

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
1/9/2020 8:00 AM  
BY SUSAN L. CARLSON  
CLERK

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
1/22/2020  
BY SUSAN L. CARLSON  
CLERK

No. 97323-7

---

SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

JOHNNY RAY CYR,

Petitioner.

---

**BRIEF OF WACDL AS AMICUS CURIAE OBO RESPONDENT,  
JOHNNY RAY CYR**

---

Thomas E. Weaver  
WSBA #22488  
WACDL Amicus Committee

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

**TABLE OF CONTENTS**

A. Identity and Interest of Amicus ..... 1

B. Issue of Concern to Amicus ..... 1

C. Argument of Amicus ..... 2

D. Conclusion ..... 14

## TABLE OF AUTHORITIES

### Cases

<i>Bresolin v. Morris</i> , 86 Wn.2d 241, 543 P.2d 325 (1975) ( <i>Bresolin I</i> ).....	6
<i>Bresolin v. Morris</i> , 88 Wn.2d 167, 558 P.2d 1350 (1977) ( <i>Bresolin II</i> ). ...	6
<i>In re Bush</i> , 26 Wn.App. 486, 616 P.2d 666 (1980) .....	10
<i>In re the PRP of Cruz</i> , 157 Wn.2d 83, 88, 134 P.3d 1166 (2006).....	2, 8
<i>Lutton v. Smith</i> , 8 Wn.App. 822, 509 P.2d 58 (1973).....	2
<i>Price v. Kitsap Transit</i> , 125 Wn.2d 456, 886 P.2d 556 (1994) .....	11
<i>State v. Gray</i> , 25 Wn.App. 789, 612 P.2d 401 (1980).....	10
<i>State v. Hebert</i> , 67 Wn.App. 836, 841 P.2d 54 (1992) .....	8
<i>State v. Kinsey</i> , 20 Wn.App. 299, 579 P.2d 1347 (1978) (same) .....	7
<i>State v. Leek</i> , 26 Wn. App. 651, 614 P.2d 209 (1980).....	7
<i>State v. McGinley</i> , 18 Wn.App. 862, 868, 573 P.2d 30 (1977) .....	5
<i>State v. Zornes</i> , 78 Wn.2d 9, 475 P.2d 109 (1970).....	2

### Statutes

69.50.401.....	5
Former RCW 9.94A.320.....	9
former RCW 9.94A.590.....	10
RCW 10.95.030, .....	10
RCW 60.32.090 .....	6

RCW 60.50.410 .....	13
RCW 69.50.401 .....	9
RCW 69.50.407 .....	7
RCW 69.50.408 .....	8, 13
RCW 69.50.410 .....	passim
RCW 69.50.410(3)(b) .....	13
RCW 9.94A.030(17) .....	12
RCW 9.94A.505(2)(a)(1) .....	9
RCW 9.94A.506(3) .....	9
RCW 9.94A.518 .....	9
RCW 9.94A.533 .....	10
RCW 9.94A.533(2) .....	7
RCW 9.94A.540 .....	10
RCW 9.94A.728 .....	12
RCW 9.94A.728(4) .....	11
RCW 9A.28.040 .....	7

#### A. IDENTITY AND INTEREST OF AMICUS

The Washington Association of Criminal Defense Lawyers (WACDL) seeks to appear in this case as *amicus curiae* on behalf of Petitioner Johnny Ray Cyr. WACDL was formed to improve the quality and administration of justice. 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. It files this brief in pursuit of that mission. The author is a co-chair of the WACDL Amicus Committee and writes this brief in that capacity.

#### B. ISSUE OF CONCERN TO AMICUS

This Court has invited briefing on the issue of the proper interpretation of RCW 69.50.410. Do the statutory minimum and maximum terms set out in RCW 69.50.410 apply even where they are inconsistent with comparable provisions of the Sentencing Reform Act?

### C. ARGUMENT OF AMICUS

After Johnny Ray Cyr pleaded guilty to the Sale of Heroin for Profit, the trial court imposed a sentence consistent with the sentencing terms of RCW 69.50.410, a sentence that is at odds with the Sentencing Reform Act (SRA). The two sentencing provisions cannot be resolved by resort to statutory construction or legislative history, which creates an irreconcilable ambiguity. Therefore, this Court should apply the rule of lenity and affirm the trial court. The rule of lenity requires the Court to interpret an ambiguous statute in favor of the defendant absent legislative intent to the contrary. *In re the PRP of Cruz*, 157 Wn.2d 83, 88, 134 P.3d 1166 (2006). Here, application of the rule of lenity requires affirming the trial court's sentence consistent with RCW 69.50.410, the Sale of Heroin for Profit statute, even though this sentence is inconsistent with the standard range sentence provisions of the SRA.

