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STATE OF WASHINGTON
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No. 98201-5

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JERRY L. PETERSON,

Petitioner.

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

**Petitioner's Supplemental Brief
in Support of Review**

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I. ISSUE

- A. This Court's decision in *State v. Cyr*, Slip Op. No. 97323-7 (April 16, 2020) overturns Division Two's resolution of Peterson's case.

II. STATEMENT OF THE CASE

The State petitioned for review after Division Two affirmed the trial court's two-year sentence for Peterson's conviction for Selling Heroin for Profit, RCW 69.50.410. *State v. Peterson*, 12 Wn. App. 2d 195, 457 P.3d 480 (2020). The State argued in part, that Division Two had not followed its own decision in *State v. Cyr*, 8 Wn. App. 2d 834, 441 P.3d 1238 (2019), because it determined the Peterson was properly sentenced to a two year mandatory sentence rather than a sentence within the Sentencing Reform Act (SRA) standard range. State's Petition; *Peterson*, 12 Wn. App. 2d at 482-83.

Since the filing of the petition for review and Peterson's response, this Court issued an opinion in *State v. Cyr*, Slip Op. No. 97323-7 (April 16, 2020). The parties were directed on May 8, 2020, to submit supplemental briefing regarding *State v. Cyr*.

III. ARGUMENT

A. CONVICTIONS FOR SELLING HEROIN FOR PROFIT ARE SENTENCED PURSUANT TO THE SENTENCING REFORM ACT.

This Court's decision in *Cyr*, overturns Division Two's decision in *Peterson*. The reasoning the Court of Appeals used in Peterson's case was rooted in belief that RCW 69.50.410, when read in conjunction with RCW 9.94A.505, is ambiguous and the rule of lenity required the court to apply RCW 69.50.410(3)(a) in favor of Peterson. *Peterson*, 12 Wn. App. 2d at 483. This resulted in the Court of Appeals holding the two year sentencing provision found in RCW 69.50.410(3)(a) was a mandatory sentence and controlled rather than the SRA's standard range sentence. *Id.* This reasoning is contradictory to this Court's holding that RCW 69.50.410 is not ambiguous, therefore the rule of lenity does not apply, and a person convicted of selling heroin for profit is properly sentenced pursuant to a standard range sentence found in the SRA. *Cyr*, Slip. Op. No. 97323-7 at 9, 14-21.

This Court held that a person convicted of selling a controlled substance for profit, RCW 69.50.410, is to be sentenced pursuant to the sentencing provisions of the SRA. *Cyr*, Slip Op. 5-9. Specifically, a person is sentenced within the appropriate range on the drug

offense sentencing grid in relation to their offender score. *Id.* at 8-9; RCW 9.94A.517; RCW 9.94A.525. Selling a controlled substance for profit is a level III offense. RCW 9.94A.518; RCW 69.50.410. Selling a controlled substance for profit is a class C felony; therefore, the maximum punishment is five years (60 months) absent the doubling provision from RCW 69.50.408 applying. RCW 9A.20.021(1)(c); RCW 69.50.410. The grid for a level III offense is as follows:

Offender Score 0 to 2	Offender Score 3 to 5	Offender Score 6 to 9 or more
51 to 68 months	68+ to 100 months	100+ to 120 months

RCW 9.94A.517.

Peterson was sentenced to two years by the trial court pursuant to RCW 69.50.410(3)(a), which states:

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...and no judge or of any court shall suspend or defer the sentence imposed for such a violation.

The Court of Appeals acknowledged all felonies are required to be sentenced using the applicable sentencing grid found in the SRA “[u]nless another term of confinement applies.” *Peterson*, 12 Wn. App. 2d at 483, *citing* RCW 9.94A502(2)(a)(i). The Court of Appeals determined subsection of RCW 69.50.410 qualified as “another term of confinement.” *Id.* The Court of Appeals, and the trial court, read

RCW 69.50.410(3)(a) to require a two year sentence, no more, and no less, on a first time offense for selling heroin for profit. *Peterson*, 12 Wn. App. 2d at 483; RP (6/13/18) 13, 15.

Contrary to Court of Appeals holding in *Peterson*, RCW 69.50.410 does not create “an independent sentencing scheme that precludes the application of other sentencing provisions.” *Cyr*, Slip Op. at 18. The mandatory two year provision found in RCW 69.50.410(3)(a) is a mandatory minimum term. *Id.* at 19-20. Nor does RCW 69.50.410 “set forth a standard sentence range.” *Id.* at 21. Therefore, because the provisions of RCW 69.50.410 do “not conflict with the standard sentence range in the SRA” *Peterson* must be resentenced to a standard range sentence. *Id.*

IV. CONCLUSION

This Court's decision in *State v. Cyr*, Slip Op. No. 97323-7, directly applies to Peterson's case, overturns Division Two's faulty conclusions that Peterson must be sentenced to a two-year mandatory sentence pursuant to RCW 69.50.410(3)(a), and requires this Court to grant review and reverse the Court of Appeals and the trial court.

RESPECTFULLY submitted this 1st day of June, 2020.

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