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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 Supplemental Brief**

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## I. ISSUE

- A. Does the Sale of a Controlled Substance for Profit statute, RCW 69.50.410, contain an independent sentencing scheme with determinate sentences that qualify as “another term of confinement”?

## II. STATEMENT OF THE CASE

Jerry Peterson pleaded guilty to one count of Sale of a Controlled Substance for Profit – Heroin,<sup>1</sup> and one count of Possession of a Controlled Substance – Heroin. RP (3/27/18) 2-7; CP 13-23. Peterson agreed she had three prior convictions, including two prior convictions for possession of a controlled substance. RP (3/27/18) 3-4; CP 24-25. Peterson also agreed the standard range sentence for Sale of Heroin for Profit was either 68+ to 100 months or 2 years, depending on statutory interpretation. RP (3/27/18) 3; CP 25. The parties agreed the statutory maximum sentence for Sale of Heroin for Profit was 120 months. *Id.*

The sole issue in the trial court was whether the specific statute, RCW 69.50.410(3)(a), controlled for sentencing purposes or if Peterson must be sentenced to a standard range sentence from the drug grid in the Sentencing Reform Act (SRA). RP (6/13/18) 12-

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<sup>1</sup> The State will refer to Sale of a Controlled Substance for Profit – Heroin, as Sale of Heroin for Profit for simplicity for the remainder of this brief. When discussing the statute in its entirety the State will refer to it as Sale of a Controlled Substance for Profit.

14; CP 6-10, 26-49. The trial court sided with Peterson, found RCW 69.50.410(3)(a) controlled, and sentenced Peterson to two years. RP (6/13/18) 15; CP 50-53.

### III. ARGUMENT

#### **A. THE SALE OF A CONTROLLED SUBSTANCE FOR PROFIT STATUTE, RCW 69.50.410, DOES NOT CONTAIN AN INDEPENDENT SENTENCING SCHEME THAT QUALIFIES AS “ANOTHER TERM OF CONFINEMENT.”**

All felonies are to be sentenced pursuant to the Sentencing Reform Act “unless another term of confinement applies.” RCW 9.94A.505(2)(a)(i). The Sale of a Controlled Substance for Profit Statute, RCW 69.50.410, does not contain a standalone, independent, sentencing scheme that qualifies as “another term of confinement.” The outdated penalty structure within RCW 69.50.410 sets forth, at best, mandatory minimum sentences. The SRA drug sentencing grid controls.

#### **1. The Plain Language Of RCW 69.50.410 Supports That The Two, Five, and Ten Year Sentencing Provisions Found Within The Statute Are Mandatory Minimum Sentences.**

This Court’s primary goal, when determining whether the sentencing provisions contained within RCW 69.50.410 are an independent sentencing scheme of mandatory sentences, “is to ascertain and give effect to the legislature’s intent and purpose.”

*State v. Cyr*, 195 Wn.2d 492, 461 P.3d 360 (2020), citing *In re Pers. Restraint of Cruz*, 157 Wn.2d 83, 87, 134 P.3d 1166 (2006). The Court “must consider the statute as a whole giving effect to all that the legislature has said, and using related statutes to help identify the legislative intent embodied in the provision in question.” *Id.* at 502 (internal alterations, quotations, and citations omitted). Further, where multiple statutes “apply to the same subject matter,” the reviewing court is charged with a duty “to reconcile apparently conflicting statutes and give effect to each of them, if this can be achieved without distortion of the language used.” *State v. Fagalde*, 85 Wn.2d 730, 737, 539 P.2d 86 (1975) (internal citations omitted); *State v. Zorne*, 78 Wn.2d 9, 15, 475 P.2d 109 (1970). This Court reviews issues regarding statutory interpretation de novo. *State v. Dennis*, 191 Wn.2d 169, 172, 421 P.3d 944 (2018).

Sale of a Controlled Substance for Profit, RCW 69.50.410, contains language regarding maximum sentences and mandatory two, five, and ten year sentences.

(1) Except as authorized by this chapter it is a class C felony for any person to sell for profit any controlled substance or counterfeit substance classified in Schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana...

(2)(a) Any person convicted of a violation of subsection (1) of this section shall receive a sentence of not more

than five years in a correctional facility of the department of social and health services for the first offense.

(b) Any person convicted on a second or subsequent cause, the sale having transpired after prosecution and conviction on the first cause, of subsection (1) of this section 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 the second or subsequent violation of subsection (1) of this section.

