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SUPREME COURT  
STATE OF WASHINGTON  
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CLERK

S. Ct. No. 99284-3  
COA No. 36482-8-III

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT RAY ABBETT,

Petitioner.

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PETITION FOR REVIEW

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## TABLE OF CONTENTS

A. IDENTITY OF PETITIONER.....	1
B. COURT OF APPEALS DECISION.....	1
C. ISSUE PRESENTED FOR REVIEW.....	1
Is the doubling provision of RCW 69.50.408(1) equivalent to an enhanced sentence and/or aggravating circumstance requiring the State to give an offender notice that it will seek a sentence above the standard range (including the maximum penalty for the particular offense), and, if so, does the failure to give notice amount to a violation of an offender’s due process rights?.....	1
D. STATEMENT OF THE CASE.....	1
E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.....	2
F. CONCLUSION.....	6

## TABLE OF AUTHORITIES

### Table of Cases

<i>Morrissey v. Brewer</i> , 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed.2d 434 (1972).....	3
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	6
<i>State v. McNeal</i> , 142 Wn. App.777, 175 P.3d 1139 (2008).....	2, 3, 4
<i>State v. Roy</i> , 147 Wn. App. 309, 195 P.3d 967, <i>review denied</i> , 165 Wn.2d 1051 (2009).....	3, 4

### Constitutional Provisions

Fourteenth Amendment.....	2
---------------------------	---

Wash. Const. art. 1, § 3.....2

Statute

RCW 9.94A.537(1).....3

RCW 69.50.408(1).....1, 2, 4

Rules

RAP 13.4(b)(4).....2, 5

#### A. IDENTITY OF PETITIONER

Robert R. Abbett asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B.

#### B. COURT OF APPEALS DECISION

Mr. Abbett seeks review of the decision of the Court of Appeals, Division III, filed on March 24, 2020, affirming his convictions and sentence. A copy of the opinion is in the Appendix. The order denying his motion for reconsideration was filed on November 5, 2020.

#### C. ISSUE PRESENTED FOR REVIEW

Is the doubling provision of RCW 69.50.408(1) equivalent to an enhanced sentence and/or aggravating circumstance requiring the State to give an offender notice that it will seek a sentence above the standard range (including the maximum penalty for the particular offense), and, if so, does the failure to give notice amount to a violation of an offender's due process rights?

#### D. STATEMENT OF THE CASE

Mr. Abbett incorporates by reference the statement of facts in his appellant's opening brief in the Court of Appeals. He also adopts the court's recitation of the procedure in its March 24, 2020 opinion.

## E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be accepted because the Court of Appeals' decision involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

Mr. Abbett argued on appeal that his sentence for possession of a controlled substance with intent to deliver exceeded the maximum for a class B felony and that the court's use of the doubling provision in RCW 69.50.408(1) violated his due process right to notice under the Fourteenth Amendment and Art. 1, § 3 of the Washington Constitution. The Court of Appeals disagreed based on what it perceived to be controlling precedent.

Mr. Abbett neither disputed that he had a previous drug conviction nor that RCW 69.50.408(1) provides the maximum sentence for possession with intent to deliver may thus be 20 years rather than the ten-year maximum for that class B felony. Rather, his claim is that due process required notice by the State of the doubled maximum term of twenty years.

The Court of Appeals held that *State v. McNeal*, 142 Wn. App. 777, 175 P.3d 1139 (2008), was controlling on the issue. It is not. Mr. Abbett, unlike Mr. McNeal, did not argue the charging document was deficient. His argument is that he was at no time

given notice, by the information or otherwise, of the doubling provision, which is the functional equivalent of the State seeking to impose an exceptional sentence of up to twice the statutory maximum of 10 years. The Court of Appeals misapprehended Mr. Abbett's argument and erroneously relied on *McNeal*.

The court excused the State of any notice requirement since “[p]resumably, as long as the accused received notice of his charges, he may conduct the research needed to determine the full maximum of his possible sentence.” (Op. at 8). That is not the process that Mr. Abbett is due. *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L. Ed.2d 484 (1972). The State's intent to seek a penalty of double the maximum of 10 years is certainly an enhancement and/or an aggravating circumstance that, by any other name, is equivalent to seeking an exceptional sentence. Due process thus requires notice. *Cf. State v. Theroff*, 95 Wn.2d 385, 392, 622 P.2d 1240 (1980); RCW 9.94A.537(1).

For the same reasons that *McNeal* is inapplicable to Mr. Abbett's situation, the court's reliance on *State v. Roy*, 147 Wn. App. 309, 195 P.3d 967 (2008), *review denied*, 165 Wn.2d 1051 (2009), is also misplaced. (Op. at 8-9). Unlike Mr. Roy, he does not argue that notice should have been given in the charging

document. The argument is that due process required the giving of notice – period – and it could be by a separate document. He got no notice. The similarities between the doubling provision and an exceptional sentence dictate the two should be treated the same as far as notice is concerned.

