No. 98201-5

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

JERRY L. PETERSON,

Respondent.

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

Petitioner's Second Supplemental Brief

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A. Is RCW 69.50.410, Selling a Controlled Substance for Profit, constitutional pursuant to article I, section 12 of the Washington State Constitution?

B. Does RCW 69.50.410's constitutionality affect the constitutionality of RCW Chapter 69.50, the Uniform Controlled Substance Act?

II. ARGUMENT

A. THE SELLING OF A CONTROLLED SUBSTANCE FOR PROFIT STATUTE, RCW 69.50.410, DOES NOT VIOLATE ARTICLE I, SECTION 12 OF THE WASHINGTON STATE CONSITUTION OR THE EQUAL PROTECTION CLAUSE OF THE FOURTHEENTH AMENDMENT OF THE UNITED STATES CONSITUTION.

Peterson incorrectly contends that RCW 69.50.410 violates article I, section 12 of the Washington Constitution because a conviction for violating RCW 69.50.410 carries a greater punishment than RCW 69.50.401. Differing sentencing, charging outcomes, or rehabilitative opportunities available to individual defendants do not violate the privileges or immunities clause or equal protection. Sale of a Controlled Substance for Profit, RCW 69.50.410, is therefore constitutional. Allowing facial challenges to criminal statutes under these circumstances presents serious separation of powers concerns.

1. A Historical Perspective Of Washington Courts' Interpretation Of Article I, Section 12.

In 2002, this Court broke from its long established precedent and determined that article I, section 12 of the Washington State Constitution

warrants an independent state constitutional analysis for some claims of violations of the State's privileges and immunities clause. *Grant County Fire Prot. Dist. v. City of Moses Lake (Grant County I),* 145 Wn.2d 702, 725-31, 42 P.3d 394 (2002); *see also State v. Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 791, 317 P.3d 1009 (2014) (Justice Stephens's dissent) (citations omitted). Much of the reasoning and analysis behind the independent analysis determination lies not only in the textual differences between the Fourteenth Amendment and the privileges and immunities clause, but in the historical context of the enactment of article I, section 12. *Ockletree,* 179 Wn.2d at 790-91 (Justice Stephens's dissent); *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake (Grant County II),* 150 Wn.2d 791, 807-09, 83 P.3d 419 (2004); *Grant County I*, 145 Wn.2d at 727-29; *see also State v. Gunwall,* 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986). Therefore, the historical landscape and the jurisprudence of article I, section 12 is relevant to the determination of the continued constitutionality of RCW 69.50.410.

a. The adoption of article I, section 12.

Washington State Constitution was adopted in 1889, during a time of fear of political corruption, general distrust of government, and similar doubts regarding large corporations, which were becoming especially powerful, particularly transportation, banking, and manufacturing. The

Journal of the Washington Constitutional Convention, 1889, at vi (Beverly Paulik Rosenow ed., 1999). States had begun adopting special privilege and immunities clauses after the 1840's as "a response to [the] perceived manipulation of lawmaking process by corporate and other powerful minority interest[s]" who sought "to advance their interests at the expense of the public." Jonathan Thompson, *The Washington Constitution's Prohibition on Special Privileges and Immunities: Real Bite for "Equal Protection" Review of Regulatory Legislation?"*, 69 Temp L. 1247, 1253 (1996). These constitutional clauses were motivated by concern and fear regarding the ability of a minority class comprised of wealthy and influential persons who are able to obtain favor, thereby advancing laws adverse to the majority. *Id.* at 1253-54. Article I, section 12, was the delegates' answer to these societal concerns of the day.

Article I, section 12, was drafted substantially similar to Oregon's Constitution's article I, section 20, which was enacted in 1857. *Hewitt v. State Accident Ins. Fund Corp. (In re Williams),* 294 Ore. 33, 42, 653 P.2d 970 (1982); THE JOURNAL OF THE WASHINGTON CONSTITUTIONAL CONVENTION, at v, 500 n.19. In addition to protections set forth in Oregon's provision, the Washington delegation believed it was necessary the privileges and immunities clause include corporations, which were "perceived as manipulating the lawmaking

process." *Grant County II*, 150 Wn. 2d 808. Therefore, the final, adopted version of article I, section 12 reads:

> No law shall be passed granting 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.

