

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
12/12/2019 8:00 AM  
BY SUSAN L. CARLSON  
CLERK

\*This amended supplemental brief  
replaces the supplemental brief  
filed on 12-9-19

NO. 97323-7  
COA NO. 50912-1-II

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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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Joely O'Rourke, Judge

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SUPPLEMENTAL BRIEF OF PETITIONER - AMENDED

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A. SUPPLEMENTAL ISSUES

1. Did the trial court correctly interpret RCW 69.50.410 to find the it was authorized to decide the doubling provision in .408 was not applicable to Cyr's actual sentence when this was his first conviction under RCW 69.50.410(1)?

2. Did the trial court correctly apply the rule of lenity to limit Cyr's sentence to five years under RCW 69.50.410(2)(a) for Cyr's first conviction under .410(1)?

B. STATEMENT OF THE CASE

Johnny Ray Cyr was charged by second amended information with three counts of Sale of a Controlled Substance for Profit – Heroin under RCW 69.50.410. CP 9. Cyr pled guilty to all three and stipulated to his prior record and offender score. CP 23. Cyr's only prior drug related conviction consists of an attempted possession of imitation controlled substance from 2015. Cyr's standard range sentence under RCW 9.94A.517(1) is 68-100 months.<sup>1</sup>

The trial court relied on the rule of lenity and 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 because this was Cyr's

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<sup>1</sup> The Court disregarded a prior marijuana conviction.

first offense for selling a controlled substance. The court interpreted RCW 69.50.408(1), to double the maximum standard range but not the actual sentence, which the court in its discretion, applying the rule of lenity, determined should be 60 months based on the fact that this was Cyr's first drug sale offense. RP 31.

The Court of Appeals acknowledged a conflict between RCW 69.50.410(2)(a) and RCW 9.94A.505(1), permitting the trial court to impose "another term of confinement" under RCW 69.50.410(2) (5 years), rather than under RCW 69.50.408 but held that the trial court's discretion was limited to sentencing Cyr within his actual standard range after doubling the statutory maximum. (Opinion at page 7-9):

This timely supplemental brief of petitioner follows.

#### C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING CYR TO 60 MONTHS BECAUSE THAT SENTENCE WAS WITHIN THE RANGE OF ACCEPTABLE CHOICES, GIVEN THE FACTS, THE MANDATORY LANGUAGE IN RCW 69.50.410(2)(a), AND WASHINGTON CASE LAW

The trial court correctly exercised its discretion in sentencing Cyr to five years for Cyr's first conviction for selling heroin for a

profit. 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)). A trial court only abuses its discretion if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons. *State v. Horn*, 3 Wn. App. 2d 302, 312, 415 P.3d 1225 (2018) (citing *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013)).

The trial court did not abuse its discretion to impose a 5 year sentence based on the rule of lenity and a correct reading of RCW 69.50.410.

a. Sentencing Starts with the SRA

The legislature enacted the Sentencing Reform Act (SRA) in 1981 to create a sentencing structure with standard ranges for offenses that still allowed some discretion in crafting and imposing sentences. RCW 9.94A.010; *State v. Clark*, 123 Wn. App. 515, 521-22, 94 P.3d 335 (2004).

Selling a controlled substance for profit under RCW 69.50.410(1) is a class C felony for which the maximum penalty under the SRA is five years. RCW 9A.20.021(1)(c). However, “[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.599. In this case, because Cyr’s standard sentence range of 68+ to 100 months exceeded the statutory maximum of 60 months, Cyr’s presumptive sentence became 60 months.

RCW 69.50.410 specifically provides sentence “terms otherwise authorized” that differ from RCW 69.50.408. The Court of Appeals used the phrase “terms otherwise authorized”, in a singularly limited manner to disregard the 5 year limit in RCW 69.50.410(2)(a), in favor of applying a ‘one size fits all’ approach to render superfluous the specific language in RCW 69.50.410(1), (2)(a).

RCW 69.50.410 provides in relevant part:

(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[Field], 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.

(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).

.....

(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.

*Id* (Emphasis added).

RCW 69.50.408 provides in relevant part:

(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.