(3)(a) 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.

(b) 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 indeterminate sentence review board under RCW 9.95.040 shall not reduce the minimum term imposed for a violation under this subsection.

(4) Whether or not a mandatory minimum term has expired, an offender serving a sentence under this section may be granted an extraordinary medical placement when authorized under \*RCW 9.94.728(4)...

RCW 69.50.410. The statute also specifically authorizes medical placement pursuant to RCW 9.94A.728, regardless of whether the



mandatory minimum term has expired. RCW 69.50.410(4). The plain language of the statute and the legislature's intent, through the creation of the statute and its amendment, establish Sale of a Controlled Substance for Profit contains mandatory minimum sentences.

**a. The legislature's intent was to enact a statute with mandatory minimum sentences for those who sold heroin for profit.**

The legislature enacted Sale of a Controlled Substance for Profit in 1973, two years after it enacted the Uniform Controlled Substances Act. Laws of 1971, ch. 308;<sup>2</sup> Laws of 1973, 2<sup>nd</sup> Ex. Sess., ch. 2, § 2.<sup>3</sup> The law was enacted during the period of time when Washington State utilized indeterminate sentencing, wherein the maximum sentence was specified for all felony offenses. *Cyr*, 195 Wn.2d at 499 (internal quotations and citations omitted). The legislature determined it was necessary to affix stringent penalties for those who chose to sell heroin while also affording people the opportunity to receive drug treatment. Laws of 1973, 2<sup>nd</sup> Ex. Sess., ch. 2, § 2.

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<sup>2</sup> Laws of 1971, Ex. Sess., ch. 308, is available on the Code Reviser's website at <http://leg.wa.gov/CodeReviser/documents/sessionlaw/1971ex1c308.pdf> (last visited 2/23/20).

<sup>3</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 7/29/20).

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

(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.<sup>4</sup> The Governor vetoed the bill, indicating the penalties may be inappropriately long in some instances and there needed to be a more comprehensive look at mandatory sentences. Laws of 1973, 2<sup>nd</sup> Ex. Sess., ch. 2. The legislature garnered enough votes to override the Governor's veto, thereby enacting RCW 69.50.410. *Id.*

The legislature's intention to have a mandatory sentence that could not be reduced by a judge under any circumstances was clear. Also manifest was the representatives' view that these "mandatory" sentences were mandatory minimum sentences. House Journal 43d Legislature (1973) at 1745.<sup>5</sup> During one point of inquiry prior to the adoption of the bill, Representative Smith inquired of Representative Eikenberry, "how long it would take the parole board to let someone out on parole, for instance if a two-year mandatory sentence were

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<sup>4</sup> With the enactment of the UCSA the legislature repealed prior statutory authority regarding drug laws in Washington State. Laws of 1971, Ex. Sess., ch. 308. Some of the earliest statutory authority for laws combating drugs can be found in the comprehensive criminal code enactment of 1909. Laws of 1909, ch. 249.

<sup>5</sup> House Journal 43d Legislature (1973) can be found at the Legislative Information Center's website (Floor Journals) at <http://leg.wa.gov/LIC/Documents/Historical/FloorJournals/House/1973exHouseJournal.pdf> (last visited 7/29/30).

set?” *Id.* There is no need for parole if a person is serving a mandatory determinate sentence.

This intent, for the “mandatory” sentencing provisions of RCW 69.50.410 to be mandatory minimum terms, has continued through to today. RCW 69.50.410 has only been amended three times since its enactment, with the greatest substantive change occurring in 1999. Laws of 1999, ch. 324, § 6.<sup>6</sup> In 1999, the legislature added what is now section (4): “Whether or not a *mandatory minimum* term has expired, an offender serving a sentence under this section may be granted an extraordinary medical placement when authorized under \*RCW 9.94A.728(4).” *Id.* (emphasis added). With this amendment, the legislature indicated two things, first, even those sentenced to mandatory minimums for Sale of a Controlled Substance for Profit may be granted extraordinary relief as allowed pursuant to the SRA. RCW 69.50.410(4); RCW 9.94A.728(1)(c). Second, the mandatory provisions in RCW 69.50.410 for selling heroin, two years for a first offense and ten years for a second offense, are mandatory minimum sentences.

