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No. 97323-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JOHNNY RAY CYR,

Petitioner.

**Response to Brief of Amicus Curiae
Washington Association of Defense Lawyers**

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



By:

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

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

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I. INTRODUCTION

Ignoring the basic tenant of statutory construction that this Court has a duty to reconcile statutes that appear in conflict, amicus curia the Washington Association of Criminal Defense Lawyers (WACDL) contends the Sentencing Reform Act (SRA) and RCW 69.50.410 are irreconcilable. WACDL Brief at 2, 9-13. WACDL asserts the rule of lenity requires the Court to forego the SRA and sentence solely pursuant to RCW 69.50.410. WACDL Brief at 13.

WACDL also argues that RCW 69.50.410, is a self-containing sentencing statute, so the doubling provision of RCW 69.50.408 does not apply. WACDL Brief at 13. WACDL fails to adequately explain how the Court can ignore the plain language of RCW 69.50.408.

The following is a brief response to selected points in WACDL's amicus brief. Points not addressed in this response are not conceded; rather they are not addressed because the State believes them to be adequately addressed in the State's Response to the Petition for Review and Supplemental Brief.

In short, an analysis of the statutory construction of Selling Heroin for Profit and the SRA lead to only one conclusion, the two are reconcilable.

II. ARGUMENT

A. **The Legislative Intent To Include RCW 69.50.410, Selling Heroin For Profit, Within The Structure Of The Sentencing Reform Act Is A Reconcilable Task.**

This Court is charged where multiple statutes “apply to the same subject matter” with a duty “to reconcile apparently conflicting statutes and to 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). Contrary to WACDL’s proclamation, the Sentencing Reform Act (SRA), RCW 9.94A, and RCW 69.50.410 are not irreconcilable. Reconciliation, one of the fundamental principle of statutory interpretation, can be achieved by reviewing the enactment and implementation of the SRA in relation with Selling Heroin for Profit and then reviewing the legislature’s enactment of RCW 69.50.410 and its amendments. This Court, after completing the review, will be able to reconcile how RCW 69.50.410 works within the SRA.

1. The legislature's enactment of RCW 69.50.410, Selling Heroin for Profit.

The legislature enacted Selling Heroin for Profit during the era when society was becoming increasingly critical of a rehabilitative model of sentencing, while also growing aware of the disparity of sentences being handed down by judges. Laws of 1973, 2nd Ex. Sess., ch. 2, § 2;¹ David Boerner, Sentencing in Washington 2-10 to 2-11 (1985). The legislature set up a statutory framework within RCW 69.50.410 that, while recognizing people should be afforded the opportunity to receive drug treatment, made a policy decision to punish those who chose to sell heroin for profit more severely. Laws of 1973, 2nd Ex. Sess., ch. 2, § 2. The law 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...

¹ Laws of 1973, 2nd Ex. Sess., ch. 2, is available on the Code Reviser's website at <http://leg.wa.gov/CodeReviser/documents/sessionlaw/1973ex2c2.pdf> (last visited 2/2/20). Selling heroin for profit is a subsection of the entire statute, Selling a Controlled Substance for Profit, RCW 69.50.410. The state will generally refer to 69.50.410 as Selling Heroin for Profit.

(3) Any person convicted of a violation of subsection (1) of this section by selling heroin shall receive a mandatory sentence of two years in a correctional facility of the department of 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 such violation...

Laws of 1973, 2nd Ex. Sess., ch. 2, § 2.² 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, 2nd Ex. Sess., ch. 2. The legislature garnered enough votes to override the Governor's veto, thereby enacting RCW 69.50.410. *Id.* The intention to have a

² Selling a Controlled Substance for Profit was enacted two years after the comprehensive Uniform Controlled Substances Act (UCSA) was enacted. 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 2/3/20). 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. Contrary to WACDL's assertion in its brief (see page 2), the Uniform Narcotics Drug Act was enacted in 1951, not 1939. Laws of 1951, 2nd Ex. Sess., ch. 22. Therefore, by the time of the enactment of the UCSA, Washington State had been continuously regulating drugs (narcotics) statutorily since at least 1909, and its first comprehensive Act was in 1951.

determinate sentence that could not be reduced under any circumstances was clear.

