'Brien presiding): "I'm sorry. We have separated those amendments and renumbered them."



Mrs. Fortson spoke against adoption of the amendment by Mr. Barden, and Mr. Kuehnle spoke in favor of the amendment.

The amendment by Mr. Barden was not adopted.

Ms. Sommers moved adoption of the following amendment by Representatives Sommers, Swayze, Maxie, Smith, Eng and Parker to Substitute House Bill No. 323:

On page 3, section 2, line 20 after "of" strike "five" and insert "two"

Representative Sommers spoke in favor of the amendment, and Representatives Kelley and Eikenberry spoke against it.

#### POINT OF INQUIRY

Mr. Eikenberry yielded to question by Mr. Smith.

Mr. Smith: "Representative Eikenberry, could you tell me what, as a practical matter, the mechanics of the parole board are, taking into consideration how long it would take the parole board to let someone out on parole, for instance if a two-year mandatory sentence were set?"

Mr. Eikenberry: "I would have to talk from some very quick checking I have done. I was very interested in the use of the word 'mandatory' in here. The best advice I have been able to get on an informal basis from the attorney general's office is that this would not necessarily dictate to the parole board that the person must be there for five years. To directly answer your question, I have seen a case of one burglary defendant who was convicted and was back out on the street from the institution in less than one year. If you were asking as to the processing time, then we are talking in terms of a matter of forty-five days."

Mr. Smith spoke in favor of adoption of the amendment, and Mr. Bender spoke against it.

Mr. Smythe demanded an electric roll call and the demand was sustained.

#### ROLL CALL

The Clerk called the roll on the adoption of the amendment by Representatives Sommers, Swayze, Maxie, Smith, Eng and Parker to Substitute House Bill No. 323, and the amendment was lost by the following vote: Yeas, 19; nays, 72; not voting, 7.

Voting yea: Representatives Blair, Bluechel, Charnley, Douthwaite, Eng, Gallagher, Goltz, King, Maxie, Moon, North F., Parker, Randall, Shinpoch, Smith, Sommers, Swayze, Valle, Williams.

Voting nay: Representatives Adams, Amen, Anderson, Bagnariol, Barden, Bauer, Bausch, Beck, Bender, Benitz, Berentson, Brown, Ceccarelli, Chatalas, Clemente, Conner,

Cunningham, Curtis, Ehlers, Eikenberry, Ellis, Erickson, Flanagan, Fortson, Freeman, Gaines, Garrett, Gaspard, Gilleland, Hansen, Hansey, Haussler, Hayner, Hendricks, Hoggins, Hurley, Jastad, Johnson, Jueling, Julin, Kalich, Kelley, Kilbury, Knowles, Kraabel, Kuehnle, Laughlin, Leckenby, Luders, Lysen, Martinis, Matthews, May, McCormick, Morrison, Nelson, Newhouse, North L., O'Brien, Pardini, Paris, Patterson, Polk, Pullen, Savage, Schumaker, Smythe, Tilly, Warnke, Wilson, Wojahn, Zimmerman.

Not voting: Representatives Charette, Kopet, Perry, Rabel, Thompson, Van Dyk, and Mr. Speaker.

Mr. Barden moved adoption of the following amendment:

On page 3, section 2, line 20 after "in" strike "a correctional facility of the department of social and health services" and insert "the state penitentiary"

Representatives Barden and Hurley spoke in favor of the amendment, and Representative Knowles spoke against it.

#### POINT OF INQUIRY

Mr. Knowles yielded to question by Mr. Barden.

Mr. Barden: "Representative Knowles, you are chairman of the committee that drafted this substitute bill, and are therefore probably most responsible for it coming out in the form that it did. Can you tell me why on line 17 you provide that a first offender must go to the state penitentiary, but that a second offender who, after serving his first sentence, has been convicted of a subsequent crime of selling dope should not be required to go to the state penitentiary?"

