No. 98201-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JERRY L. PETERSON,

Petitioner.

ON APPEAL FROM LEWIS COUNTY SUPERIOR COURT
Honorable James W. Lawler

BRIEF OF WACDL, ACLU-WA AND WDA AS AMICI CURIAE IN SUPPORT OF PETITIONER, JERRY L. PETERSON

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I. IDENTITY AND INTEREST OF AMICI

The Washington Association of Criminal Defense Lawyers (WACDL), American Civil Liberties Union of Washington (ACLU-WA) and Washington Defenders Association (WDA) seek to appear in this case as *amici curiae* on behalf of Petitioner Jerry L. Peterson (Peterson). A professional bar association founded in 1987, WACDL has around 800 members, made up of private criminal defense lawyers, public defenders, and related professionals. It was formed to promote the fair and just administration of criminal justice and to ensure due process and defend the rights secured by law for all persons accused of crime.

ACLU-WA is a statewide, nonprofit, nonpartisan organization with over 135,000 members and supporters. It is dedicated to the preservation and defense of civil liberties and civil rights, and has long worked to defend constitutional rights including those at issue in this case. ACLU-WA also is committed to drug policy reform, criminal justice reform, and reduction of mass incarceration, and works to promote racial equity in all those contexts.

WDA is a statewide organization whose membership is comprised of public defender agencies, indigent defenders and those who are committed to seeing improvements in indigent defense. WDA represents 30 public defender agencies and has over 1,600 members comprising

attorneys, investigators, social workers and paralegals throughout Washington State representing indigent defendants accused of drug related crimes and the disproportionate impact the selective use of prosecution has on vulnerable populations.

II. ISSUES OF CONCERN TO AMICI

Whether RCW 69.50.410 is an invalid and unenforceable statute on the grounds that (a) it violates article 1, section 12 of the Washington Constitution; (b) has been repealed by implication; and/or (c) should be stricken under the doctrine of desuetude?

III. ARGUMENTS AND AUTHORITY

Peterson was convicted of selling heroin for profit under RCW 69.50.410, a rarely invoked and ill-fated statute that criminalizes the same conduct separately criminalized under the much more commonly used RCW 69.50.401. In *State v. Cyr*, 195 Wn.2d 492, 461 P.3d 360 (2020), the Court established that RCW 69.50.410 does not establish an independent sentencing structure, but rather that the sentencing structure established by the Sentencing Reform Act of 1981 (SRA) controls over the specific sentencing provisions set forth in RCW 69.50.410.

Having so held, nothing of substance remains of RCW 69.50.410, the purpose of which was to divert nonviolent drug offenders into treatment facilities, to be operated by the Department of Social and Health

Services (DSHS), which have never existed due to a legislative disinclination to fund them. Instead, the only remaining impact of RCW 69.50.410 is to provide prosecutors with unfettered authority to unilaterally multiply SRA standard range sentences several times over for the same conduct by choosing between a seriousness level of II and a seriousness level of III.

Thus, a statute enacted to emphasize rehabilitation and treatment for nonviolent drug offenders is now used rarely and arbitrarily by prosecutors to dramatically increase prison sentences for select nonviolent drug offenders, the precise opposite result of its plain language and clear intent. In light of the holding in *Cyr* and the failure to fund DSHS correctional facilities, RCW 69.50.410 violates article 1, section 12 of Washington's Constitution and is invalid under the doctrines of repeal by implication and desuetude.

A. The Legislative and Jurisprudential History of RCW 69.50.410

RCW 69.50.410(1), the statute under which Peterson was convicted, provides that "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." The statute then goes on to provide that a person convicted of a violation "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." RCW 69.50.410(2)(a). For second offenses of subsection (1), the sentence to the DSHS correctional facility is mandatory and may not be suspended or deferred. RCW 69.50.410(2)(b).[1]

The statute then provides for different sentences for those who violate subsection (1) by selling heroin, setting a mandatory two year sentence in a DSHS correctional facility for a first offense and a ten year mandatory sentence to the DSHS correctional facility for a second or subsequent offense. RCW 69.50.410(3). The statute has had multiple non-substantive amendments, but the length of sentences and the requirement that offenders be committed to a DSHS facility have remained in the statute, despite the nonexistence of such facilities. See, e.g., Laws of 2003, ch. 53, § 342 (language amended from "it shall be unlawful for any person…" to "it is a class C felony for any person…"); Laws of 1999, ch. 324, § 6 (amended to allow for extraordinary medical placement).