*Id*. The legislature's use of the term "**may**" generally indicates the existence of an option that is a matter of discretion. *Whatcom County v. Western Washington Growth Management Hearings*

*Board*, 186 Wn.2d 648, 694, 381 P.3d 1 (2016). When a provision contains both the words “shall” and “may”, the presumption is the Legislature intended to distinguish them—“shall” being construed as mandatory and “may” as discretionary or permissive. *Scannell v. Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435 (1982);; *Issel v. State*, 39 Wn. App. 485, 487, 694 P.2d 34 (1984).

The trial court correctly recognized that under the rule of lenity, RCW 69.50.410(2)(a) must be treated differently than other “terms otherwise authorized” referenced in RCW 69.50.408 because RCW 69.50.410’s contains its own doubling provision which does not apply to a first time conviction for selling heroin for a profit. Therefore, the five years is not just a statutory maximum – it is a separate sentencing scheme. RP 30-31. Unlike the trial court, the Court of Appeals failed to recognize this distinction, and failed to apply the rule of lenity.

The Court of Appeals without reference to the rule of lenity, “interpreted” RCW 69.50.408 to determine if RCW 69.50.408 “automatically doubles the maximum sentence for a second violation of chapter 69.50, or whether it is within the court’s discretion to apply [RCW 69.50.401] to double the maximum

sentence”. (Opinion at page 5).

The Court of Appeals determined that RCW 69.50.408 required rather than **permitted** it to double Cyr’s maximum time incarcerated, based on Cyr’s prior conviction for attempted sale of an imitation controlled substance. (Opinion at p.4). The Court seemed to recognize that under this Court’s precedent in *In re Pers. Restraint of Cruz*, 157 Wn.2d 83, 90, 134 P.3d 1166 (2006), RCW 69.50.408 doubles only the maximum sentence that can be imposed, but incorrectly conflated this to include increasing the actual sentence imposed. (Opinion at page 5).

This analysis is flawed because the Court of Appeals conflated the term “statutory maximum” with the “maximum sentence” it could impose for Cyr. Based on this error, the Court of Appeals disregarded *Cruz*, and incorrectly determined that because *In re Pers. Restraint of Hopkins*, 89 Wn. App. 198, 201, 948 P.2d 394 (1997), rev'd sub nom, *In re Hopkins*, 137 Wn. 2d 897, 976 P.2d 616 (1999) expressly held that the court does not have the discretion to decline to double the statutory maximum, it was required to automatically impose a sentence in excess of the term codified for a Class Felony for the sale of a controlled profit under

RCW 69.40.410.

However, *Hopkins* and *Cruz*, did not address whether the specific language in RCW 69.50.410 exempted it from the general doubling provision because .410 was not at issue in that case. The Court of Appeals noted that once the statutory maximum is doubled the sentencing court **may** impose any sentence within that maximum term so long as it complies with other applicable provisions of the Sentencing Reform Act (SRA). This necessarily includes applying RCW 69.50.410. *Hopkins*, 89 Wn. App. at 201.

Similarly, in *Cruz*, this Court held that RCW 69.50.408 doubles the maximum penalty not the standard range penalty. *Cruz*, 157 Wn.2d at 90. But again, section .410 was not at issue in *Cruz*. Instead, this Court only addressed the narrow issue of whether the phrase “twice the term otherwise authorized” refers to the standard range sentence or the maximum sentence or both. *Cruz*, 157 Wn.2d at 86.

Nothing in *Hopkins* or *Cruz* prohibited the trial court in the instant case from finding that section .410 contained its own sentencing scheme that was not subject to the doubling provision in .408. Further, nothing in *Hopkins* or *Cruz* prohibited the trial court

from finding that even if .408 applied to .410(1) it did not override 410(2)(a), which mandates a specific sentence for a first time conviction of selling heroin for a profit.

The state is incorrect to argue that the trial court was not authorized to impose a five year sentence because, relevant here, the SRA applies to all felonies unless “another term of confinement applies.” RCW 9.94A.505(1), (2)(a)(i). Here, RCW 69.50.410(2)(a) is another term of confinement which applies to limit Cyr’s sentence to five years for a first time conviction of selling heroin for a profit.

