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NO. 97323-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JOHNNY CYR  
Petitioner.

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PETITION FOR REVIEW OF THE COURT OF APPEALS  
MAY 14, 2019 DECISION IN STATE V. CYR COA#50912-1-II

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A. IDENTITY OF MOVING PARTY

Petitioner Johnny Cyr through his attorney, Lise Ellner, asks this court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Johnny Cyr requests review of the Court of Appeals May 14, 2019 ruling. A copy of the decision is attached (Appendix A).

C. ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals incorrectly hold that because Cyr had a previous conviction under RCW 69.50, the trial court erred when it exercised its discretion to sentence Cyr to five years for his current convictions under RCW 69.50.410 rather than applying the doubling provision in RCW 69.50.408(1)?

D. STATEMENT OF THE CASE

The facts relevant to this petition are set forth in Respondent's response to the State's appeal. In addition, the following facts are relevant:

The trial court relied on RCW 69.50.410 (2) and (3) to impose a 60-month sentence for Cyr's first conviction for selling a controlled

substance for profit, rather than applying the doubling provision of RCW 69.50.408(1). RP 31.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THE COURT OF APPEALS' DECISION  
THAT CYR'S SENTENCE SHOULD BE  
VACATED AND REMANDED FOR NEW  
SENTENCING UNDER RCW 59.60.408  
INVOLVES AN ISSUE OF  
SUBSTANTIAL PUBLIC INTEREST.

The Court of Appeals incorrectly held that because Cyr had a previous conviction under RCW 69.50, the trial court erred when it exercised its discretion to sentence Cyr to five years for his current convictions under RCW 69.50.410. *Cyr*, No. 50912-1-II, slip opinion, at 2.

RAP 13.4(b)(4) provides:

A petition for review will be accepted by the Supreme Court only... If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This issue meets the criteria set forth in RAP 13.4(b)(4).

A trial court has broad discretion in sentencing a defendant. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). This Court reviews "a trial court's sentence for errors of law or abuses of discretion in deciding what sentence applies." *State v. Roy*, 147

Wn. App. 309, 314, 195 P.3d 967 (2008) (*quoting State v. Castro*, 141 Wn. App. 485, 494, 170 P.3d 78 (2007)). Here, the trial court neither erred nor abused its discretion.

In sentencing, the trial court begins with the standard sentence range established by the Sentencing Reform Act (SRA). RCW 9.94A.505(1), (2)(a)(i). Here, the drug sentencing grid established a standard range of 68+ to 100 months for Cyr's offense. RCW 9.94A.517(1).

However, RCW 69.50.410 provides in relevant part the following mandatory language:

(1) Except as authorized by this chapter 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.

(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.

(Emphasis added) *Id.*

RCW 69.50.408 provides in permissive language as follows:

(1) Any person convicted of a second or subsequent offense under this chapter **may** be imprisoned for a term up to twice the term otherwise authorized, fined

an amount up to twice that otherwise authorized, or both.

(Emphasis added) Id.

The terms “shall” and “may” are not ambiguous. “Shall” is mandatory and “may” is permissive”. *State v. Gonzalez*, 198 Wn. App. 151, 155, 392 P.3d 1158 (2017). “The word ‘shall’ in a statute ... imposes a mandatory requirement unless a contrary legislative intent is apparent.” *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (quoting *Erection Co. v. Dep’t. of Labor and Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993)).

The trial court recognized the conflict between RCW 69.50.410 and RCW 69.50.408 to correctly read the two provisions together to mean that an offender convicted for the first time under RCW 69.50.410(2)(a) for selling a controlled substance for profit, “shall” be sentenced within the mandatory, limited 60 month maximum. RP 30-31.

The trial court properly exercised its discretion and declined to apply the doubling provision where the plain mandatory language of RCW 59.60.410(1) exempted Cyr’s first conviction for selling a controlled substance from the automatic doubling provision. RP 31.