In 1977, the Legislature repealed RCW 69.32.090, which rendered "the duty to establish and maintain a drug treatment and rehabilitation program imposed on the Secretary of the [DSHS…] merely discretionary."

[1] It bears noting that this subsection of the statute was rendered superfluous when the power of judges to defer or suspend felony sentences was separately abolished on June 30, 1984. RCW 9.94A.575

State v. Barnett, 17 Wn. App. 53, 55, 561 P.2d 234 (1977) (citing RCW 69.32.090, repealed by Laws of 1975, 2d Ex. Sess., ch. 103, § 3).

In the same year that RCW 69.32.090 was repealed, this Court decried the failure of the Legislature to establish and maintain DSHS drug treatment programs for eligible offenders, stating:

> The State of Washington, by its failure to fund and establish legislatively mandated drug treatment programs in the state's prisons, has constructed a maze for Bresolin from which there is no escape. He is psychologically and has been physiologically addicted to drugs. All his crimes have been committed either to obtain drugs or money with which to purchase drugs. Due to lack of funding, no programs have been provided to help him cure this addiction, although the people of this state over 50 years ago, in Laws of 1923, ch. 47, § 7 (now RCW 69.32.090), expressed a mandate that such programs were necessary and must be provided. Use of drugs has resulted in confinement in institutions where his addiction is encouraged by the availability of narcotics. He is unable to escape either their physical presence or the prison drug subculture that encourages their use. On his release at the end of his term, nothing will have been accomplished by confinement except to confirm the physical and psychological needs which guarantee, once more, his involvement in criminal acts, followed by more confinement.

Bresolin v. Morris, 86 Wn.2d 241, 248-51, 543 P.2d 325 (1975). The Court went on to lament the increased risk of recidivism in the absence of rehabilitative programs, adding "there can be no justification for failure to follow the statutory mandate to provide the inmate the opportunity to participate in a rehabilitative program, focused on his drug addiction." *Id*.

Instead of following this statutory mandate, the Legislature abolished it. *Barnett*, 17 Wn. App. at 55. Thus, imposing sentences that comply with the mandates of RCW 69.50.410 has never been possible.

Contemporaneously with RCW 69.50.410, the Legislature enacted RCW 69.50.401, which provided, in part, "it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." RCW 69.50.401. Anyone who violates RCW 69.50.410 would also have necessarily run afoul of RCW 69.50.401. *See State v. McGinley*, 18 Wn. App. 862, 868, 573 P.2d 30 (1977) (noting that delivery under RCW 69.50.401 "is a broader category than sale" under RCW 69.50.410). Moreover, the "sale" element of RCW 69.50.410 does not render it materially distinguishable from "delivery" under RCW 69.50.401 because drug dealers generally do not operate as charities. See Laws of 1989, ch. 271, § 211 (justifying asset forfeiture laws on the grounds that they "will provide a significant deterrent to crime by removing the profit incentive of drug trafficking").

The salient difference between the two statutes prior to enactment of the SRA was the respective sentencing structures. Whereas RCW 69.50.410 mandated indeterminate sentences in DSHS facilities, RCW 69.50.401 called for the offender to be "imprisoned" for a maximum of five years in the case of possession and 10 years in the case of delivery.

RCW 69.50.401(1980); *State v. Smith*, 93 Wn. 2d 329, 335 n.1, 610 P.2d 869 (1980). Thus, prior to enactment of the SRA, the prosecutor had discretion to charge sellers of heroin so as to emphasize the goal of rehabilitation (treatment) under RCW 69.50.410, or the goal of retribution (imprisonment) under RCW 69.50.401, by simply defining the act as a "sale for profit" or "delivery" as desired. Given the lack of funding for the DSHS, the availability of treatment and goal of rehabilitation were severely undermined, rendering all sentences terms of imprisonment.

The conclusion in *Cyr* that "the 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" has made clear that nothing of substance remains of RCW 69.50.410, and certainly nothing remotely related to the legislative intent behind enactment of that statute.