Since the days of the New Deal, there have been three eras of statutory enactments relevant to sentencing for drug offenses in Washington. In 1939, Washington adopted the Uniform Narcotic Drug Act. See, generally, *State v. Zornes*, 78 Wn.2d 9, 475 P.2d 109 (1970) (discussing a 1967 amendment to the Uniform Narcotic Drug Act). Under the Uniform Narcotic Drug Act, certain drug offenses carried mandatory

minimum of five years. See discussion in *Lutton v. Smith*, 8 Wn.App. 822, 509 P.2d 58 (1973).

Effective May 21, 1971, the Uniform Narcotic Drug Act was repealed and replaced by the Uniform Controlled Substances Act (UCSA). *Lutton*, footnote 2. As part of this change, the legislature enacted RCW 69.50.410, which has since been amended twice in 1999 and 2003. The statute currently reads, in its entirety (with the 2003 amendments reflected in subsection (1)) (with the 1999 amendments reflected in (3)(b)):

(1) Except as authorized by this chapter ~~it shall be unlawful~~ 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.

For the purposes of this section only, the following words and phrases shall have the following meanings:

(a) "To sell" means the passing of title and possession of a controlled substance from the seller to the buyer for a price whether or not the price is paid immediately or at a future date.

(b) "For profit" means the obtaining of anything of value in exchange for a controlled substance.

(c) "Price" means anything of value.

(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 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 9.94A.728(4).

(5) In addition to the sentences provided in subsection (2) of this section, any person convicted of a violation of subsection (1) of this section shall be fined in an amount calculated to at least eliminate any and all proceeds or profits directly or indirectly gained by such person as a result of sales of controlled substances in violation of the laws of this or other states, or the United States, up to the amount of five hundred thousand dollars on each count.

(6) Any person, addicted to the use of controlled substances, who voluntarily applies to the department of social and health services for the purpose of participating in a rehabilitation program approved by the department for addicts of controlled substances shall be immune from prosecution for subsection (1) offenses unless a filing of an information or indictment against such person for a violation of subsection (1) of this section is made prior to his or her voluntary participation in the program of the department of social and health services. All applications for immunity under this section shall be sent to the department of social and health services in Olympia. It shall be the duty of the department to stamp each application received pursuant to this section with the date and time of receipt.

(7) This section shall not apply to offenses defined and punishable under the provisions of RCW 69.50.401 through 69.50.4015.

(Emphasis added.)

This statute was first enacted in 1973 and has since been amended twice, in 1999 and 2003. Prior to 2003, unlike most felonies in Washington which are classified as Class A, B, or C, the original statute contained no sentencing provisions other than those contained in subsections (2) and (3). Rather than classify Sale for Profit as a Class A, B, or C felony, the legislature instead chose to create mandatory minimum sentences and maximums unique to the statute. A first offense for Sale of Heroin for Profit carries a mandatory sentence of two years and maximum sentence of five years, to be served in a “correctional facility of the department of social and health services” (DSHS). A second offense carries a mandatory sentence of ten years, also to be served in a DSHS facility.

Reminiscent of the mandatory minimum sentences that existed under the Uniform Narcotics Drug Act, the original understanding in 1973 was that violations of RCW 69.50.410 would result in intentionally “harsh mandatory sentences.” *State v. McGinley*, 18 Wn.App. 862, 868, 573 P.2d 30 (1977). In *McGinley*, the Court of Appeals concluded, “RCW 69.50.410 establishes mandatory prison sentences for persons convicted of

selling certain drugs” and prosecutors have discretion whether to charge defendants with RCW 69.50.410 or 69.50.401 (delivery of a controlled substance). *McGinley* at 868.