Mr. Knowles: "What page are you talking about?"

Mr. Barden: "Page 3, lines 15 through 17 read: 'Any person convicted of a violation of subsection (1) of this section shall receive a sentence of not more than five years in the state penitentiary for the first offense.' But then down the page, you say that for a second offense he doesn't have to go to the penitentiary. I am wondering about the logic of that and your reasoning for constructing the bill in such a manner. My amendment would provide the consistency and continuity of punishment by saying for a second offense he would likewise go to the penitentiary."

Mr. Knowles: "I can't answer that. Representative Kelley, the vice chairman of the committee, advises me that in putting these bills into a substitute bill the error was made."

Mr. Kelley: "I was just going to state as far as the distinction between the two, this was created when we created the substitute bill. This took different provisions from different bills. The mandatory provisions came from your bill, Representative Barden, another came from the initial House Bill No. 323, and the other came from the third bill. The substitute bill does represent a

hybrid of three bills, and this would be the reason for the difference in wording between the two, but the distinction itself is not detrimental to the bill."

Representatives Charette and Parker spoke against adoption of the amendment by Mr. Barden, and Representatives May and Smythe spoke in favor of it.

Mr. Smythe demanded an electric roll call and the demand was sustained.

MOTION

On motion of Mr. Charette, the House recessed until 1:30 p.m.

-----  
AFTERNOON SESSION  
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The House was called to order at 1:30 p.m. by the Speaker (Mr. O'Brien presiding). The Clerk called the roll and all members were present except Representatives Kopet, Maxie and Rabel who were excused.

The Speaker (Mr. O'Brien presiding) declared the House to be at ease.

The Speaker called the House to order.

MOTION

On motion of Mr. Thompson, the House recessed until 7:30 p.m.

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EVENING SESSION  
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The House was called to order at 7:30 p.m. by the Speaker (Mr. O'Brien presiding). The Clerk called the roll and all members were present except Representatives Bausch, Eng, Maxie and Rabel.

The Speaker assumed the Chair.

The Speaker declared the House to be at ease.

The Speaker called the House to order.

SIGNED BY THE SPEAKER

The Speaker announced that he was about to sign:

HOUSE BILL NO. 204,  
SUBSTITUTE HOUSE BILL NO. 351,  
SENATE BILL NO. 2071.

adoption of the following amendment:

Beginning on page 2, line 15 after "fault:" strike the balance of the paragraph and insert "PROVIDED FURTHER, That no insurance company or its agent for underwriting purposes relating to the operation of commercial motor vehicles shall use any information contained in the abstract relative to any person's operation of motor vehicles while not engaged in such employment."

We further recommend the House amendment not be adopted.

Signed by Senators Walgren, Marsh and Lewis (Harry); Representatives Newhouse, Beck and Perry.

#### MOTION

On motion of Mr. Beck, the report of the Conference Committee on Engrossed Senate Bill No. 2278 was adopted and the committee was granted the powers of Free Conference.

#### MOTION

On motion of Mr. Charette, the House advanced to the sixth order of business.

#### SECOND READING

SUBSTITUTE HOUSE BILL NO. 323, by Committee on Judiciary (Originally sponsored by Representatives Fortson, Clemente, Bender, Hansen and North [Frances]):

Providing mandatory sentencing for certain violations involving controlled substances.

The House resumed consideration of Substitute House Bill No. 323 on second reading. The Speaker stated the question before the House to be the following amendment by Mr. Barden:

On page 3, section 2, line 20 after "in" strike "a correctional facility of the department of social and health services" and insert "the state penitentiary"

#### ROLL CALL

The Clerk called the roll on the adoption of the amendment by Mr. Barden to Substitute House Bill No. 323, and the amendment was lost by the following vote: Yeas, 18; nays, 73; not voting, 7.