In fact, RCW 69.50.410 is now effectively a prosecutorial tool for achieving the precise opposite of its intent. In its table of seriousness levels, the SRA assigns to the sale of heroin for profit under RCW 69.50.410 a seriousness level of III. RCW 9.94A.518. However, the same table assigns to the delivery of drugs listed under schedule I of RCW 69.50.204, which includes heroin, a seriousness level of II. RCW 9.94A.518. Thus, prosecutors are able to arbitrarily mete out far greater

sentences under RCW 69.50.410 than would be available under RCW 69.50.401 for the same conduct and the same offender score by selecting the desired applicable seriousness level.

Under this framework, when a prosecutor is presented with allegations of a heroin sale committed by an individual who, like Peterson, carries an offender score of four, she may elect to charge the offense as a "delivery" under RCW 69.50.401, in which case the offender would face an SRA standard range of 20+ to 60 months, or as a "sale for profit" under RCW 69.50.410, in which case the offender would face an SRA range of 68+ to 100 months. The end result of this unplanned combination of legislative overhauls and judicial interpretation is that RCW 69.50.410, a statute enacted to provide two years of DSHS treatment for sellers of heroin instead of 10 years of prison, is now being used by prosecutors to arbitrarily multiply standard range terms of imprisonment for heroin sellers several times over.

B. RCW 69.50.410 Violates the Privileges and Immunities Clause of Article 1, Section 12 of Washington's Constitution.

RCW 69.50.410, as it is currently construed, denies the constitutional protections guaranteed by article 1, section 12, of the Washington Constitution. In *Olsen v. Delmore*, 48 Wn.2d 545, 295 P.2d 324 (1956), this Court held that an act which "prescribes different

punishments or different degrees of punishment for the same act committed under the same circumstances by persons in like situations" violates the constitutional guarantees provided by the Fourteenth Amendment to the United States Constitution and article 1, section 12, of the Washington State Constitution. See *State v. Zornes*, 78 Wn.2d 9, 475 P.2d 109 (1970) (applying the *Olsen* holding).

Subsequently, this holding was called into question by the U.S. Supreme Court decision in *United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed. 2d 755 (1979), insofar as it relates to the Fourteenth Amendment. See *City of Kennewick v. Fountain*, 116 Wn.2d 189, 193, 802 P.2d 1371 (1991). However, "[t]he question that remains, of course, is whether the *Olsen/Zornes* line of cases is still viable insofar as article I, section 12 is concerned." *State v. Kirwin*, 165 Wn.2d 818, 831, 203 P.3d 1044 (2009) (Madsen, J., dissenting). As set forth herein, that question is properly answered in the affirmative.

1. Article 1, section 12 requires an independent constitutional analysis.

This Court previously held that "the privileges and immunities clause of the Washington State Constitution, article I, section 12, requires an independent constitutional analysis from the equal protection clause of the United States Constitution." *Grant Cty Fire Prot. Dist. 5 v. City of*

Moses Lake, 150 Wn.2d 791, 805, 83 P.3d 419 (2004) (citing *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986)).[2]

This conclusion likewise applies in the present context because the imposition of different punishment for the same act under the same circumstances by persons in like situations violates "fundamental rights which belong to the citizens of [Washington] by reason of such citizenship," including the fundamental due process right to not be subject to penalties based on arbitrary distinctions. *Certification from the U.S. Dist. Court for the W. Dist. of Wash. in Larry C. Ockletree v. Franciscan Health Sys., Corp.*, 179 Wn.2d 769, 317 P.3d 1009, 1015 (2014) ("privileges and immunities" refers "alone to those fundamental rights which belong to the citizens of [Washington] by reason of such citizenship.") (quoting *State v. Vance*, 29 Wn. 435, 458, 70 P. 34 (1902)); *State v. Wallace*, 86 Wn. App. 546, 554, 937 P.2d 200 (1997) (recognizing that the fundamental right to liberty includes the right to be free from

[2] In evaluating whether a state constitutional provision requires an independent analysis, the Court looks to the following six nonexclusive neutral criteria: (1) the textual language of the state constitution; (2) differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) structural differences between the federal and state constitutions; and (6) matters of particular state or local concern. *Gunwall*, 106 Wn.2d at 58.

penalties based on arbitrary distinctions) (quoting *Chapman v. United States*, 500 U.S. 453, 465, 111 S. Ct. 1919, 114 L.Ed.2d 524 (1991)).