From the beginning, the sentencing provisions of RCW 69.50.410 were a failure because, despite the Legislature’s stated intention, a DSHS drug treatment facility was never created, although trial judges continued to impose the “harsh” mandatory and minimum sentences prescribed by the statute, with defendants serving their time in Department of Corrections (DOC) prisons. When the statute was passed in 1973, the legislature apparently contemplated creating a drug treatment program for drug addicts run by the DSHS as an alternative to prison. See former 69.32.090. In a situation not unlike the current attempts to get DSHS to comply with statutory and judicial requirements for restoring competency to incompetent defendants, the requirement that drug addicts receive treatment in a DSHS facility turned out to be an unfunded mandate. In *Bresolin v. Morris*, 86 Wn.2d 241, 543 P.2d 325 (1975) (*Bresolin I*), this Court held DSHS in contempt for failure to provide the necessary services. The legislature responded by repealing RCW 60.32.090 entirely, a decision acquiesced in by this Court after constitutional review. *Bresolin v. Morris*, 88 Wn.2d 167, 558 P.2d 1350 (1977) (*Bresolin II*). Therefore, there being no properly funded DSHS treatment facility from 1973 to

1975 and no statutory provision for such a facility thereafter, all of the sentencing provisions of subsections (2) and (3) requiring incarceration “in a correctional facility of the department of social and health services” were obsolete from the beginning.

Despite the fact the statute calls for mandatory sentences to be served in a non-existent DSHS treatment facility, however, trial courts continued to sentence defendants for violating its provisions, imposing prison terms of two to five years in DOC, and the appellate courts affirmed. See *State v. Leek*, 26 Wn. App. 651, 614 P.2d 209 (1980) (affirming judgment of sentence for violation of RCW 69.50.410); *State v. Kinsey*, 20 Wn.App. 299, 579 P.2d 1347 (1978) (same).

In 1981, Washington entered its third era of drug sentencing with the advent of the Sentencing Reform Act (SRA). Unlike the change from the Uniform Narcotics Drug Act to the Uniform Controlled Substances Act, however, the legislature did not completely repeal the provisions of the UCSA. Instead, it chose to keep in place most UCSA statutes, despite the fact that many of the sentencing provisions of the UCSA are inconsistent with comparable provisions of the SRA. Mr. Cyr’s case represents at least the third time the Washington Courts have addressed these inconsistent provisions.

The first inconsistent provision addressed by the Washington appellate courts is in the area of conspiracy. RCW 9A.28.040 defines criminal conspiracy while RCW 69.50.407 defines drug conspiracy. The SRA provides that conspiracy charges “under chapter 9A.28 RCW” are sentenced at seventy-five percent of the standard range. RCW 9.94A.533(2). The Court of Appeals held that drug conspiracy is not the same as criminal conspiracy. Drug conspiracies are to be sentenced as unranked felonies under the SRA, and not at seventy-five percent of the standard range like other conspiracies. *State v. Hebert*, 67 Wn.App. 836, 841 P.2d 54 (1992).

The second inconsistent provision is the doubling provision of RCW 69.50.408, applicable to those being sentenced to a subsequent offense “under this chapter,” a provision analyzed by this Court in *In re the PRP of Cruz*, 157 Wn.2d 83, 134 P.3d 1166 (2006). The trial court had interpreted RCW 69.50.408 as doubling both the maximum penalty and the standard range. This Court reversed, noting, “Since this statute was enacted prior to the SRA, we must understand how sentencing was done before the SRA in order to properly interpret the statute.” *Cruz* at 88. This Court then cited the rule of lenity and held that the statute doubles only the maximum penalty, and not the standard range. *Cruz* at 88.

Now, for at least the third time, the Washington appellate courts must reconcile a drug sentencing statute enacted under the UCSA that is inconsistent with the SRA. RCW 69.50.410 creates both a maximum penalty and a minimum penalty for Sale of Heroin for Profit. The trial court in Mr. Cyr's case exercised its discretion and imposed the maximum penalty for a first offense.<sup>1</sup> Although Mr. Cyr has at least one prior conviction for a violation of the UCSA, he has no prior convictions for Sale of Heroin for Profit, so his range under RCW 69.50.410 is 24 to 60 months. This Court should affirm the trial court's discretion.

When the SRA was first passed, Delivery of Controlled Substance (RCW 69.50.401) and Sale for Profit (RCW 69.50.410) were both classified as Level VI offenses, except Sale of Heroin for Profit (RCW 69.50.410) was classified as Level VIII. Former RCW 9.94A.320; see Session Laws, Chapter 209, 1984. Although the level of offense has changed over the years, Sale for Profit has remained in the SRA Offense Table continuously since 1984 and is currently classified as a Level III Drug Offense. RCW 9.94A.518. Mr. Cyr's standard range under the SRA is 68+ to 100 months.