Voting yea: Representatives Bagnariol, Barden, Berentson, Cunningham, Curtis, Eikenberry, Freeman, Gilleland, Hansey, Hurley, Jueling, Kuehnle, Pardini, Paris, Polk, Pullen, Schumaker, Smythe.

Voting nay: Representatives Adams, Amen, Anderson, Bauer, Beck, Bender, Benitz, Blair, Bluechel, Brown, Ceccarelli, Charette, Charnley, Chatalas, Clemente, Conner, Douthwaite, Ehlers, Ellis, Erickson, Fortson, Gaines, Gallagher, Garrett, Gaspard, Goltz, Hansen, Haussler, Hayner, Hendricks, Hoggins, Jastad, Johnson, Julin, Kalich, Kelley, Kilbury, King, Knowles, Kopet, Kraabel, Laughlin, Leckenby, Luders, Lysen, Martinis, Matthews, May, McCormick, Moon, Morrison, Nelson, Newhouse, North F.,

North L., O'Brien, Parker, Patterson, Perry, Randall, Savage, Shinpoch, Smith, Sommers, Swayze, Thompson, Valle, Van Dyk, Warnke, Williams, Wilson, Wojahn, and Mr. Speaker.

Not voting: Representatives Bausch, Eng, Flanagan, Maxie, Rabel, Tilly, Zimmerman.

On motion of Mr. Parker, the following amendment was adopted:

On page 3, section 2, line 17 delete "the state penitentiary" and insert "a correctional facility of the department of social and health services"

Mr. Nelson moved adoption of the following amendment:

On page 3, section 2, line 21 after "services" insert "or state penitentiary,"

Mr. Nelson spoke in favor of the amendment and Mr. Parker spoke against it.

The amendment by Mr. Nelson was not adopted.

Mr. Barden moved adoption of the following amendment:

On page 3, section 2, line 23 after "the" strike "second or subsequent"

Mr. Barden spoken in favor of the amendment.

The amendment was not adopted.

Mr. Leckenby moved adoption of the following amendments by Representatives Leckenby and Smythe:

On page 3, section 2, line 18 after "second" and before "cause" strike "or subsequent"

On page 3, line 24 after "section." add "Any person convicted of a third or subsequent cause, the sale having transpired after prosecution and conviction on two or more prior causes, of subsection (1) of this section shall receive a mandatory sentence for the remainder of that person's life in a correctional facility of the department of social and health services and no judge of any court shall suspend or defer the sentence imposed for the third or subsequent violation of subsection (1) of this section: PROVIDED, That, no privileges of parole, probation, reduction of sentence or outside programs without physical restraints such as work release, furlough or any others shall be allowed such person: PROVIDED, FURTHER, That the board of prison terms and paroles under RCW 9.95.040 shall not reduce the minimum term imposed for a violation under this subsection."

Mr. Leckenby spoke in favor of the amendments, and Representatives Kelley and Charette spoke against them.

Mr. Leckenby spoke again in favor of the amendments, and Mr. Smythe closed debate speaking in favor of the amendments.

Mr. Kuehnle demanded an electric roll call and the demand was sustained.

## ROLL CALL

The Clerk called the roll on the adoption of the amendments by Representatives Leckenby and Smythe to Substitute House Bill No. 323, and the amendments were lost by the following vote: Yeas, 34; nays, 55; not voting, 9.

Voting yea: Representatives Amen, Barden, Beck, Benitz, Berentson, Cunningham, Curtis, Eikenberry, Flanagan, Freeman, Garrett, Gilleland, Hansey, Haussler, Hendricks, Hoggins, Hurley, Juelling, Kopet, Kraabel, Kuehnle, Leckenby, Luders, Nelson, Newhouse, North L., Pardini, Paris, Patterson, Polk, Pullen, Schumaker, Smythe, Warnke.