It is also important to note, that the Washington State privileges and immunities clause was enacted thirty years after Oregon State Constitution was adopted. Much had happened in the United States since that time. Slavery had been abolished and the Fourteenth Amendment had been passed granting equal treatment to all persons. U.S. Const. amend XIII, XIV; *Grant County II*, 150 Wn.2d 808-09 (internal quotation and citation omitted). While the Fourteenth Amendment also contains language regarding privileges and immunities it differs from our State Constitution:

> …No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend XIV. As a result, when the delegates adopted, with minor the modification of adding corporations, the Oregon Constitutional language, they were aware of a fundamental shift in federal protections regarding citizen equality which had not influenced the Oregon constitutional drafters.

b. Interpretation of article I, section 12.

In keeping with this difference, the early decisions of the Washington Supreme Court focused on favoritism, or "the award of special privilege rather than the denial of equal protection." *Grant County II,* 150 Wn.2d at 810; *Grant County I,* 145 Wn.2d at 409 (citations omitted). The Washington Supreme Court has reviewed whether granting immunity to physicians on a state examining board from the licensing requirements held by general physicians violated article I, section 12. *State v. Carey*, Wash. 424, 426-27, 30 P. 729 (1892). This Court determined it was a duty, rather than an unconstitutionally conferred privilege, for barred lawyers to recommend eligible candidates for jury commissioner. *State v. Vance,* 29 Wash. 435, 457-59, 70 P. 34 (1902). The Court found that requiring common carriers to be permitted and carry insurance when operated upon public roads did not violate the privileges and immunities clause because the classifications of carriers subject to the regulations were permissible and necessary to regulate the use of public highways. *State v. Seattle Taxicab & Transfer Co.*, 90 Wash. 416, 417-29, 156 P. 837 (1916). All of these decisions analyzed the privileges and immunities clause of article I, section 12 independently the constitutionality claims.

The more singular focus of analysis began to turn to parallel analysis, in which the Court started simultaneously addressing article I,

section 12 and the Fourteenth Amendment. In 1936, the Court distinguished between article I, section 12's "undue favor" and the Fourteenth Amendment's "hostile discrimination" prohibitions, yet analyzed the constitutionality of the statute without differentiating which constitutional provision ultimately rendered the section of the statute unconstitutional. *State ex re. Bacich v. Huse*, 187 Wash. 75, 80-85, 59 P.2d 1101 (1936). Similarly, this Court conducted its article I, section 12 and Fourteenth Amendment evaluation together of a claim the State's taxation of interstate versus intrastate manufacturers was based upon an unreasonable arbitrary classification. *Crown Zellerbach Corp v. State*, 45 Wn.2d 749, 764-65, 278 P.2d 305 (1954). A defendant's article I, section 12 and Fourteenth Amendment challenges to force joint peremptory challenges with his codefendant were analyzed simultaneously without an independent article I, section 12 evaluation. *State v. Persinger*, 62 Wn.2d 362, 382 P.2d 497 (1963). This Court intermixed article I, section 12 and the Fourteenth Amendment when it determined the constitutionality of a statute allowing the same act to be punished as a felony or misdemeanor, finding the two constitutional provisions were substantially identical. *Olsen v. Delmore*, 48 Wn.2d 545, 295 P.2d 324 (1956). This track of cases showed the Court's trend towards a homogenized analysis of article I, section 12 and Federal equal protection cases.