RCW 69.50.410 has only been amended three times since its enactment, the most substantive change occurring in 1999 when 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).” Laws of 1999, ch. 324, § 6 (emphasis added).³ The legislature in this amendment indicated two things, first, even those sentenced to mandatory minimums for Selling Heroin 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.

³ 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 2/2/20). The other amendments were Laws of 2003, ch. 53, § 342, which classified the crime as a Class C felony, and Laws of 1975-'76, 2nd Ex. Sess, ch. 103, § 1, which changed some language such as director and institution. WACDL incorrectly states the statute has been amended twice since its enactment. WACDL Brief at 3.

When the legislature enacted RCW 69.50.410 it was not a classified felony, as that did not exist in its current form; the statute contained a statutory maximum sentence of five years for a first offense. Laws of 1973, 2nd Ex. Sess., ch. 2, § 2; RCW 69.50.410(2)(a). The legislature also included, in regards to selling heroin, that a second offense was punishable with a mandatory ten year sentence. Laws of 1973, 2nd Ex. Sess., ch. 2, § 2; RCW 69.50.410(3)(b). Yet, any conviction for a second offense of Sale of a Controlled Substance for Profit, not only heroin, under RCW 69.50.410 may be sentenced to up to 120 months pursuant to the doubling provision in RCW 69.50.408. Laws of 1971, Ex. Sess., ch. 308, § 69.50.408. This doubling provision continues to this day. RCW 69.50.408; *In re Pers. Restraint Cruz*, 157 Wn.2d 83, 88-90, 134 P.3d 1166 (2006).

2. The enactment and implementation of the Sentencing Reform Act in relation with Selling Heroin for Profit.

The legislature intended Selling Heroin for Profit to be included in the Sentencing Reform Act. Washington State enacted

the Sentencing Reform Act in 1981. Laws of 1981, ch. 137.⁴ The legislature, after careful consideration, made a decision to enact a system of sentencing that was determinant and comprehensive, rejecting the indeterminate sentencing structure in place at that time. David Boerner, *Sentencing in Washington* 1-1 to 1-3 (1985). The legislature also concurrently created the Sentencing Guidelines Commission (SGC), a 15 member committee composed of various stakeholders, which was charged with conducting a study, recommending standards and standard sentence ranges, and devising plea standards among other duties. Laws of 1981, ch. 137, § 4-6.

Implementation of the system was realized in 1984, after the legislature created the first sentencing grid and table of crimes included in each seriousness level. Laws of 1983, ch. 115 §§ 1, 3-4.⁵ It was a year later that Selling Heroin for Profit, RCW 69.50.410, was added to the sentencing grid in the SRA as a level VIII offense.

⁴ Laws of 1981, ch. 137 is available on the Code Reviser's website at <http://leg.wa.gov/CodeReviser/documents/sessionlaw/1981c137.pdf> (last visited 2/2/20).

⁵ 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 (2/2/20)). While the law was passed in 1983, it became effective in July 1, 1984.

Laws of 1984, ch. 209, § 17.⁶ The legislature later moved controlled substance crimes to their own sentencing grid, including placing Selling a Controlled Substance for Profit on that grid as a level III offense. Laws of 2002, ch. 290, § 9.⁷ Explicitly ranking the crime in the SRA affirmed a legislative intent that Sale of Heroin for Profit belonged within the sentencing structure of the SRA.