Doubling the statutory maximum does not require the court to impose a specific sentence in accord with the defendant’s standard range sentence, when RCW 69.50.410(2)(a), directs that a sentence for a person convicted for the first time for the sale of a controlled substance “**shall**” receive a term not to exceed 60 months). Shall is mandatory. *Scannell*, 97 Wn.2d at 704. Thus, a reasonable interpretation is that the trial court correctly sentenced Cyr under the mandatory provisions in a sentence under RCW 69.50.410(2)(a), rather than under the permissive language in RCW 69.50.408.

This ambiguity requires statutory interpretation because

when read together there is more than one reasonable interpretation as to how to apply these statutes.

b. Statutory Construction

“When the legislature has expressed its intent in the plain language of a statute, we cannot substitute our judgment for the legislature’s judgment.” *Protect the Peninsula’s Future v. Growth Mgmt. Hr’gs Bd.*, 185 Wn. App. 959, 972, 344 P.3d 705 (2015). To assess the meaning of the plain language, the court considers the text of the provision in question, the context of the statute in which the provision is found, and related statutes. *Id.*

If the plain meaning of a statute is unambiguous, the court must apply that plain meaning as an expression of legislative intent without considering extrinsic sources. *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). Otherwise where the plain language of each statute read together is not clear and provides for more than one reasonable interpretation, the court must interpret the language in the defendant’s favor under the rule of lenity. *State v. A.M.*, 194 Wn.2d 33, 45, 448 P.3d 35 (2019).

Recently in *State v. Dennis*, 191 Wn.2d 169, 178, 421 P.3d 944 (2018), both parties argued that RCW 9.41.040(4)(a)(ii)(A) was

not ambiguous. This Court rejected the state's statutory interpretation which attempted to improperly add language into RCW 9.41.040(a) to require additional requirements for a defendant to petition for restoration of firearm rights under RCW 9.41.040(4)(a)(ii)(A), as well as rendering other language superfluous.

Unlike in *Dennis*, because RCW 69.50.408 and RCW 69.50.410 when read together are “susceptible to more than one reasonable interpretation[]”, they are ambiguous. *Seven Sales LLC v. Otterbein*, 189 Wn. App. 204, 208, 356 P.3d 248 (2015) (quoting *Stephenson v. Pleger*, 150 Wn. App. 658, 662, 208 P.3d 583 (2009)); *State v. Schwartz*, \_\_\_ Wn.2d \_\_\_, 450 P.3d 141, 145 (2019).

Statutory interpretation is a question of law that is reviewed de novo. *State v. Van Noy*, 3 Wn. App. 2d 494, 497, 416 P.3d 751 (2018). To construe such ambiguous language, the court looks to the legislative history, relevant case law, and established principles of statutory construction to discern legislative intent. *Jametsky*, 179 Wn.2d at 762; *Anthis v. Copland*, 173 Wn.2d 752, 756, 270 P.3d 574 (2012).

(i) Legislative History

The legislature enacted RCW 69.50.408 in 1971 as part of the Uniform Controlled Substance Act. 1971 ex.s. c 308 § 69.50.408. At the time RCW 69.50.408 was enacted there was no crime of sale of a controlled substance for profit under chapter 69.50. 1971 ex.s. c 308.

This provision predates the SRA which has a stated purpose to “make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences” RCW 9.94A.101.

The crime of selling a controlled substance for profit was enacted two years later, in 1973. Even though the doubling provision in RCW 69.50.408 was already in place, the legislature created a separate sentencing scheme for this new crime within subsection RCW 69.50.410, which implemented harsh mandatory sentences including its own doubling provision. 1973 2nd ex.s. c 2 § 2.

There is no indication the legislature intended that a conviction under RCW 69.50.410 was subject to an even harsher

sentence by applying the doubling provision in RCW 69.50.408 in addition to the sentences outlined in RCW 69.50.410. In *State v. McGinley*, 18 Wn. App. 862, 868, 573 P.2d 30 (1977), after enactment of both RCW 69.50.408, and RCW 69.50.410, the Court of Appeals concluded, “RCW 69.50.410 establishes mandatory prison sentences for persons convicted of selling certain drugs”. *McGinley* 18 Wn. App. at 868.