“[W]hen choice has to be made between two readings of what conduct [the legislature] has made a crime, it is appropriate, before we choose the harsher alternative, to require that [the legislature] should have spoken in language that is clear and definite.” *State v. Weatherwax*, 188 Wn.2d 139, 155, 392 P.3d 1054 (2017) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222, 73 S.Ct. 227, 97 L.Ed. 260 (1952)). Here, because there were two reasonable interpretations, the trial court correctly applied the rule of lenity and imposed the shorter sentence. RP 31; *Weatherwax*, 188 Wn. 2d at 153.

To the contrary, the Court of Appeals held that the doubling provision in RCW 59.60.408(1) applied to the facts of Cyr’s case despite this conviction meeting the parameters of RCW 59.60.410(2)(a) for a first conviction for selling a controlled substance for a profit. RP 31.

The Court of Appeals acknowledged the conflict between the 60-month limitation in RCW 69.50.410(2)(a) and the doubling provision in .408(1). *State v. Cyr*, No. 50912-1-II, slip opinion, at 8. However, instead of applying the rule of lenity, as the trial court did, it incorrectly concluded that RCW 69.50.410(2)(a) is subject to the

doubling provision of RCW 59.60.408(1). *Cyr*, No. 50912-1-II, slip opinion, at 9.

This court should accept review because this issue is of substantial public importance due to the likelihood that it will recur given the lack of clarity from the Legislature regarding the application of RCW 69.50.410 to a first time conviction rather than the doubling provision in RCW 69.50.408(1) when a defendant was previously convicted under a different subsection of RCW 69.50.

F. CONCLUSION

For the reasons stated herein and in the response brief, this Court should accept review.

DATED THIS 11<sup>th</sup> day of June 2019.

Respectfully submitted,

LAW OFFICES OF LISE ELLNER



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LISE ELLNER, WSBA 20955  
Attorney for Petitioner



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ERIN SPERGER, WSBA No. 45931  
Attorney for Petitioner

I, Lise Ellner, a person over the age of 18 years of age, served the Lewis County Prosecutor's Office appeals@lewiscountywa.gov and sara.beigh@lewiscountywa.gov and Johnny Cyr/DOC#385057, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326 on June 11, 2019. Service was made electronically to the prosecutor and to Johnny Cyr by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink, appearing to read "Lise Ellner", with a horizontal line extending to the right.

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Signature

## APPENDIX A

May 14, 2019

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Appellant,

vs.

JOHNNY RAY CYR,

Respondent.

No. 50912-1-II

PUBLISHED OPINION

MAXA, C.J. – The State appeals Johnny Ray Cyr’s 60-month sentence for his convictions under RCW 69.50.410(1) of three counts of sale of a controlled substance for profit, heroin.

Under the drug sentencing grid in the Sentencing Reform Act (SRA), the standard range sentence for Cyr’s conviction ordinarily would be 68+ to 100 months. RCW 9.94A.517(1). But the violation of RCW 69.50.410(1) is a class C felony with a maximum sentence of 60 months. The State argues that the maximum sentence must be automatically doubled to 120 months under RCW 69.50.408(1), which states, “Any person convicted of a second or subsequent offense under [chapter 69.50 RCW] may be imprisoned for a term up to twice the term otherwise authorized.” The State claims that because Cyr had a previous conviction under chapter 69.50 RCW, the trial court was required to sentence him within the SRA standard range.

Cyr argues that the trial court had discretion whether to treat 60 months as the maximum sentence or to double the maximum sentence under RCW 69.50.408. In addition, RCW 69.50.410(2)(a) provides that a person convicted under RCW 69.50.410(1) “shall receive a

sentence of not more than five years.” Cyr claims that RCW 69.50.410(2)(a) limited Cyr’s sentence to 60 months regardless of the RCW 69.50.408 doubling provision. The trial court agreed with Cyr that its sentencing authority was limited to 60 months.