The SGC's worksheets are consistent with a view that Selling for Profit should be sentenced under the SRA, not as a stand-alone statute. The first edition of the Adult Sentencing Guidelines Manual, compiled and published by the SGC, included a sentencing worksheet for Selling Heroin for Profit. Adult Sentencing Guidelines Manual, III-75 (1984).⁸ The worksheet sets out the standard range of the offense, 21-27 for an offender score of zero, and information such as sentencing options of first-time offender and exceptional sentence. *Id.* The worksheet was updated over

⁶ Laws of 1984, ch. 209, is available on the Code Reviser's website at <http://leg.wa.gov/CodeReviser/documents/sessionlaw/1984> (last visited 2/2/20).

⁷ Laws of 2002, ch. 290, is available on the Code Reviser's website at <http://lawfilesexp.leg.wa.gov/biennium/2001-02/Pdf/Bills/Session%20Laws/House/2338-S2.sl.pdf> (last visited 2/2/20).

⁸ A copy of the 1984 Adult Sentencing Guidelines Manual is available on the Washington State Caseload Forecast Council website at http://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_1984.pdf (last visited 2/2/20).

time, but the information remained essentially the same through 2001, including the same ranges, basic fine and alternative sentencing information. Adult Sentencing Guidelines Manual, III-354-57 (2001).⁹ Again, the clear indication is the SGC believed Selling Heroin for Profit was to be sentenced pursuant to the SRA while it was included on the sentencing grid.

The initial worksheet after the enactment of the 2002 separate drug sentencing grid included the standard ranges for a level III offense, 51 to 68 months, 68+ to 100 months, and 100+ to 120 months, but noted in “F” that if the statutory maximum became 120 months on the second conviction. Adult Sentencing Guidelines Manual, III-264 (2003);¹⁰ RCW 9.94A.517. The worksheet also notes sentencing options – meaning alternative options such as Drug Offender Sentencing Alternative, First Time Offender, and other options. Adult Sentencing Guidelines Manual, III-264 (2003), III-264, 268. The 2017 Sentencing Guidelines Manual worksheet for

⁹ A copy of the 2001 Adult Sentencing Guidelines Manual is available on the Washington State Caseload Forecast Council website at http://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2001.pdf (last visited 2/2/20).

¹⁰ A copy of the 2003 Adult Sentencing Guidelines Manual is available on the Washington State Caseload Forecast Council website at http://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2003.pdf (last visited 2/2/20).

Selling a Controlled Substance for Profit no longer lists the entire sentencing range for a level III drug offense; instead once the statutory maximum of 60 months is met it simply states the range is 60-60* for 3-5 and 6-9+. Adult Sentencing Manual, 450 (2017).¹¹ The 2017 worksheet contains citations to where to find information on deadly weapon enhancements, sentencing alternatives, community custody, discusses the doubling provision on a second offense, and also mandatory minimum sentence of two or ten years for selling of heroin. *Id.* The worksheet incorporates RCW 9.94A.599, which states, “[i]f the presumptive sentence duration given in the sentencing grid exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence.” Further, this change in how the sentencing range is displayed is not unique to Selling a Controlled Substance for Profit. In the 2017 Adult Sentencing Manual, any crime where the standard range exceeds the statutory maximum is

¹¹ A copy of the 2017 Adult Sentencing Guidelines Manual is available on the Washington State Caseload Forecast Council website at http://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2017.pdf (last visited 2/3/20). It should be noted that the change to the format in the offender score grid was first published in the 2014 version of the Adult Sentencing Manual at 449, found at http://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2014.pdf (last visited 2/3/20).

displayed in the same fashion. See Adult Sentencing Manual, 359 (Incest, 8-9+ points 60-60*), 370 (Involving a minor in Drug Dealing, 3-9+ 60-60*), 383 (Malicious Explosion of a Substance Third Degree, 8-9+ 12 -120*) (2017).