After enacting RCW 69.50.410 the legislature contemplated creating a drug treatment program for drug addicts run by the Department of Social and Health Services (DSHS) as an alternative to prison. See former 69.32.090. The requirement that drug addicts receive treatment in a DSHS facility became an unfunded mandate. *Bresolin v. Morris*, 86 Wn.2d 241, 543 P.2d 325 (1975). The Court held DSHS in contempt for failing to provide treatment. In response, the legislature repealed RCW 60.32.090 but not RCW 69.50.410. When the SRA was passed in 1981 it did not diminish RCW 69.50.410, notwithstanding the lack of services. RCW 9.94A.020.

In 1999, the legislature amended RCW 69.50.410 to add subsection (4) to make it clear that defendants serving a sentence under section 410 could still apply for extraordinary medical

placement under the SRA, RCW 9.94A.728(4). 1999 c 324 HB 1299. If defendants convicted under .410 were required to be sentenced pursuant to the SRA there was no need for the amendment.

In 2003, the legislature again amended RCW 69.50.410 to reinforce the pre-SRA sentencing provisions, knowing that the DSHS treatment facility was non-existent, but that trial courts were continuing to enforce the mandatory sentence provisions.

In 1981 the SRA provided that delivery of controlled substance (RCW 69.50.401)) and controlled substance sale for profit (RCW 69.50.410) were both classified as Level VI offenses, except in 2003 the legislature amended RCW 69.50.410 to classify controlled substance (heroin) sale for profit (RCW 69.50.410) as Level VIII. Former RCW 9.94A.320; see Session Laws, Chapter 209, 1984. Since the enactment of RCW 69.50.410 and the SRA, both society and the legislature began to view drug offenses differently and the legislature has called for treatment rather than harsh sentences.

Toward that end, the legislature enacted RCW 9.94A.517, which created a separate sentencing grid for drug related crimes.

The intent in creating a separate sentencing grid was to “increase the use of effective substance abuse treatment for defendants...” not to create harsher sentences for drug offenders. 2002 HB 2338 – S2 – Digest.

The legislature also amended section .410 in 2003 to change the language from it “shall be unlawful” to “is a class C felony” for any person to sell for profit any controlled substance. 2003 c 53 § 342. Classifying this crime as a class C felony clarifies that the statutory maximum is five years, which is lower than the standard sentence range under the SRA for level III drug offenses. RCW 9.94A.517. This is the first and only time the penalty provisions of the statute have been amended. 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).

Until 2003, unlike most felonies in Washington which are classified as Class A, B, or C, the statute contained no sentencing provisions other than those contained in subsections (2) and (3).

The amendments to RCW 69.50.410(4) provide a de facto acknowledgment and approval the legislature knew the courts were

sentencing defendants convicted of selling narcotics according to the terms mandated in .410 and not under the SRA. By failing to remove that separate sentencing scheme the legislature affirmed it.

One reasonable explanation for the amendments to RCW 69.50.410 is that the legislature intended to lower the sentence for a conviction under RCW 69.50.410(1) and left .410(2)(a) in place to also exempt a first time conviction for the sale of heroin from the doubling provision in .408(1).

(ii) Apply Later More Specific Statute  
Not General Statute

RCW 69.50.410 is the more specific statute for offenders convicted of selling heroin. It is not a general drug sentencing statute, such as RCW 69.50.408. “When two statutes pertain to the same subject matter and a conflict cannot be harmonized, the more specific statute supersedes the general statute.” *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). A later and more specific statute controls over the earlier and more general one. *Diaz v. State*, 175 Wn.2d 457, 470, 285 P.3d 873 (2012); MICHAEL SINCLAIR, A GUIDE TO STATUTORY

INTERPRETATION 138 (2000).