In 1986 this Court adopted what is now commonly referred to as the *Gunwall* analysis, a list of six, nonexclusive criteria to be considered when determining if the Washington State Constitution extends broader protection than the federal, and therefore an independent state analysis is warranted. *State v. Gunwall,* 106 Wn.2d at 58-63. The criteria required by the courts to be properly briefed prior to consideration of state constitutional claims 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 history and common law history, (4) preexisting state law, (5) differences in structure between the federal and state constitutions, and (6) matters of particular state interest or local concern." *Grant County I*, 145 Wn.2d at 725-26, *citing Gunwall*, 106 Wn.2d at 58. In *Grant County* I, this Court reviewed several prior cases where appellants argued article I, section 12 provides greater protections than the equal protection clause. *Grant County I*, 145 Wn.2d at 725. However, the argument had never been sufficiently briefed to warrant review. *Id.* The parties in *Grant County I* provided this Court with the required Gunwall analysis regarding article I, section 12, therefore the Court reviewed the factors and considered whether the state constitution provided broader protection. *Id.* at 725-31.

In *Grant County I*, an annexation case, the appellants asserted "the petition method of annexation violates" article I, section 12, "by giving special privileges to certain properly owners." *Id.* at 725. After conducting a *Gunwall* analysis, the Court determined article I, section 12 provided greater protections than the Fourteenth Amendment. *Id.* at 726-31. The following test was articulated, "a legislative classification will not violate article I, section 12 if the legislation applies alike to all persons within a designated class and there is a reasonable ground for distinguishing between those who fall within the class and those who do not." *Id.* at 731 (citations omitted). The level of scrutiny applicable to the reasonable ground determination differs depending on the type of issue involved. *Id.* at 732. The petition method of annexation was found unconstitutional because it conferred a privilege to a favored minority.

Grant County II again addressed challenges to the petition method for property annexation after reconsideration hearings from this Court's decision in *Grant County I* (in part). *Grant County II*, 150 Wn.2d at 797-801. The Court conducted a *Gunwall* analysis again for article I, section 12. *Id.* at 806-11. It determined the texts are significantly different, in consideration of factors one and two. *Id.* at 806-07. A review of Oregon's article I, section 20, and its applicable law interpreting it was considered for an analysis of factor three. *Id.* at 807-09. It was next noted the Fourteenth

Amendment was enacted to grant equal protection for those denied rights, in particular slaves, rather than "to prevent people from seeking certain privileges or benefits to the disadvantage of others." *Id.* at 808-09, (*citing State v. Smith*, 117 Wn.2d 263, 283, 814 P.2d 652 (1991); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81, 21 L. Ed. 394 (1872)). Then, reviewing law from the early twentieth century, this court determined factor four, preexisting state law supported an independent analysis. *Id.* at 809-10. Factor five always supports an independent analysis. *Id.* at 811. Finally, annexation was a local concern, therefore it supported an independent analysis. *Id.* This Court came to different conclusion than it did in *Grant County I* because it determined there was no "privilege" in "the statutory right to petition for annexation," and without such article I, section 12 does not apply. *Id.* at 812-16.

Therefore, the "independent 'privileges' analysis applies only where a law implicates 'privilege' or 'immunity' as defined in our early cases distinguishing the 'fundamental rights' of state citizenship." *Schroeder v. Weighall*, 179 Wn.2d 566, 572, 316 P.3d 482 (2014) (citations omitted). Pursuant to the article I, section 12 privileges prong analysis, legislation is "subjected to a two-part test." *Schroeder*, 179 Wn.2d at 572-73. First, does the challenged law grant "a 'privilege' or 'immunity' for purposes of state constitution[?]" *Id.* at 573 (citation omitted). If yes, is there "a 'reasonable

ground' for granting that privilege or immunity[?]" *Id.* The conferring of a benefit does not constitute a privilege or immunity in every instance, thereby requiring an independent article I, section 12 analysis. *Id.* The benefits that triggers the independent analysis "are only those implicating 'fundamental rights of state citizenship.'" *Id.*, *citing Vance*, 29 Wash. at 458 (internal ellipsis removed).

> The privileges and immunities therein referenced to pertain alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship. These terms, as they are used in the constitution of the United States, secure each state to the citizens of all states the right to remove and carry on business therein; all right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect debts and to enforce other personal rights; and the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of the some other state are exempt from.