---

<sup>1</sup> This Court may wish to take judicial notice of the briefing in *State v. Jerry Peterson*, 52183-1-II, where the same trial judge, interpreting the same statute, imposed a two year sentence for a first offense for Sale of Heroin for Profit. The case is pending oral argument on January 14, 2020. *Amicus* is also the court-appointed attorney for Ms. Peterson.

But the fact that Sale for Profit is listed on the SRA sentencing charts does not resolve the question. The maximum term of confinement in a range may not exceed the statutory maximum for the crime. RCW 9.94A.506(3). Additionally, the SRA requires the court to impose a standard range sentence “unless another term of confinement applies.” RCW 9.94A.505(2)(a)(1). Therefore, this Court must still determine whether the minimum and maximum penalties of two to five years for a first offense for Sale of Heroin for Profit constitute “another term of confinement” that applies.

As noted above, the sentencing provisions of RCW 69.50.410 are reminiscent of the sentencing provisions of the Uniform Narcotics Drug Act, including the mandatory minimum terms. When the legislature enacted the SRA, it took pains to repeal almost all existing mandatory minimum statutes. See *In re Bush*, 26 Wn.App. 486, 616 P.2d 666 (1980) (upholding the pre-SRA sentence of a 7-1/2 year mandatory minimum sentence for armed robbery); *State v. Gray*, 25 Wn.App. 789, 612 P.2d 401 (1980) (recognizing the pre-SRA one year mandatory minimum for violation of Uniform Firearm Act). In 2000, the legislature passed RCW 9.94A.540 (former RCW 9.94A.590) resurrecting mandatory minimums for certain enumerated offenses, such as first degree murder and first degree assault. The current version of the statute enumerates six offenses

with mandatory minimum sentences. See, also, RCW 9.94A.533 (creating mandatory minimum sentences for firearm and deadly weapon enhancements). After a thorough review of the criminal code, *amicus* has been able to identify only one statute, other than RCW 69.50.410, where a mandatory minimum sentencing statute was not repealed after the enactment of the SRA. And that statute, RCW 10.95.030, which creates a mandatory minimum sentence for aggravated murder of life without parole, has continued to be applied unabated even after the enactment of the SRA.

RCW 69.50.410 has been amended twice, in 1999 and 2003, since the enactment of the SRA. The Legislature did so knowing that the DSHS treatment facility referenced in the statute is non-existent, but that trial courts continued to otherwise enforce its sentencing provisions and sentence defendants to lengthy prison sentences. The Legislature is presumed to know the existing state of the case law in those areas in which it is legislating. *Price v. Kitsap Transit*, 125 Wn.2d 456, 886 P.2d 556 (1994). The fact that the Legislature has twice amended the statute is evidence that the Legislature intends for the mandatory sentencing provisions of the statute to continue to be enforced.

The two amendments also evidence an intent by the Legislature to have the sentencing provisions enforced. In 1999, the Legislature

amended the statute to add subsection (4). Subsection (4) makes clear that defendants serving mandatory minimum terms pursuant to the statute may still apply for extraordinary medical placement pursuant to RCW 9.94A.728(4). The only way it makes sense to allow inmates to apply for extraordinary medical placement from the mandatory minimum sentences is if the Legislature intended for the mandatory minimum sentences to continue to be imposed.

The 1999 amendment raises another question: to whom does “an offender serving a sentence under this section” apply for extraordinary medical placement. Pursuant to RCW 9.94A.728, the application is to the secretary of the “department.” The “department” is the Department of Corrections, not the Department of Social and Health Services. RCW 9.94A.030(17). This is, therefore, a *sub silencio* acknowledgment by the Legislature that, going forward, the mandatory minimum provisions of subsections (2) and (3) are intended to be served in DOC facilities, and not in DSHS facilities as specified in the statute.