Here, RCW 69.50.410 is both the later and more specific statute and it was enacted 2 years after RCW 69.50.408. RCW 69.50.410 mandates specific sentences for heroin specific crimes because under *Diaz*, and *Rice*, RCW 69.50.410 supersedes the general provision in RCW 69.50.408(1) in both time and specificity. *Diaz*, 175 Wn.2d at 470; and *Rice*, 159 Wn. App. at 571.

(iii) Construe Statutes to  
Harmonize to Avoid  
Rendering Provisions  
Superfluous

Statutes are construed as a whole to harmonize with each other instead of conflict, and to give effect to all provisions when possible. *State v. George*, 160 Wn.2d 727, 735, 158 P.3d 1169 (2007); *State v. Young*, 125 Wn.2d 688, 696, 888 P.2d 142 (1995). Washington courts, observe “the rule against surplusage, which requires this court to avoid interpretations of a statute that would render superfluous a provision of the statute.” *Veit, ex rel. Nelson v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 113, 249 P.3d 607 (2011); *Accord Dennis*, 191 Wn.2d at 173-74.

In *Dennis*, the state unsuccessfully conflated the washout provision which sets the term of years depending on whether the

crime was for a Class B, or C felony, with the 5 year firearm restoration, in an effort to deny the defendant the opportunity to petition for a firearm if he spent five years without a crime for a Class C felony. The Supreme Court disagreed with the state because the state attempted to render the language “five-year period” superfluous.

By contrast, in *In re Estate of Mower*, 193 Wn. App. 706, 720, 374 P.3d 180 (2016), citing *Nelson*, the Court properly interpreted the statute at issue to avoid rendering any language superfluous or meaningless. The Court in *Mower* interpreted RCW 11.12.051 by determining the legislature intentionally chose to include in RCW 11.12.051 language revoking will provisions “in favor of” a former spouse, as well as provisions “granting any interest or power to the testator’s former spouse.”

**To avoid subsuming the former provision within the latter, and thereby render the phrase “in favor of” superfluous and redundant**, the Court in *Mower*, citing *Nelson*, interpreted the phrase “in favor of” to mean something distinct from the conveyance of power or property interests. Because the legislature chose to include the language, it must refer to some benefit other

than a direct grant of power or property. *Mower*, 193 Wn. App. at 720 (emphasis added).

The trial court here implicitly and correctly applied the principles of *Dennis*, *Nelson* and *Mower*, to avoid rendering redundant and superfluous, the language “shall receive a sentence of not more than five years” in RCW 69.50.410. Toward this end, the trial court applied the plain, specific, self-contained doubling provisions of RCW 69.50.410, and harmonized it with RCW 69.50.408 by recognizing the heroin specific language in RCW 69.50.410.

In reversing the trial court and applying RCW 69.50.408, the Court of Appeals contrary to the requirement to interpret a statute to avoid redundancy and superfluosity, first, claimed that it was not interpreting any statute, but rather applying a plain meaning.

Second, rather than applying the rules of statutory construction, the Court of Appeals ignored the doubling provision in RCW 69.50.410, rendering it redundant and superfluous because it simply saw “no reason to treat” RCW 69.50.410(2)(a) differently than any other sentence.” (Opinion a p. 9). This interpretation violates the rules of statutory construction. *Dennis*, 191 Wn.2d at

173-74; *Nelson*, 171 Wn.2d at 113; *Mower*, 193 Wn. App. at 720.

Third, the Court of Appeals did not apply the rule of lenity when confronted with two statutes that could not be harmonized when read together.

(iv) Harmonize Other Statutes

RCW 69.50.410 provides another term of confinement and RCW 9.94A.030(50) states that the statutory maximum **can<sup>2</sup> be prescribed** in any statute defining the maximum penalty for a crime. Under the rule of lenity, the trial court was required to treat the five year sentence as just that – a sentencing range from 60 to 60 – rather than as a statutory maximum which can be doubled under RCW 69.50.408.

The Court of Appeals' holding that the five year limitation in .410(2)(a) is a statutory maximum that was automatically doubled under .408(1) is incorrect because it is inconsistent with the legislative history of .410 and stated intent in sentencing drug offenders which indicates the legislature intended to create a separate sentencing scheme under .410 that is exempt from the doubling provision in .408(1).