Vance, 29 Wash. at 458, *citing* Cooley, Constitutional Limitations, at 597 (6th ed.). The "fundamental rights" protected by the privileges and immunities clause are not interchangeable with the fundamental rights guaranteed by the due process clause of the Fourteenth Amendment. *Ockletree*, 179 Wn.2d at 792-94 (Justice Stephens dissenting). This matters, as shown below, because the right to the same criminal punishment as other for proscribed conduct, those within the scope of Fourteenth Amendment protection, is not within the separate protective sphere of article I, section 12.

2. Considering The Constitutionality Of RCW 69.50.410 Pursuant To The Article I, Section 12, Challenge Articulated By Amicus And Adopted By Peterson.

The continued constitutionality of RCW 69.50.410, Sale of a Controlled Substance for Profit, must be reviewed pursuant to the article I, section 12 challenge articulated by Amicus in its brief.[1] While this Court's Order required both parties to submit supplemental briefing on the matter, it is now Peterson, who adopted Amicus's article I, section 12 argument as her own, who must shoulder the burden to demonstrate RCW 69.50.410 unconstitutionally grants a privilege or immunity pursuant in violation of article I, section 12 beyond a reasonable doubt.[2] *Madison v. State*, 161 Wn.2d at 92. Therefore, the challenge of RCW 69.50.410 as articulated by Amicus in its briefing is the sole basis for Peterson's article I, section 12 challenge of the statute.

Peterson never acknowledges her burden. Amicus at 8-17; Peterson Amicus Response at 4-5.[3] Peterson also fails to articulate, with any clarity, what privilege or immunity RCW 69.50.410 violates. At one point Peterson

[1] The first time an article I, section 12 challenge to RCW 69.50.410 was advanced was in WACDL/ACLU-WA/WDA's Amicus brief (hereafter Amicus). The argument can be found at Amicus at 8-17.

[2] "Ms. Peterson thereby incorporates by reference the *amicus* brief, adopts them as her own, and urges this Court to reach the merits of the arguments contained therein." Peterson's Response of Respondent to Amicus Brief at 2 (hereafter Peterson Amicus Response).

[3] Because Peterson adopted and incorporated Amicus's arguments as her own, the State will cite to Amicus's briefing as if Peterson submitted it herself for authority of Peterson's position and argument.

appears to argue RCW 69.50.410 allows for prosecutorial discretion to arbitrarily elect the penalty between different felony offenses, for the same conduct, based upon arbitrary factors. Amicus at 14-15. Later, Peterson makes a similar argument, but without stating arbitrarily, just simply the differing degrees of punishment. Amicus at 17. Earlier, Peterson alleges the ability of prosecutors to choose between the two punishments allows for prosecutors to favor certain defendants over others on the basis of arbitrary factors.[4] Amicus at 11. Peterson's lack of clarity is not surprising because much of her argument is spent trying to fit a Fourteenth Amendment, equal protection analysis, into an article I, section 12, privileges and immunities clause argument.

a. Peterson's difficulty in articulating an independent article I, section 12 challenge to RCW 69.50.410 is confirmation why an independent analysis is not warranted under the privileges and immunities clause.

A disparity in the sentencing range for two different crimes, with different elements, that could arise out the same conduct, does not fall under a privilege or immunity implicating a "fundamental right of citizenship" for purposes of article I, section 12. Sale of a Controlled Substance for Profit,

[4] A criminal defendant who believes they have been treated more harshly than similarly situated individuals may obtain relief under the selective prosecution doctrine. *State v. Terrovonia*, 64 Wn. App. 417, 824 P.2d 537 (1992). This would be the appropriate venue to advance such an argument.

RCW 69.50.410, requires a person to sell, for profit, any controlled substance, classified in schedule I, with the except marijuana. Delivery of a Controlled Substance requires a person to deliver a controlled substance. RCW 69.50.401. There is no requirement of proving the additional, "for profit" element in a prosecution of RCW 69.50.401. Arguendo, even if the two statutes were identical there is still no fundamental right of citizenship implicated by the legislature's policy determination to place RCW 69.50.401 as a level II offense and RCW 69.50.410 as a level III offense on the drug sentencing grid.