We hold that (1) because Cyr had a previous conviction under chapter 69.50 RCW, RCW 69.50.408 automatically doubled the maximum sentence and the trial court did not have discretion to treat 60 months as the maximum sentence; (2) the provision in RCW 69.50.410(2)(a) that the maximum sentence for Cyr’s conviction was 60 months places a limitation on application of the SRA sentencing grid, but RCW 69.50.408 applies to double that maximum 60-month sentence; and (3) the trial court erred in ruling that Cyr’s maximum sentence was 60 months and in failing to sentence Cyr within the SRA standard range. Accordingly, we vacate Cyr’s sentence and remand for the trial court to exercise its discretion in sentencing Cyr within the standard range in light of the doubled statutory maximum of 120 months.

#### FACTS

The State charged Cyr with three counts of sale of a controlled substance for profit, heroin, in violation of RCW 69.50.410(1). Cyr pleaded guilty to all three counts. Cyr stipulated to an offender score of 5 and a criminal history that included a 2015 conviction for attempted possession of an imitation controlled substance, a violation of chapter 69.50 RCW.<sup>1</sup> Both parties apparently agreed that the SRA drug sentencing grid set the standard range for Cyr’s offender score at 68+ to 100 months. But if the doubling provision of RCW 69.50.408 did not apply, the

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<sup>1</sup> Cyr also had a misdemeanor conviction for possession of marijuana in municipal court. The State claims that this conviction was under chapter 69.50 RCW, but the record does not state the statutory basis of the conviction. Therefore, we do not treat the marijuana possession conviction as a previous conviction under chapter 69.50 RCW.

statutory maximum sentence for Cyr's convictions was 60 months. This is because violation of RCW 69.50.410(1) is a class C felony with a maximum sentence of 60 months and because RCW 69.50.410(2)(a) limited the sentence to 60 months.

The trial court acknowledged that the maximum sentence for Cyr's convictions under RCW 69.50.410(1) could be doubled under RCW 69.50.408. But the court determined that RCW 69.50.410(2)(a) directs courts to impose no more than 60 months for a first conviction of sale of a controlled substance for profit.<sup>2</sup> Therefore, on the judgment and sentence the court stated that the sentencing range for Cyr's convictions was 60 to 60 months and the maximum sentence was 60 months. The court sentenced Cyr to 60 months on each count, to run concurrently.

The State appeals Cyr's sentence.

#### ANALYSIS

##### A. STANDARD SENTENCE RANGE UNDER THE SRA

The SRA contains sentencing grids that calculate a sentence range for offenders according to their offender score and the "seriousness level" of their offense. RCW 9.94A.510, .517. But "[t]he maximum term of confinement in a range may not exceed the statutory maximum for the crime as provided in RCW 9A.20.021." RCW 9.94A.506(3).

RCW 9.94A.517 provides a special sentencing grid for drug offenders. The parties agreed that Cyr's offender score was 5. The sale of a controlled substance for profit, the crime defined in RCW 69.50.410(1), has a seriousness level of three. RCW 9.94A.518. Under the drug sentencing grid, a defendant with an offender score of 5 who is convicted of an offense with

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<sup>2</sup> Cyr had no prior conviction of sale of a controlled substance for profit in violation of RCW 69.50.410(1).

a seriousness level of three has a standard sentence range between 68+ and 100 months. RCW 9.94A.517(1).

However, selling a controlled substance for profit under RCW 69.50.410(1) – for which Cyr was convicted – is a class C felony. RCW 69.50.410(1). The maximum penalty for a class C felony under the SRA is five years confinement. RCW 9A.20.021(1)(c). The SRA accounts for the situation in which the standard sentence range exceeds the statutory maximum. *See State v. Clark*, 123 Wn. App. 515, 521, 94 P.3d 335 (2004). “If 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.” RCW 9.94A.599. Therefore, Cyr’s presumptive sentence under the SRA would be 60 months rather than within the standard range of 68+ to 100 months.