Voting nay: Representatives Adams, Anderson, Bagnariol, Bauer, Bender, Blair, Bluechel, Brown, Ceccarelli, Charette, Charnley, Chatalas, Clemente, Conner, Douthwaite, Ehlers, Ellis, Erickson, Fortson, Gaines, Gallagher, Gaspard, Goltz, Hansen, Hayner, Jastad, Johnson, Julin, Kalich, Kelley, Kilbury, King, Knowles, Laughlin, Lysen, Matthews, May, McCormick, Moon, North F., O'Brien, Parker, Perry, Randall, Savage, Shinpoch, Smith, Sommers, Thompson, Valle, Van Dyk, Williams, Wojahn, Zimmerman, and Mr. Speaker.

Not voting: Representatives Bausch, Eng, Martinis, Maxie, Morrison, Rabel, Swayze, Tilly, Wilson.

Mr. Hendricks moved adoption of the following amendment by Representatives Hendricks, Kelley, Patterson and Garrett:

On page 3, section 2, line 24 after "section." insert a new subsection to read as follows:

"(3) Any person convicted of a violation of subsection (1) of this section by selling heroin shall receive a mandatory sentence of two years in a correctional facility of the department of social and health services and no judge of any court shall suspend or defer the sentence imposed for such violation. Any person convicted on a second or subsequent sale of heroin, the sale having transpired after prosecution and conviction on the first cause of the sale of heroin shall receive a mandatory sentence of ten years in a correctional facility of the department of social and health services and no judge of any court shall suspend or defer the sentence imposed for this second or subsequent violation: PROVIDED, That the board of prison terms and paroles under RCW 9.95.040 shall not reduce the minimum term imposed for a violation under this subsection."

Renumber the remaining subsections consecutively

Mr. Hendricks spoke in favor of adoption of the amendment.

Mr. Schumaker demanded an electric roll call and the demand was sustained.

Representatives Pullen and Kelley spoke in favor of the amendment, and Representative Smith and Fortson spoke against it.

## ROLL CALL

The Clerk called the roll on the adoption of the amendment by Representatives Hendricks, Kelley, Patterson and Garrett to Substitute House Bill No. 323, and the amendment was adopted by the following vote: Yeas, 53; nays, 41; not voting, 4.

Voting yea: Representatives Amen, Anderson, Bagnariol, Barden, Bauer, Bender, Benitz, Berentson, Clemente, Conner, Cunningham, Curtis, Ehlers, Eikenberry, Ellis, Flanagan, Freeman, Garrett, Gaspard, Gilleland, Hansen, Hansey, Haussler, Hendricks, Hoggins, Hurley, Jueling, Kalich, Kelley, Knowles, Kopet, Kraabel, Kuehnle, Laughlin, Leckenby, Luders, Matthews, May, Morrison, Nelson, Newhouse, North F., Pardini, Paris, Patterson, Polk, Pullen, Schumaker, Smythe, Tilly, Warnke, Wilson, Zimmerman.

Voting nay: Representatives Adams, Beck, Blair, Bluechel, Brown, Ceccarelli, Charette, Charnley, Chatalas, Douthwaite, Erickson, Fortson, Gaines, Gallagher, Goltz, Hayner, Jastad, Johnson, Julin, Kilbury, King, Lysen, Martinis, McCormick, Moon, North L., O'Brien, Parker, Perry, Randall, Savage, Shipoch, Smith, Sommers, Swayze, Thompson, Valle, Van Dyk, Williams, Wojahn, and Mr. Speaker.

Not voting: Representatives Bausch, Eng, Maxie, Rabel.

Substitute House Bill No. 323 was ordered engrossed.

On motion of Mr. Conner, the rules were suspended, the second reading considered the third, and Engrossed Substitute House Bill No. 323 was placed on final passage.

Mrs. Fortson spoke in favor of passage of the bill, and Mr. Swayze spoke against it.

## POINT OF INQUIRY

Mr. Kelley yielded to question by Mr. Barden.