Article I, section 12 lends itself to challenges of different regulatory laws the government places upon businesses "that has the effect of benefitting certain businesses at the expense of others." *Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 607, 192 P.3d 306 (2008). The Court follows a two-step process when evaluating article I, section 12 cases. *Schroeder*, 179 Wn.2d at 573. This Court must first determine if the challenged law grants a privilege or immunity for purposes of article I, section 12. *Id.* Peterson cannot answer this threshold question with clarity for the Court, rather she intermixes constitutional principles of due process and fundamental rights of liberty interest, not privileges and immunities. Amicus 10-11. The answer to the Court's initial inquiry is no. The right Peterson is asserting is not a privilege or immunity, it is an equal protection

right, and therefore must be analyzed under the Fourteenth Amendment's equal protection clause.

Peterson asserts RCW 69.50.410 "violates 'fundamental rights which belong to citizens of Washington by reason of such citizenship,' including *the fundamental due process right to not be subject to penalties based upon arbitrary distinctions*." Amicus at 10 (emphasis added). Peterson appears from this statement to understands the only way she can raise a claim under article I, section 12 is for the alleged violation to implicate a fundamental right of state citizenship. What Peterson fails to do is confine her analysis and argument to fundamental rights conferred as interpreted by article I, section 12. The privileges and immunities clause is not a due process clause. U.S. Const., Amend. XIV; Const. art. I, §§ 3, 12. Peterson cites to *State v. Wallace* to support her premises that "fundamental right to liberty includes the right to be free from penalties based on arbitrary distinctions," ignoring that *Wallace* is a Fourteenth Amendment analysis for a claimed equal protection violation. Amicus at 10-11; *State v. Wallace*, 86 Wn.2d 546, 552-54, 937 P.2d 200 (1997). This distinction matters. The fundamental right of citizenship in context of article I, section 12 pertains to the right to carry on business, control property and assert ones rights thereto, collect debts, the pursuit of a common law cause of action in court, and equal protection regarding taxes. *Schroeder*, 179 Wn.2d at 573; *Vance*,

29 Wash. at 458. Fundamental rights retains its historical definition and context, therefore a law must implicate the traditional definition of "fundamental rights of state citizenship." *Schroeder*, 179 Wn.2d at 572.

Consideration of the preexisting law in regards to article I, section 12 challenges concerning disparate treatment of similarly situated individuals as to sentencing provisions is not helpful because it does not independently analyze whether a fundamental right of citizenship is implicated. *State v. Zornes*, 78 Wn.2d 9, 475 P.2d 109 (1970); *State v. Reid*, 66 Wn.2d 243, 401 P.2d 988 (1965); *Olsen*, 48 Wn.2d 545. Rather the cases intermix their article I, section 12 and Fourteenth Amendment analysis without any distinction between the two. *Id.* The historical backdrop for which article I, section 12 was drafted and adopted confirms that the purpose of this provision was to protect business, property, and personal rights to employ legal process to protect those monetary interests. Peterson has not explained how "the fundamental due process right to not be subject to penalties based upon arbitrary distinctions" is a privilege or immunity falling within the greater protection of article I, section 12. Indeed, there is no fundamental right of citizenship implicated by potentially disparate treatment in charging decisions rendered by prosecuting attorneys. Therefore, article I, section 12 does not provided greater protection to

Peterson's claimed constitutional violation than the Fourteenth Amendment.[5]

This Court turns to a Fourteenth Amendment analysis of Peterson's article I, section 12 claim. *Am. Legion Post,* 164 Wn.2d at 607-10; *Madison*, 161 Wn.2d at 97-98. Article I, section 12 requires equal protection under the law. *Am. Legion Post*, 164 Wn.2d at 608. "Equal protection that all persons similarly situated should be treated alike." *Id.* (internal quotations and citations omitted) The aim of the equal protection clause is to secure "equality of treatment by prohibiting hostile discrimination." *Id.* The Court must determine what level of scrutiny is appropriate to adjudicate the claimed constitutional violation. *Id.* at 608-09. Strict scrutiny applies to suspect classifications and "laws burdening fundamental rights and liberties." *Id.* "Immediate scrutiny applies only if the statute implicates both an important right and a semi-suspect class not accountable for its status." *Id.* at 609 (internal quotations and citations omitted). Rational basis applies when the other forms of review are not appropriate. *Id.* "A classification passes rational basis review so long as it bears a rational relation to some legitimate end." *Id.* (internal quotations an citations omitted).