**B. APPLICABILITY OF RCW 69.50.408 DOUBLING PROVISION**

The parties agree that Cyr had a previous conviction under chapter 69.50 RCW and therefore that RCW 69.50.408 potentially applies. The State argues that RCW 69.50.408 automatically doubles the statutory maximum when the defendant is convicted of a subsequent offense under chapter 69.50 RCW, and therefore that Cyr must be sentenced within the standard range. Cyr contends that the trial court has discretion to decide whether to double the statutory maximum. We agree with the State.

**1. Legal Principles**

RCW 69.50.408(1) states, “Any person convicted of a second or subsequent offense under [chapter 69.50 RCW] may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.” An offense is a second or subsequent offense if, “prior to his or her conviction of the offense, the offender has at



any time been convicted under this chapter or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs.”

RCW 69.50.408(2).<sup>3</sup>

RCW 69.50.408(1) doubles only the maximum sentence that can be imposed for a second violation of chapter 69.50 RCW, not the standard sentence range. *In re Pers. Restraint of Cruz*, 157 Wn.2d 83, 90, 134 P.3d 1166 (2006).

Resolution of this issue depends upon the interpretation of RCW 69.50.408. “Statutory interpretation is a question of law that we review de novo.” *State v. Van Noy*, 3 Wn. App. 2d 494, 497, 416 P.3d 751 (2018). The primary goal of statutory interpretation is to determine the legislature’s intent. *Id.* at 498. To determine the legislature’s intent, we first look to the plain language of the statute, considering the language of the provisions in question, how the provisions fit within the context of the statute, and the statutory scheme as a whole. *Id.*

## 2. Automatic Doubling

The issue here is whether RCW 69.50.408 automatically doubles the maximum sentence for a second violation of chapter 69.50 RCW or whether it is within the trial court’s discretion to apply the statute to double the maximum sentence.

The plain language of RCW 69.50.408(1) compels the conclusion that the doubling of the statutory maximum sentence is automatic rather than discretionary. If a defendant “may be imprisoned for a term up to twice the term otherwise authorized,” RCW 69.50.408(1), by definition twice the term otherwise authorized is the maximum sentence for a second violation of

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<sup>3</sup> RCW 69.50.408(3) states, “This section does not apply to offenses under RCW 69.50.4013,” which statute involves possession of controlled substances. But although RCW 69.50.408(3) states that *current* possession offenses cannot be doubled, that subsection does not prevent *prior* possession convictions from providing the basis for doubling of the maximum sentence under RCW 69.50.408(1). *State v. McGrew*, 156 Wn. App. 546, 556-57, 234 P.3d 268 (2010).

chapter 69.50 RCW. And use of the term “may” in RCW 69.50.408(1) means that the trial court has discretion whether to *impose* a sentence equal to the new maximum, not that the trial court has discretion whether to double the maximum sentence.

In *In re Personal Restraint of Hopkins*, Division One of this court expressly held that RCW 69.50.408(1) is not discretionary and instead automatically doubles the maximum sentence. 89 Wn. App. 198, 201, 201-03, 948 P.2d 394 (1997), *rev'd on other grounds*, 137 Wn.2d 897 (1999). The court stated,

[W]e hold that RCW 69.50.408 is neither discretionary nor a sentence enhancement but rather a provision that automatically doubles the statutory maximum sentence for convictions under RCW 69.50 when the defendant had a prior conviction under that statute.

*Id.* at 203.<sup>4</sup>

Subsequent cases include language that is consistent with this holding. In *State v. O'Neal*, this court stated that “RCW 69.50.408 doubles the maximum length of time for which the offender may be confined, *thereby defining a new statutory maximum.*” 126 Wn. App. 395, 429, 109 P.3d 429 (2005) (emphasis added), *aff'd*, 159 Wn.2d 500, 150 P.3d 1121 (2007). In *State v. Roy*, Division Three stated, “A judge is not required to impose a double sentence, but the option is available to him or her under RCW 69.50.408(1).” 147 Wn. App. 309, 315, 195 P.3d 967 (2008).<sup>5</sup> And the Supreme Court in *Cruz* stated that the legislature meant RCW 69.50.408 to have “the effect of doubling the statutory maximum sentence.” 157 Wn.2d at 90.