Mr. Barden: "Representative Kelley, Representative Swayze has indicated that it is unlikely that this bill would have any dampening effect or any impact on the drug problem. I wonder if you, from your vantage point on the Judiciary Committee and as a practicing attorney in Pierce County, could offer your opinion on that subject?"

Mr. Kelley: "I would take exception to Representative Swayze's remarks for several reasons. Number one, there was a great deal of testimony in the first hearing before the committee addressing itself to exactly what would happen if we had mandatory drug sentences there. Some people from the King County sheriff's office who have been working in this field, and actually are closer to the people that are involved in drug traffic than anybody else in our society, and know these people, stated definitely there would be a dampening effect on their activities. Secondly, I think there is something we haven't discussed here, and that is the mobility of the people that deal in

drugs. The very hard drug sellers can be found moving constantly between Vancouver, British Columbia, and down as far as San Diego. They are a very highly mobile group and highly responsive to what they call heat. When the heat is on they get up and move. I think by this bill we will be making a very strong statement about the temperature of the heat, as it were, in the state of Washington, and the temperature is going to go up. And many of these people who deal in these drugs are simply going to find it more expedient to move to other states where it isn't quite so hot. I don't know if that answers your question, Representative Barden, but for those reasons I would urge your adoption of this bill."

Representatives Barden and Eikenberry spoke in favor of passage of the bill, and Representatives King and Charette spoke against it.

Mr. Beck demanded the previous question and the demand was sustained.

#### ROLL CALL

The Clerk called the roll on the final passage of Engrossed Substitute House Bill No. 323, and the bill passed the House by the following vote: Yeas, 69; nays, 25; not voting, 4.

Voting yea: Representatives Amen, Anderson, Bagnariol, Barden, Bauer, Beck, Bender, Benitz, Berentson, Ceccarelli, Chatalas, Clemente, Conner, Cunningham, Curtis, Ehlers, Eikenberry, Ellis, Flanagan, Fortson, Freeman, Gaines, Gallagher, Garrett, Gaspard, Gilleland, Hansen, Hansey, Haussler, Hayner, Hendricks, Hoggins, Hurley, Jastad, Johnson, Jueling, Kalich, Kelley, Kilbury, Knowles, Kopet, Kraabel, Kuehne, Laughlin, Leckenby, Luders, Martinis, Matthews, May, McCormick, Morrison, Nelson, Newhouse, North F., North L., O'Brien, Pardini, Paris, Patterson, Polk, Pullen, Savage, Schumaker, Smythe, Tilly, Warnke, Wilson, Zimmerman, and Mr. Speaker.

Voting nay: Representatives Adams, Blair, Bluechel, Brown, Charette, Charnley, Douthwaite, Erickson, Goltz, Julin, King, Lysen, Moon, Parker, Perry, Randall, Shinoch, Smith, Sommers, Swayze, Thompson, Valle, Van Dyk, Williams, Wojahn.

Not voting: Representatives Bausch, Eng, Maxie, Rabel.

Engrossed Substitute House Bill No. 323, having received the constitutional majority, was declared passed. There being no objection, the title of the bill was ordered to stand as the title of the act.

HOUSE BILL NO. 474, by Representatives Smith, Bluechel, Sommers, Bausch, King, Ehlers, Zimmerman, Bauer, Blair and Gaspard:

Allowing state, city, and county employees to engage in certain political activities.



**LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE**

**October 02, 2020 - 5:00 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
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**Appellate Court Case Title:** State of Washington v. Jerry L. Peterson  
**Superior Court Case Number:** 17-1-00222-9

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Sender Name: Lori Jendryka-Cole - Email: lori.cole@lewiscountywa.gov

**Filing on Behalf of:** Sara I Beigh - Email: sara.beigh@lewiscountywa.gov (Alternate Email: teri.bryant@lewiscountywa.gov)

Address:  
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2nd Floor  
Chehalis, WA, 98532  
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