[5] As stated above, if the Court found RCW 69.50.410 granted a privilege or immunity the next inquiry would be if there was a reasonable ground for the legislature to grant that privilege or immunity. *Schroeder,* 179 Wn.2d at 573. This determination is different than equal protection analysis, requiring instead that the distinction actually "serve the legislature's stated goals." *Id.* at 574

People selling controlled substances for profit are not suspect class. *Id.* at 609 n.31. "[A] statutory classification that implicates physical liberty is not subject to the intermediate level of scrutiny under the equal protection clause unless the classification also affects a semisuspect class." *State v. Thorne*, 129 Wn.2d 736, 771, 921 P.2d 514 (1996). Similar to recidivist criminals, for profit drug dealers are not a semisuspect class. *Thorne,* 129 Wn.2d at 771. Therefore, rational basis is the appropriate level of review for Peterson's claim that RCW 69.50.410 violates equal protection under the law for allowing prosecutors to punish some sellers of controlled substances more harshly than others based upon arbitrary factors.[6]

The legislature is vested with the power to define crimes and prescribe the punishments for those crimes. *State v. Whitfield*, 132 Wn. App. 878, 893, 134 P.3d 120 (2006). "It is the prerogative of the legislature to determine the kinds and severity of punishment appropriate to each offense and to each degree of a given offense." *Whitfield*, 132 Wn. App. at 893 (internal quotation and citation omitted). The right to equal protection does

[6] It should be noted that RCW 69.50.410 in and of itself does not create the disparity Peterson complains of, as felonies are sentenced pursuant to the SRA, and it is within Chapter 9.94A that the differing levels of punishment were enacted by the legislature. Peterson never discusses the interplay between the statutes or what effect that has on her article I, section 12 challenge of RCW 69.50.410. This nuance and added complexity to a serious constitutional question this Court is now choosing to entertain is another reason why issues, especially ones of constitutional magnitude potentially impacting two chapters of the RCW, should not be considered when raised for the first time in an amicus brief.

not require perfection in legislative classification. *State v. Persinger,* 62 Wn.2d at 368. A statutory enactment is within the wide discretion of the legislature unless the classification produces inequality or discrimination that "is manifestly arbitrary, unreasonable, inequitable and unjust." *Id.* If there are any state of facts that "reasonably can be conceived that will sustain" the statutory classification challenged it is presumed such facts exist. *Id.* The burden is placed upon the person challenging the classification to show "that it fails to rest upon any reasonable basis and is essentially arbitrary." *Id.* at 368-69.

This Court previously held in *Olsen* and *Zornes* that a person is denied equal protection when an act purports to authorize a prosecutor to choose whether to charge a person with a misdemeanor of a felony "for the same act committed under the same circumstances." *Zornes,* 78 Wn.2d at 21; *Olsen,* 48 Wn.2d at 550, *citing State v. Pirkey,* 203 Ore. 697, 281 P.2d 698 (1955). The United States Supreme Court has subsequently overruled *Pirkey, Olsen,* and *Zornes* Fourteenth Amendment equal protection analysis, holding a prosecutor's ability to choose between two statutes prohibiting the same behavior, but carrying different penalties, was

constitutional. *United States v. Batchelder*, 442 U.S. 114, 115-25, 99 S. Ct. 2198, 60 L. Ed. 755 (1979).[7]

The legislature's determination to classify people who sell a controlled substance for profit and punish them more harshly is reasonably related to its vested powers to define crimes, the punishments for those crimes, and make policy determinations based upon its police powers. *Campbell v. State*, 12 Wn.3d 549, 464-66, 122 P.2d 458 (1942); *Whitfield*, 132 Wn. App. at 893. The legislature determined in 1973 that those who sold drugs for profit should be punished more harshly when it enacted its "Controlled Substances - - Mandatory Sentences." Laws of 1973, 2nd Ex. Sess., ch. 2. The legislature has continued this intention when placed Selling a Controlled Substance for Profit as a Level III offense on the drug offense seriously level. Laws of 2002, ch. 290, § 9. It is upon Peterson to show that the legislature's classification is arbitrary. In the absence of such proof any state of facts "reasonably can be conceived that will sustain" the statutory classification challenged it must be presumed such facts exist. *Persinger*, 62 Wn.2d at 368. Those who receive compensation for the sale of controlled substances are in a different classification than those that simply transfer controlled substances to another person. RCW 69.50.410; RCW 69.50.401.