As to the first two criteria, the language of article 1, section 12 differs substantially from the Fourteenth Amendment. *Grant Cty Fire Prot. Dist. 5*, 150 Wn.2d at 806.[3] For the third criterion, this Court has noted that the state constitutional history shows that article 1, section 12 was intended to protect more broadly against "favoritism," as opposed to the more specific intent of the Fourteenth Amendment to "guarantee that certain classes of people (blacks) were not denied the benefits bestowed on other classes (whites), thereby granting equal treatment to all persons." *Grant Cty Fire Prot. Dist. 5*, 150 Wn. 2d at 808. Therefore, "the historical context as well as the linguistic differences indicates that the Washington State provision requires independent analysis from the federal provision when the issue concerns favoritism." *Id*. The ability of prosecutors to choose between a seriousness level of II or III for the same conduct allows the prosecutor to favor certain defendants and disfavor others on the basis of wholly arbitrary factors.

[3] Whereas the federal constitution is concerned with the tyranny of the majority against minority groups, the state constitution more broadly protects against "laws serving the interest of special classes of citizens to the detriment of the interests of all citizens." *Grant Cty Fire Prot. Dist. 5*, 150 Wn.2d at 806-07.

With respect to the fourth criterion, preexisting state law supports an independent analysis because the Court has previously "interpreted article I, section 12 independently from the federal provision and in a manner that focused on the award of special privileges rather than the denial of equal protection." *Id*. (citing *N. Springs Water Co. v. City of Tacoma*, 21 Wn. 517, 58 P. 773 (1899); *In re Application of Camp*, 38 Wn. 393, 80 P. 547 (1905)). In the specific context presented here, preexisting state law interpreting equal protection under the state and federal constitutions struck down statutes that "prescribe[] different punishments or different degrees of punishment for the same act committed under the same circumstances by persons in like situations," thereby affording broader constitutional protections than those afforded under the Fourteenth Amendment as interpreted in *Batchelder*, 442 U.S. 114. See *Zornes*, 78 Wn.2d 9; *Olsen*, 48 Wn.2d 545.

As to the fifth criterion, "structural differences will always support an independent analysis." *Grant Cty Fire Prot. Dist. 5*, 150 Wn. 2d at 811. Regarding the sixth, the constitutional issue presented herein is of particular state interest or local concern because "criminal law is a uniquely local matter" and "[t]here is no need for national uniformity in criminal law." *State v. Earls*, 116 Wn. 2d 364, 396, 805 P.2d 211 (1991) (Utter, J., dissenting) (citing *Moran v. Burbine*, 475 U.S. 412, 89 L.Ed.2d

410, 106 S.Ct. 1135 (1986)). Accordingly, as the Court concluded in *Grant Cty Fire Prot. Dist. 5*, each of the relevant *Gunwall* criterion justify independent analysis from the equal protection clause in the Fourteenth Amendment in the context of evaluating the constitutionality of RCW 69.50.410.

2. RCW 69.50.410 is unconstitutional under article 1, section 12.

For the foregoing reasons, the question of "whether the *Olsen/Zornes* line of cases is still viable insofar as article I, section 12 is concerned" must be answered in the affirmative. *Kirwin*, 165 Wn. 2d at 831 (Madsen, J., dissenting). Applying this line of cases here, it is apparent that RCW 69.50.410, in light of the legislative and jurisprudential developments following its enactment, violates article I, section 12 and invalidates Peterson's conviction. *Zornes*, 78 Wn.2d 9; *Olsen*, 48 Wn.2d 545.

In *Olsen*, the Court struck down as unconstitutional RCW 9.41.160, which bestowed upon prosecutors sole discretion to charge one who violates RCW 9.41.050 with either a misdemeanor or a felony. *Olsen*, 48 Wn. 2d at 546-50. The Court reasoned that, because the statute "prescribes different punishments or different degrees of punishment for the same act committed under the same circumstances by persons in like situations", it violates the privileges and immunities clause set forth in

article 1, section 12. *Id*. at 550 (citing *State v. Pirkey*, 203 Ore. 697, 281 P.2d 698 (1955)).