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<sup>2</sup> Like the term “may”, “can” is also permissive. Black’s Law Dictionary, p. 186 (Fifth Ed. 1979). “[T]o have permission to. Often used interchangeably with “may”.

In the instant case, the trial court correctly determined that RCW 69.50.410 (2) “gives the courts directive as to the sentences that would apply in these facts.” RP 31

RCW 69.50.4016 and RCW 69.50.410(7) also support the trial court’s imposition of a 5 year sentence. RCW 69.50.4016 provides that:

RCW 69.50.401 through 69.50.4015 shall not apply to offenses defined and punishable under the provisions of RCW 69.50.410.

RCW 69.50.410(7) provides:

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

Cyr’s conviction for the sale of heroin is defined in RCW 69.50.410, the statute he was charged under. CP 9.

The Legislature twice explained that convictions under RCW 69.50.410 for drug offenses are sentenced differently than other offenses because RCW 69.50.410 provides another “**term of confinement**” specific to the sale of narcotics for profit. RCW 69.50.410(2),(3), (7); RCW 69.50.4016.

c. Rule of Lenity

RCW 69.50.4108 and .410 are ambiguous when read

together. When a statute is ambiguous, the rule of lenity requires the courts to strictly construe ambiguous statutes in a manner most beneficial to defendants. *United States v. Bass*, 404 U.S. 336, 347, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971) (quoting *Lewis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971)); *A.M.*, 194 Wn.2d at 45 (quoting *Bass*, 404 U.S. at 348 (other quotations omitted)).

The Courts must resolve ambiguous criminal statutes in favor of the defendant (and against the drafter—the State) under the rule of lenity, without reliance on legislative history to interpret criminal statutes when the rule of lenity suffices. *A.M.*, 194 Wn.2d at 45.

Under the facts presented, the trial court acknowledged the doubling provision of RCW 69.50.408, recognized the ambiguity in RCW 69.50.408 and RCW 69.50.410, and correctly applied the rule of lenity to the facts of Cyr’s case, (one prior drug conviction, for an attempted possession charge, no prior drug offenses other than the possession charge) to apply a sentence in conformance with RCW 69.50.410 under the rule of lenity

In contrast, the Court of Appeals, contrary to legal

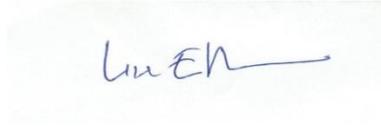
precedent, ignored: (1) the ambiguity in RCW 69.50.408 and RCW 69.50.410 when read together; (2) the canons of statutory construction; (3) and the rule of lenity. For these reasons, this Court should reverse the Court of Appeals.

#### D. CONCLUSION

Johnny Ray Cyr respectfully requests that this Court affirm the trial court and reverse the Court of Appeals, to hold that the heroin and sale of narcotic specific sentences set forth in RCW 69.50.410 supersede the general doubling provision set forth in RCW 69.50.408(1). And hold that when reading RCW 69.50.408 and RCW 69.50.410 there is an ambiguity with more than one reasonable interpretation that requires application of the rule of lenity to Cyr's favor.

DATED this 12<sup>th</sup> day of December 2019.

Respectfully submitted,



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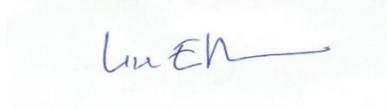
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Attorney for Petitioner

I, Lise Ellner, a person over the age of 18 years of age, served the Lewis County Prosecutor's Office [appeals@lewiscountywa.gov](mailto:appeals@lewiscountywa.gov) and [sara.beigh@lewiscountywa.gov](mailto:sara.beigh@lewiscountywa.gov) and Johnny Cyr/DOC#385057, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326 a true copy of the document to which this certificate is affixed on December 12, 2019. Service was made by electronically to the prosecutor and Johnny Cyr by depositing in the mails of the United States of America, properly stamped and addressed.



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Signature

**LAW OFFICES OF LISE ELLNER**

**December 11, 2019 - 9:07 PM**

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**Appellate Court Case Title:** State of Washington v. Johnny Ray Cyr  
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