The number of worksheets is also informative. The 2017 Adult Sentencing Manual only contains one worksheet for Selling for Profit Any Controlled Substance in Schedule I. Adult Sentencing Manual, 450 (2017). It notes the mandatory provisions of selling heroin versus other controlled substances for profit in the comment section of the worksheet below the sentence range table. *Id.* In contrast, the Caseload Forecast Council (Council) has issued multiple worksheets for the provisions of RCW 69.50.401(2), defining delivering or other delivery crimes based on sometime subtle differences in how those crimes are punished. RCW 69.50.401(2); Adult Sentencing Manual, 324, 395-98, 401 (2017) (creating multiple worksheets for deliver, possession with intent to deliver and manufacture, deliver, or possess with intent to deliver for various drugs). The Council found it necessary to create separate worksheets for Deliver or Possession with Intent to Deliver Methamphetamine and Manufacture Methamphetamine, both

crimes listed under RCW 69.50.401(2)(b). Adult Sentencing Manual, 324, 401 (2017). Manufacture Methamphetamine is a level III offense, while Deliver is a level II offense with lower standard ranges. *Id.* The Council's decision to issue separate worksheets, rather than a notation on a singular worksheet, is an indication of its view that crimes arising out of a single statute (or even a single subsection) can, and at times should, be separated into different worksheets due to the significant differences in how they must be sentenced.

Indeed, one can deduce that the Council agrees with the State's, not WACDL's interpretation. The appropriate range for a conviction for Selling Heroin for Profit is 51 to 60* for a defendant with an offender score of zero to two, with a notation that if it is a violation of selling heroin, there is a mandatory minimum two year sentence on the first offense and 10 years on the second offense, none of which may be suspended or deferred. Adult Sentencing Manual, 450 (2017). If WACDL were correct that sentencing of Selling Heroin for Profit were drastically different than Selling other Controlled Substances for Profit – e.g. if the sentence were a

mandatory 24 months regardless of history – the CFC would definitely have issued a separate worksheet for the crime.

3. The reconciliation of RCW 69.50.410, Selling Heroin for Profit, and the Sentencing Reform Act.

Selling a Controlled Substance for Profit, specifically Heroin, pursuant to RCW 69.50.410, is not an irreconcilable, stand-alone statute to be sentenced in isolation of the SRA (or any other statute within 69.50) as proclaimed by WACDL. WACDL Brief at 13-14. The continuous placement of Selling Heroin for Profit on a SRA sentencing grid since 1984 is plain statutory language that RCW 69.50.410 is supposed to be sentenced pursuant to the SRA. The enactment of RCW 69.50.410 prior to the existence of SRA, with what the legislature now considers a mandatory minimum provision, does not preclude convictions obtained pursuant to it to be sentenced under the provisions of the SRA.

The mandatory minimum provisions contained within RCW 69.50.410 in regards to the sale of heroin to do not prohibit the use of the drug offense sentencing grid and the drug offense seriousness level contained within the SRA. RCW 9.94A.517; RCW 9.94A.518; RCW 69.50.410(3). Therefore, the appropriate range

the trial court should sentence within, understanding it may not go below the mandatory minimum provided within RCW 69.50.410(3), is the standard range for a level III drug offense.

There are other mandatory minimum sentences found within the SRA. RCW 9.94A.540. All of the crimes noted the mandatory minimum terms provision of the SRA have sentencing ranges that start at or above the mandatory minimum terms for adult offenders. RCW 9.94A.510; RCW 9.94A.515; RCW 9.94A.540.¹² A mandatory minimum sentence is not, therefore, incompatible with SRA.