In *Zornes*, the Court addressed a situation where, as in this case, two statutes that prohibited the same conduct, to wit, possession of cannabis, enabled prosecutors to elect in their sole discretion whether to charge the conduct as a misdemeanor or felony. *Zornes*, 78 Wn. 2d at 25. Relying on *Olsen*, the Court held that because there was "no basis in the statutes for distinguishing between persons who can be charged with unlawful possession of cannabis under one act and those who can be charged under the other," the statutory structure violated article 1, section 12. *Id*.

The statute in question here is, if anything, even more arbitrary and Byzantine than the marijuana statute at issue in *Zornes*. Because of the elimination of the treatment-oriented sentencing structure provided for in RCW 69.50.410, the statute now serves no purpose other than to give prosecutors sole discretion to arbitrarily elect between a seriousness level of III or II for the same conduct, thereby substantially elevating the SRA range. In Peterson's case, the Lewis County prosecutor opted for more than a threefold increase of the low-end SRA range over the range that would have applied had Peterson been charged under RCW 69.50.401 for the same conduct, for no apparent reason. In most counties, Peterson's

unremarkable controlled buy would be charged as a Level II delivery of a controlled substance, not as a Level III sale for profit. Pursuant to the holdings in *Olsen* and *Zornes*, this degree of prosecutorial discretion to dictate a sentence on the basis of arbitrary factors violates article 1, section 12 of the Washington Constitution.

Analysis of cases distinguishing *Olsen* underscores this point. *See State v. Boggs*, 57 Wn.2d 484, 358 P.2d 124 (1961); *State v. Reid*, 66 Wn.2d 243, 401 P.2d 988 (1965). In *Boggs*, equal protection was not violated because a statute vested the trial judge, not the prosecutor, with broad discretion to impose a wide range of sentences based on the same conduct. *Boggs*, 57 Wn.2d 484. Thus, *Boggs* establishes that special concerns are implicated when statutes provide prosecutors with undue authority to dictate sentences through arbitrary charging decisions. *Id*.

In *Reid*, statutes providing different sentences for use and possession of drugs, respectively, did not violate state or federal equal protection or privileges and immunities clauses because "Illegal possession is potentially much more dangerous to society than illegal use, because the possessor may dispense the drugs to others, whereas the user is affecting mainly himself." *Reid*, 66 Wn.2d at 247.

The reasoning in *Reid* does not apply to the sentencing discrepancy between RCW 69.50.410 and 69.50.401 because selling heroin is no more

dangerous to society than delivering heroin - both involve dispensing drugs to others. If anything, delivering drugs for free, as opposed to for profit, poses a greater public health risk because it eliminates financial limitations on the ability of users to procure controlled substances and makes it easier to introduce young people to a future of addiction. In any event, there is no material difference between delivering and selling heroin because, as the legislature has recognized, it is the profit incentive rather than the spirit of charity that drives the drug trade. See Laws of 1989, ch. 271, § 211. Additionally, "sale for profit" is defined so broadly to include an exchange for "anything of value," regardless of whether any actual profit is made. *State v. Leek*, 26 Wn. App. 651, 657, 614 P.2d 209 (1980).

In *McGinley*, the Court of Appeals addressed a similar argument regarding prior incarnations of RCW 69.50.401 and 69.50.410 which penalized the sale of marijuana under the former but not the latter. *McGinley*, 18 Wn. App. at 868. The court rejected an argument that the statutory framework allowed the prosecutor to improperly elect penalties under the prior sentencing structure because, unlike the heroin charge in Peterson's case, the sale of marijuana for which the defendant was convicted was only punishable under RCW 69.50.401 and expressly excluded from RCW 69.50.410. *Id.*

Because *Zornes* and *Olsen* are "still viable insofar as article I, section 12 is concerned", and because RCW 69.50.410 now "prescribes different punishments or different degrees of punishment for the same act committed under the same circumstances by persons in like situations", it violates article 1, section 12 of Washington's Constitution. See *Kirwin*, 165 Wn. 2d at 831 (Madsen, J., dissenting); *Olsen*, 48 Wn.2d 545.