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<sup>6</sup> Laws of 1999, ch. 324, is available on the Code Reviser’s website at <http://lawfilesexternal.wa.gov/biennium/1999-00/Pdf/Bills/Session%20Laws/House/1299.sl.pdf> (last visited 7/29/20). The other amendments were Laws of 2003, ch. 53, § 342, which classified the crime as a Class C felony, and Laws of 1975-'76, 2<sup>nd</sup> Ex. Sess, ch. 103, § 1, which changed some language such as director and institution.

**b. This Court recognized Sale of a Controlled Substance for Profit contained mandatory minimums.**

This Court has previously recognized Sale of a Controlled Substance for Profit contains mandatory minimum sentences. *Cyr*, 195 Wn.2d at 509. The context of this recognition occurred while addressing an argument that RCW 69.50.408 conflicted with 69.50.410 so far as Sale of a Controlled Substance for Profit “contained its own doubling provision.” *Id.* at 508. This Court disagreed with *Cyr* (and the amicus’s) analysis. *Id.* at 508-09. This Court noted that on a second or subsequent conviction for the sale of heroin, a person “shall receive a mandatory sentence of ten years...and no judge of any court shall suspend or defer the sentence imposed for this second or subsequent violation: PROVIDED, That the indeterminate sentence review board, under RCW 9.95.040 shall not reduce the minimum term imposed for a violation under this subsection.” *Id.* at 509, *citing* RCW 69.50.410(3)(b). This Court then found, “[t]his provision thus explicitly sets a mandatory *minimum* term that cannot be suspended or deferred.” *Id.* (emphasis original). This Court held there was no conflict with the doubling provision found in RCW 69.50.408, as that applies to the statutory maximum term. *Id.*

Similarly, the two year mandatory term for a first offense for Selling Heroin for Profit is a mandatory minimum term. RCW 69.50.410(3)(a). A person convicted of selling heroin for profit “shall receive a mandatory sentence of two years...and no judge of any court shall suspend or defer the sentence imposed for such violation.” *Id.* Similarly, a person who sells other controlled substance under RCW 69.50.410, “on a second or subsequent cause...shall receive a mandatory sentence of five years... and no judge of any court shall suspend or defer the sentence imposed[.]” The language of these sentencing provisions have the same mandatory language as that of the 10 year second or subsequent offense with one distinction, the indeterminate sentence review board is not precluded from reducing the minimum term imposed. RCW 69.50.410(3)(a)(b). All of these “mandatory” terms are mandatory minimum terms.

The mandatory minimum term found in RCW 69.50.410 is analogous the mandatory minimums found in RCW 9.94A.540. It sets minimum terms for specific crimes, such as Rape in the First Degree (five years) that cannot be reduced or mitigated by a court pursuant to an exceptional sentence. RCW 9.94A.540. These minimum terms are only minimums and the standard sentencing

range still applies, once you take into account the mandatory minimum sentence. RCW 9.94A.505(2)(a).

**2. The Trial Court Must Sentence A Person Found Guilty of Sale Of Heroin For Profit Under The Drug Sentencing Grid Found In The Sentencing Reform Act, While Adhering To The Mandatory Minimums Set Forth In RCW 69.50.410.**

A person convicted of a felony offense shall be sentenced as provided in the Sentencing Reform Act. RCW 9.94A.505(1). The SRA was created with the purpose of, in part, creating a sentencing structure that was “proportionate to the seriousness of the offense and the offender’s criminal history.” RCW 9.94A.010(1); *see also Cyr*, 195 Wn.2d at 499-500. All classified felonies are sentenced within the standard sentencing range established in the sentencing grids, “unless another term of confinement applies.” RCW 9.94A.505(2)(a)(i).

Sentencing, in its most simplistic form, can be broken down into a five-step process. *Cyr*, 195 Wn.2d at 500-501. Step one, determine the class and statutory maximum sentence of the felony. *Id.* at 500 (citations omitted).<sup>7</sup> Step two, determine the seriousness level of the offense. *Id.* Drug crimes, such as Sale of Heroin for Profit,

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<sup>7</sup> The State will be omitting the internal citations in *Cyr* for the remainder of this paragraph.

are sentenced using a separate, three tiered grid, and therefore have their own table for their seriousness levels. RCW 9.94A.517; RCW 9.94A.518; *Cyr*, 195 Wn.2d at 500. Step three, determine the person's offender score. RCW 9.94A.518; RCW 9.94A.525; *Cyr*, 195 Wn.2d at 500. Step four, "determine the applicable standard range sentence." *Cyr*, 195 Wn.2d at 500. The standard range is determined by the intersection of the person's offender score and the seriousness level on the sentencing grid. RCW 9.94A.530(1). Step five, the court imposes sentence. *Cyr*, 195 Wn.2d at 501.