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<sup>4</sup> On review in *Hopkins*, the Supreme Court reversed on other grounds. 137 Wn.2d 897, 976 P.2d 616 (1999). The court noted that because of its disposition, it did not need to address Division One’s characterization of RCW 69.50.408. *Id.* at 900 n.2.

<sup>5</sup> The court in *Roy* did not address whether the doubling was automatic because a court commissioner already had ruled as the law of the case that the trial court did not have discretion to decide whether to double the maximum sentence. 147 Wn. App. at 315.

However, after noting that RCW 69.50.408 creates a new statutory maximum sentence, this court in *O'Neal* stated, “A trial court has discretion to utilize the doubling provision of RCW 69.50.408.” 126 Wn. App. at 429. The court acknowledged that this statement was contrary to Division One’s holding in *Hopkins*. *Id.* at 429 n.27.

It appears that the court in *O'Neal* conflated the trial court’s discretion to *impose* a particular sentence within the doubled statutory maximum with the trial court’s lack of discretion regarding the automatic doubling of the statutory maximum. The court in *O'Neal* cited as authority *State v. Mayer*, 120 Wn. App. 720, 727, 86 P.3d 217 (2004). *O'Neal*, 126 Wn. App. at 429. But *Mayer* did not hold that the trial court had discretion whether to double the statutory maximum fine. Instead, the court in *Mayer* held that the trial court had discretion whether to *actually impose* the doubled fine as opposed to a lesser fine. 120 Wn. App. at 727.

We adopt the holding in *Hopkins* and disregard the court’s statement in *O'Neal*. We hold that under RCW 69.50.408(1), the doubling of the statutory maximum sentence is automatic. But as the court stated in *Roy*, the trial court is not required to *impose* the maximum sentence. 147 Wn. App. at 315. The trial court’s discretion involves what sentence to actually impose within the doubled maximum and the standard range.

C. EFFECT OF RCW 69.50.410(2)(a) LIMITATION

RCW 69.50.410(2)(a) states that a person convicted of a violation of RCW 69.50.410(1) “shall receive a sentence of not more than five years in a correctional facility” for a first offense. Cyr argues that regardless of the standard range derived from the SRA sentencing grid and regardless of any doubling under RCW 69.50.408, RCW 69.50.410(2)(a) controls his sentence and establishes that he cannot be sentenced to more than 60 months. We disagree.

1. Conflict Between the SRA and RCW 69.50.410(2)(a)

The SRA provides that “[w]hen a person is convicted of a felony, the court shall impose punishment as provided in this chapter.” RCW 9.94A.505(1). Further, the trial court generally must impose a sentence within the standard sentence range established by the SRA’s sentencing grids. RCW 9.94A.505(2)(a)(i). As noted above, the drug sentencing grid establishes a standard range of 68+ to 100 months for Cyr’s offense. RCW 9.94A.517(1). These provisions appear to conflict with the 60-month limitation in RCW 69.50.410(2)(a), which is outside the SRA.

When two statutes appear to conflict, the rules of construction direct us to, if possible, reconcile them so as to give effect to both provisions. *State v. Rice*, 159 Wn. App. 545, 571, 246 P.3d 234 (2011), *aff’d on other grounds*, 174 Wn.2d 884, 279 P.3d 849 (2012). Relevant here, RCW 9.94A.505 contains an exception to the application of the SRA sentencing grids. RCW 9.94A.505(2)(a)(i) states that the trial court must apply the sentencing grids “[u]nless another term of confinement applies.” We reconcile RCW 9.94A.505(1) and RCW 69.50.410(2)(a) by concluding that RCW 69.50.410(2)(a) constitutes “another term of confinement” under RCW 9.94A.505(2)(a)(i) for first time convictions under RCW 69.50.410(1).