The legislative intent to include RCW 69.50.410 within the umbrella of the SRA is further established by its 1999 amendment to the statute. Laws of 1999, ch. 324, § 6. The plain language of the statute, by directly stating provisions of the SRA, with citation to RCW 9.94A.728, within RCW 69.50.410 requires an interpretation

¹² WACDL states in its briefing it did a thorough search of the criminal code and was able to identify only one mandatory minimum statute that was not repealed when the SRA was enacted, RCW 10.95.030, aggravated murder (life without parole). WACDL Brief at 11. While the State will not proclaim it has been able to search every criminal statute, as they are voluminous, it can state that there are at least two other crimes in which mandatory minimum sentences were not repealed with the enactment of the SRA, Prison Riot and Holding Person Hostage – Interference with Officer’s Duties. RCW 9.94.010; RCW 9.94.030. These two crimes contain a mandatory sentence of not less than one year and maximum sentence of not more than ten, a sentencing structure that has been within the statute since its inception in 1955. Laws of 1955, ch. 241, §3. These two crimes are unranked felony offenses. See, RCW 9.94A.515.

that it belongs within the sentencing structure of the SRA. *State v. Dennis*, 191 Wn.2d 169, 172-73, 421 P.3d 944 (2018).

Not only does WACDL ask this Court to disregard the principle of reconciliation, it is also asking this Court to disregard the well-established principle that the Court “must interpret a statute so as to render no portion meaningless or superfluous.” *Dennis*, 191 W.2d at 173. The Court would have to render the legislature’s inclusion of RCW 69.50.410 within the SRA meaningless if it determined the legislature never meant to have Selling Heroin for Profit sentenced pursuant to a sentencing grid. WACDL is requesting this Court ignore the legislature’s continuous inclusion of Selling Heroin for Profit within the SRA for the past 36 years.

This Court should reconcile the two statutory schemes by holding RCW 69.50.410(3) sets for the mandatory minimum sentences for Selling Heroin for Profit. A trial court may not defer or suspend any part of that sentence. Then the SRA sentencing grid is applied. A level III offense has a sentencing range of 51-68 months (0-2), 68+ to 100 months (3 to 5), and 100+ to 120 months (6-9+). RCW 9.94A.517. Since the statutory maximum sentence for Selling Heroin for Profit is 60 months, the grid would generally be 51-60*

months (0-2), 60-60* months (3-5), and 60-60* months (6-9+). RCW 9.94A.517; RCW 9.94A.599; 9A.20.021(1)(c); RCW 69.50.410. An offender who has a previous conviction under RCW 69.50 is subject to the doubling provision of RCW 69.50.408, and the statutory maximum sentence doubles. Therefore, in the case of a defendant situated like Cyr, who has a prior qualifying controlled substance conviction, the maximum sentence is 120 months. CP 23-24; RCW 9A.20.021(1)(b); RCW 69.50.408; RCW 69.50.410.¹³ With a maximum sentence of 120 months, the standard drug sentencing grid for a level III offense becomes the appropriate standard range, still subject to the mandatory minimum term. RCW 9.94A.517; RCW 69.50.410(3).

Reconciliation that incorporates the mandatory minimums and uses the sentencing grid respects the legislature's intention to have a higher standard range, indicative of the serious nature of

¹³ WACDL suggests this Court may wish to take judicial notice of counsel's briefing in *State v. Peterson*, COA No. 52183-1-II. WACDL Brief at 9. The State requests this Court decline WACDL's invitation. Although not part of this record, counsel for the State is the same deputy prosecutor as the one who handles Ms. Peterson's case. WACDL has incorrectly identified the Lewis County Superior Court Judge as being the same in both cases. Cyr's matter was presided over by the Honorable Joely O'Rourke. Ms. Peterson's matter was presided over by the Honorable James W. Lawler.

selling a controlled substance for profit, and also punishing those who sell heroin with a minimum non-deferrable.

III. CONCLUSION

WACDL's proclamation that the SRA and RCW 69.50.410 are irreconcilable is false. The legislature took the steps 36 years ago to explicitly include, and rank, Selling Heroin for Profit in the SRA. A review of the statutory construction and enactment of Selling Heroin for Profit and the SRA lead to only one conclusion, the statutes are reconcilable.

RESPECTFULLY submitted this 4th day of February, 2020.

JONATHAN MEYER
Lewis County Prosecuting Attorney



by: _____
SARA I. BEIGH, WSBA 35564
Attorney for the Respondent.

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