[7] Even if this Court decided to adopt the pre-*Batchfelder* federal standard as the one required under article I, section 12, which it should not do, as argued herein – the two statutes here have different elements, and therefore meet the *Olsen/Zornes* test.

It is not an arbitrary, inequitable, unreasonable, or unjust classification, therefore there is no equal protection clause violation. RCW 69.50.410 is constitutional.

B. IN THE ALTERNATIVE, IF RCW 69.50.410 IS UNCONSTITUTIONAL ITS VIABILITY WOULD NOT AFFECT THE CONSTITUTIONALITY OF THE UNIFORM CONSTROLLED SUBSTANCE ACT, RCW CHAPTER 69.50.

While not conceding RCW 69.50.410 is unconstitutional, arguendo RCW 69.50.410 unconstitutionality does not render the Uniform Controlled Substances Act, Chapter 69.50, unconstitutional. The provision is severable from the remainder of the UCSA.

The entirety of a legislative act is not unconstitutional "unless the invalid provisions are unseverable and it cannot be reasonably believed that the legislative body would have passed one without the other, or unless elimination of the invalid part would render the remaining part useless to accomplish the legislative purpose." *Amalgamated Transit v. State*, 142 Wn.2d 183, 227-28, 11 P.3d 762 (2000). The inclusion of a severability clause may provide assurance that the remaining sections would have been enacted by the legislative body if other provisions are found invalid. *Amalg.*, 142 Wn.2d at 228. "A severability clause is not necessarily dispositive on the question of whether the legislative body would have enacted the remainder of the act." *Id.*

The UCSA was enacted in 1971, two years prior to the enactment of RCW 69.50.410, Sale of a Controlled Substance for Profit. Laws of 1971, ch. 308; Laws of 1973, 2nd Ex. Sess., ch. 2, § 2. UCSA was enacted with a severability clause. Laws of 1971, ch. 308, § 69.50.605. While, the code reviser decodified RCW 69.50.605 in July 2016, this action has no effect on the validity of the severability clause, therefore it is still valid law. RCW 1.08.017.

The legislature choose to add Sale of a Controlled Substance for Profit in 1973 as part of its intention for harsher sentenced for those who sold drugs for profit. This action was taken to include an additional crime, as the legislature had already codified Delivery of a Controlled Substance, RCW 69.50.401, in 1971 as part of the enactment of the UCSA. Laws of 1971, ch. 308, § 69.50.401. The two provisions were not enacted in tandem with each other. If this Court finds RCW 69.50.410 unconstitutional it is severable from the remainder of the UCSA, as it was not part of the original act. Further, eliminating Sale of a Controlled Substance for Profit does not render the remaining parts of the Act useless to accomplish the legislature's purpose to control the use, distribution, and manufacture of controlled substances. *Seeley v. State,* 132 Wn.2d 776, 782, 940 P.2d 604 (1997). The UCSA continues to be constitutional.

III. CONCLUSION

Peterson has not met the high burden of showing, beyond a reasonable doubt that RCW 69.50.410 is unconstitutional. The claimed constitutional error does not convey a privilege or immunity, and therefore does not fall under the broader protection granted by the state constitution through article I, section 12. RCW 69.50.410 does not violate the equal protection clause of the Fourteenth Amendment, and therefore is also constitutional pursuant to the less stringent standard granted through article I, section 12 for equal protection. The statute, RCW 69.50.410 is constitutional, but even if it were not, it is severable from Chapter 69.50, which remains constitutional.

RESPECTFULLY submitted this 30th day of October, 2020.

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