In 2003, the Legislature amended subsection (1) to state for the first time that violations of the statute are Class C felonies. This is the first and only time the penalty provisions of the statute have been amended. The legislative history of this amendment is titled “Technical Reorganization of Criminal Statutes” and states, “The legislature intends

by this act to reorganize criminal provisions throughout the Revised Code of Washington to clarify and simplify the identification and referencing of crimes. It is not intended that this act effectuate any substantive change to any criminal provision in the Revised Code of Washington.” Session Laws 2003, S.B. 5758, Section 1. Therefore, the change in classification was not intended to effectuate any substantive change.

The State argues that RCW 69.50.408 doubles the maximum penalty for Mr. Cyr from 60 months to 120 months. But this argument ignores the fact that RCW 69.50.410 has a doubling statute embedded into it. Subsection (3)(b) not only doubles the maximum penalty for Sale of Heroin for Profit, but it creates a mandatory minimum sentence of ten years for those with a prior Sale for Profit conviction. It makes no sense to double the maximum sentence pursuant to RCW 69.50.408 when RCW 69.50.410 already doubles it.

In sum, the sentencing provisions of RCW 69.50.410 and the SRA are irreconcilable and create an ambiguity. This Court should apply the rule of lenity and affirm the discretion of the trial court.

It occurs to *amicus* that there is an element of “be careful what you ask for, you might get it” lurking in this case. For defendants with a prior conviction for Sale of Heroin for Profit, the mandatory sentence is ten years. It is hypothetically possible, therefore, for a defendant with one

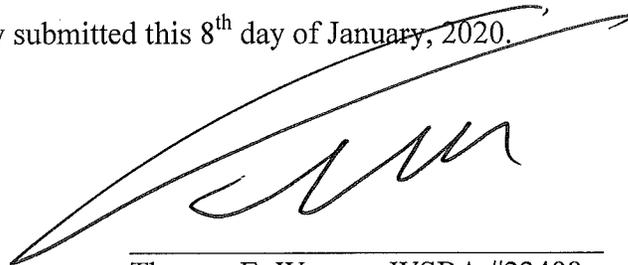
prior Sale of Heroin for Profit conviction and an offender score of “1” to be sentenced to 120 months in prison pursuant to RCW 69.50.410(3)(b), despite the fact that his standard range under the SRA would be 51 to 68 months.

The legislature created the “harsh mandatory sentences” of RCW 60.50.410 in order to send a firm message to drug dealers that selling controlled substances for profit would be dealt with by the courts in a draconian fashion. The State cannot now complain that Mr. Cyr’s “harsh” sentence is too lenient. Further, Mr. Cyr is now on notice: if he continues to sell heroin for profit, next time he will face mandatory sentencing of 120 months.

#### D. CONCLUSION

The Court of Appeals should be reversed and the discretion of the trial court affirmed.

Respectfully submitted this 8<sup>th</sup> day of January, 2020.

A handwritten signature in black ink, appearing to read 'T. Weaver', is written over a horizontal line. The signature is fluid and cursive.

Thomas E. Weaver, WSBA #22488  
Attorney for Amicus Curiae WACDL

**THE LAW OFFICE OF THOMAS E. WEAVER**

**January 08, 2020 - 5:00 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 97323-7  
**Appellate Court Case Title:** State of Washington v. Johnny Ray Cyr  
**Superior Court Case Number:** 17-1-00220-2

**The following documents have been uploaded:**

- 973237\_Briefs\_20200108165853SC622284\_8264.pdf  
This File Contains:  
Briefs - Amicus Curiae  
*The Original File Name was Cyr Brief.pdf*
- 973237\_Motion\_20200108165853SC622284\_1413.pdf  
This File Contains:  
Motion 1 - Amicus Curiae Brief  
*The Original File Name was Cyr Motion.pdf*

**A copy of the uploaded files will be sent to:**

- Liseellnerlaw@comcast.net
- appeals@lewiscountywa.gov
- erin@legalwellspring.com
- office@blacklawseattle.com
- rbrown@waprosecutors.org
- sara.beigh@lewiscountywa.gov
- teri.bryant@lewiscountywa.gov
- tim@blacklawseattle.com
- valerie.liseellner@gmail.com

**Comments:**

---

Sender Name: Alisha Freeman - Email: admin@tomweaverlaw.com

**Filing on Behalf of:** Thomas E. WeaverJr. - Email: tweaver@tomweaverlaw.com (Alternate Email: )

Address:  
PO Box 1056  
Bremerton, WA, 98337  
Phone: (360) 792-9345

**Note: The Filing Id is 20200108165853SC622284**