Reading RCW 9.94A.505 and RCW 69.50.410(2)(a) together, an offender convicted for the first time under RCW 69.50.410(1) must be sentenced within the SRA statutory range except that the sentence cannot exceed 60 months.<sup>6</sup>

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<sup>6</sup> We recognize that our reading of the two statutes differs from the unpublished opinion of Division One of this court in *State v. Heckl*, No. 73932-8-I (Wash. Ct. App. Nov. 9, 2015) (unpublished), <http://www.courts.wa.gov/opinions/pdf/739328.pdf>. In that case, Division One held that the SRA superseded the earlier enacted RCW 69.50.410(2)(a). *Id.* at 4. However, the court in *Heckl* did not attempt to reconcile RCW 9.94A.505 and RCW 69.50.410(2)(a) and did not address the “[u]nless another term of confinement applies” language in RCW 9.94A.505(2)(a)(i).

2. Doubling of RCW 69.50.410(2)(a) Maximum

Cyr appears to assume that the RCW 69.50.408 doubling provision applies only to the statutory maximum sentence for a class C felony and does not affect the provision in RCW 69.50.410(2)(a) that an offender convicted for the first time under RCW 69.50.410(1) can be sentenced to no more than 60 months. We disagree.

As noted above, RCW 69.50.408(1) states that an offender convicted of a second or subsequent offense under chapter 69.50 RCW “may be imprisoned for a term up to twice the term otherwise authorized.” RCW 69.50.410(2)(a) authorizes a sentencing court to impose a sentence of no more than 60 months on an offender convicted for the first time under RCW 69.50.410(1).

The issue here is whether the maximum sentence established in RCW 69.50.410(2)(a) is a “term otherwise authorized” subject to doubling under RCW 69.50.408. We conclude that it is. We see no reason to treat the maximum sentence in RCW 69.50.410(2)(a) differently than any other statutory maximum. *See* RCW 9.94A.030(50) (stating that the statutory maximum can be prescribed in any statute defining the maximum penalty for a crime). Accordingly, we hold that the 60-month maximum under RCW 69.50.410(2)(a) is doubled under RCW 69.50.408 for a second conviction under chapter 69.50 RCW.

D. IMPOSITION OF STANDARD RANGE SENTENCE

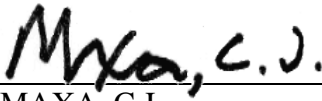
Under RCW 69.50.408, Cyr’s maximum sentence was 120 months – double the maximum of 60 months stated in RCW 69.50.410(2)(a). Cyr’s standard sentence range under the SRA drug sentencing grid in RCW 9.94A.517(1) was between 68+ and 100 months. Following the automatic doubling, the standard range no longer exceeded the limitation in RCW 69.50.410(2)(a) and 60 months no longer was the presumptive sentence. Therefore, under the

SRA the trial court was required to sentence Cyr within that standard range. RCW 9.94A.505(2)(a)(i).

Here, the trial court sentenced Cyr to 60 months in confinement. That sentence was below the SRA standard range, which was within the doubled statutory maximum. Therefore, the court erred in imposing the sentence. On remand, the court must sentence Cyr within the standard range. The court will have discretion regarding the sentence actually imposed within that range.


CONCLUSION

We vacate Cyr's sentence and remand for the trial court to exercise its discretion in sentencing Cyr within the standard range in light of the doubled statutory maximum of 120 months.

  
\_\_\_\_\_  
MAXA, C.J.

We concur:

  
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WORSWICK, J.

  
\_\_\_\_\_  
GLASGOW, J.

**LAW OFFICES OF LISE ELLNER**

**June 11, 2019 - 1:32 PM**

**Transmittal Information**

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