C. <u>RCW 69.50.410 Has Been Repealed by Implication.</u>

RCW 69.50.410 is also invalid because it was repealed by implication. Statutes are repealed by implication (1) when the later act covers the entire field of the earlier one, is complete in itself, and is intended to supersede prior legislation, or (2) when the two acts cannot be reconciled and both given effect by a fair and reasonable construction. *State v. Conte*, 159 Wn.2d 797, 815, 154 P.3d 194 (2007); *Amalgamated Transit Union Legis. Council v. State*, 145 Wn.2d 544, 552, 40 P.3d 656 (2002). Repeal by implication is disfavored and when potentially conflicting acts can be harmonized to maintain the integrity of both, those acts will be so construed. *City of Spokane v. Rothwell*, 166 Wn.2d 872, 877, 215 P.3d 162 (2009).

RCW 69.50.410 has been repealed by implication because it cannot be given a fair and reasonable construction that upholds its plain language and intent while also upholding the plain language and intent of

the SRA. The plain language and intent of RCW 69.50.410 provides for a DSHS treatment-based approach for drug offenders. As set forth above, in light of the repeal of RCW 69.32.090 and failure to fund DSHS, the enactment of the SRA, and the holding in *Cyr*, compliance with the plain language of RCW 69.50.410 is not possible.

To the contrary, the current state of affairs is diametrically opposed to the language and intent of RCW 69.50.410, reinstituting a retrograde retributive approach to the war on drugs, rather than a rehabilitation-oriented approach, that has been a disastrous and costly failure nationwide. See *Bresolin*, 86 Wn. 2d at 248-51 (lamenting lack of treatment programs for drug offenders and ineffectiveness of imprisonment).

This outcome also undermines the plain language of the SRA and legislative intent to structure sentences and increase consistency between sentences, instead bestowing tremendous power on prosecutors to arbitrarily seek far greater penalties for select offenders. See *Cyr*, 195 Wn.2d at ¶ 15 (The SRA "is intended 'to ensure that offenders who commit similar crimes and have similar criminal histories receive equivalent sentences.'"); *State v. Crocker,* 196 Wn. App. 730, 736, 385 P.3d 197 (2016) ("One of the purposes of the SRA is to ensure punishment 'commensurate with the punishment imposed on others committing similar offenses.'").

Without DSHS drug treatment programs and the rehabilitative purpose they were intended to serve, and in light of the holding in *Cyr*, the only remaining legal effect of RCW 69.50.410 is to bestow upon prosecutors the unfettered discretion to charge the sale of heroin as a schedule III or schedule II offense, and thereby unilaterally dictate the applicable SRA standard range, in direct violation of the clear legislative purposes of RCW 69.50.410 and the SRA. The SRA and RCW 69.50.410 cannot be reconciled and both given effect by a fair and reasonable construction, and RCW 69.50.410 has been repealed by implication.

D. RCW 69.50.410 is Invalid Under the Doctrine of Desuetude.

RCW 69.50.410 is invalid under the doctrine of desuetude because it is rarely used in practice and has never been used as intended to sentence drug offenders to DSHS treatment facilities. "Desuetude is "[d]isuse; cessation or discontinuance of use. . . . Applied to obsolete practices and statutes." *State v. Johnstone*, 96 Wn. App. 839, 846 n.7, 982 P.2d 119 (1999) (quoting Black's Law Dictionary 449 (6th ed. 1990)). "Although originally a civil law doctrine, courts have acknowledged that a desuetudinal statute could present 'serious problems of fair notice' in a criminal case." *U.S. v. Jones*, 347 F. Supp.2d 626, 628 (E.D. Wis. 2004).

It appears that no one has ever been sentenced to "a correctional facility of the department of social and health services" for a violation of

RCW 69.50.410. Thus, not only has there been a cessation or discontinuance of use of the statute, but in fact it has never been used pursuant to its plain language. To sentence a defendant under the SRA for violations of a rarely invoked statute that provides for a treatment-oriented sentencing structure that has never been used violates principles of fair notice and due process. Accordingly, the statute is obsolete and should be stricken pursuant to the doctrine of desuetude.

IV. CONCLUSION

For the foregoing reasons, RCW 69.50.410 should be stricken as unconstitutional, repealed by implication and/or invalid under the doctrine of desuetude and Peterson's conviction should be vacated.

Respectfully submitted this 4th day of September, 2020.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 4th day of September, 2020.

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September 04, 2020 - 10:13 AM

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