In *Cyr*, this Court considered whether RCW 69.50.410 controlled sentencing or the SRA's standard range, as set forth on the drug sentencing grid, controlled. *Id.* at 498-502. The Court held that a person sentenced for Sale of Heroin for Profit was subject to sentencing pursuant to the SRA, including the drug offense sentencing grid. *Id.* Because Sale of Heroin for Profit is a level III drug offense it is punished at the highest level, with the bottom of the range being 51 to 68 months for a person with zero to two points. RCW 9.94A.517; RCW9.94A.518. Therefore, a person with an offender score of three or greater would have a presumptive sentence of 60 months unless they had a prior qualifying offense that



would double the statutory maximum sentence to 120 months. *Cyr*, 195 Wn.2d at 501.

If Sale of a Controlled Substance for Profit was not meant to be sentenced pursuant to a standard range sentence on the drug grid, it would not have been included in the SRA. Sale of Heroin for Profit has been intentionally placed in the SRA since 1984, the year after the creation of the SRA sentencing grid and seriousness level table. RCW 69.50.410; Laws of 1984, ch. 209, § 17; Laws of 1983, ch. 115, § 3.<sup>8</sup> The legislature moved Sale of Heroin for Profit (Sale of a Controlled Substance for Profit) to the drug grid, where it currently resides, when it created the grid in 2002. RCW 9.94A.518; Laws of 2002, ch. 290, § 9.<sup>9</sup> This Court is charged with ascertaining and giving “effect to the legislature’s intent and purpose” when interpreting a statute. *Cyr*, 195 Wn.2d at 501-02 (citations omitted). It would defy the legislature’s obvious intent to read RCW 69.50.410 as having an independent sentencing structure of mandatory

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<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 7/30/20); 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 7/30/20).

<sup>9</sup> Laws of 2002, ch. 290 is available on the Code Reviser’s website at <http://lawfilesexxt.leg.wa.gov/biennium/2001-02/Pdf/Bills/Session%20Laws/House/2338-S2.sl.pdf> (last visited 7/30/20).

determinate sentencing for the Sale of Heroin for Profit when it has included the offense in the SRA's sentencing grid for 36 years.

Therefore, a trial court sentencing an individual for Sale of Heroin for Profit must sentence that person pursuant to a standard range sentence found on the SRA drug grid, subject to the mandatory minimum sentences set forth in RCW 69.50.410. Even if the trial court had cause grant an exceptional sentence below the standard range, it could not, pursuant to the language of RCW 69.50.410, sentence a person below the mandatory minimum sentence set forth in the statute.

The Court of Appeals erroneously adopted the trial court's interpretation that the two year sentencing provision in RCW 69.50.410(3)(a) was a mandatory determinate sentence. *State v. Peterson*, 12 Wn. App. 2d 195, 199, 457 P.3d 480 (2020); RP (6/13/18) 15. The Court of Appeals also found ambiguity in the statute where none exists. *Cyr*, 195 Wn.2d at 505; *Peterson*, 12 Wn. App. 2d at 199. "[T]he plain language of RCW 69.50.410, read in context, cannot reasonably be interpreted as creating an independent sentencing scheme that precludes the application of other sentencing provisions. Multiple other sentencing provisions explicitly apply." *Cyr*, 195 Wn.2d at 508. The trial court's

misinterpretation of a statute is an abuse of discretion. *Diaz v. State*, 175 Wn.2d 457, 462, 285 P.3d 873 (2012). This Court should hold the sentencing provisions in RCW 69.50.410 requiring “mandatory” sentences are mandatory minimum sentences and convictions pursuant to this statute are to be sentenced within the standard range of the SRA sentencing grid, subject to these mandatory minimums. This Court should reverse the Court of Appeals, hold the trial court abused its discretion, and remand Peterson’s case back to the trial court for resentencing within the standard range.

#### IV. CONCLUSION

The trial court incorrectly interpreted the Sale of a Controlled Substance for Profit statute to require a mandatory two-year sentence for a first offense for the sale of heroin rather than requiring mandatory minimum two years and sentencing Peterson pursuant to the SRA drug grid. The Court of Appeal erred by adopting this interpretation. These errors require reversal and remand of Peterson's matter for resentencing.

RESPECTFULLY submitted this 31<sup>st</sup> day of July, 2020.

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