The State gives notice of seeking an exceptional sentence and RCW 69.50.408(1)'s doubling of the maximum term is its equivalent. Furthermore, it is within the court's discretion to impose them. Due process requires that notice of the doubling provision be provided to the defendant and it will not do to tell the accused to look it up. Neither *McNeal* nor *Roy* is applicable. Mr. Abbett's contention has not been addressed before and the Court of Appeals declined to apply the rule to the doubling provision:

Nevertheless, Abbett cites no authority mandating that due process notice requirements, applicable when the State seeks enhanced penalties, apply to when the State seeks to apply the doubling provision under RCW 69.50.408(1). We decline to extend the rule in this appeal. (Op. at 10).

Despite whatever reason the Court of Appeals had for not deciding the precise issue raised by Mr. Abbett, the Supreme Court should now accept review and answer the question. Notice and the doubling provision are recurrent themes in drug cases and the

notice issue is one of substantial public interest that should be determined by this Court. RAP 13.4(b)(4).

With respect to Mr. Abbett's statement of additional grounds, none were decided on the merits. (Op. at 10-12). One ground complained about the destruction of exculpatory evidence before trial. The Court of Appeals surmised the reference was to the "inadvertently destroyed baggies containing methamphetamine." (Op. at 10). It then said such baggies would implicate, rather than exculpate, him. The point, however, was that the baggies did not contain methamphetamine and the defense could not perform independent testing to prove it. Mr. Abbett will raise the issue in a personal restraint petition as it pertains to matters outside the record.

His second ground was that trial counsel was ineffective by failing to object to the State's introduction of only a portion of the law enforcement video at the scene. The Court of Appeals did not consider or decide this ground because it referred to matters outside the record and thus a personal restraint petition was the proper vehicle for pursuing this issue. (Op. at 11).

Last, Mr. Abbett claimed the destruction of the baggies coupled with the partial video introduced by the State was



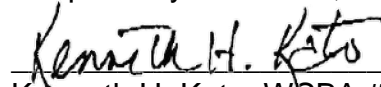
prosecutorial misconduct. The court said he did not show prejudice. But the prejudice is that independent testing would have shown there was no methamphetamine and the entire video would have been exculpatory. These are matters outside the record and a personal restraint petition is the vehicle for raising the issue since it relates to destruction of the baggies in ground one and the failure to object to introduction of the entire video in ground two. *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

#### F. CONCLUSION

Based on the foregoing facts and authorities, Mr. Abbett respectfully urges this Court to grant his petition for review.

DATED this 4<sup>th</sup> day of December, 2020.

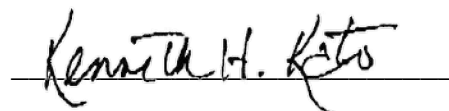
Respectfully submitted,



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#### CERTIFICATE OF SERVICE

I certify that on December 4, 2020, I served a copy of the petition for review by USPS on Robert Abbett, # 866880, PO Box 888, Monroe, WA 98272; and through the eFiling portal on Tamara Hanlon at her email address.



## APPENDIX

**FILED**  
**MARCH 24, 2020**  
**In the Office of the Clerk of Court**  
**WA State Court of Appeals Division III**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

STATE OF WASHINGTON,	)	No. 36482-8-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
ROBERT RAY ABBETT,	)	
	)	
Appellant.	)	

FEARING, J. — On appeal from a conviction for possession of a controlled substance with intent to deliver, Robert Abbett claims the State violated his due process rights by failing to notify him that the State might seek doubling of his maximum sentence under RCW 69.50.408(1). The statutory subsection allows doubling of the maximum sentence if the offender earlier garnered another drug conviction. We follow precedent that holds the State need not give such notice in the charging information. We thereby affirm Abbett’s sentence.

FACTS

Toppenish Police Officer Joshua Rosenow stopped Robert Abbett on April 6, 2017, for speeding and an obstructed license plate. After Officer Rosenow activated his emergency lights, Abbett continued driving his truck a block and a half before stopping.

Abbett had a female passenger. Officer Rosenow walked to Abbett's car, took Abbett's driver's license, returned to his patrol vehicle, and, through his car's computer, researched Abbett's driver's license number. Rosenow's search unearthed a Marysville Municipal Court no-contact order restraining Abbett from contact with Brenda Istvan. Officer Rosenow returned to Abbett's vehicle and asked the passenger for her identification. The identification card listed Istvan.

Officer Joshua Rosenow requested law enforcement officer assistance to arrest Robert Abbett. Officer Cody Quantrell arrived within thirty seconds. Officer Rosenow opened Abbett's truck's driver side door, and Abbett promptly closed the door. Abbett attempted to shift his truck into "drive," and the engine revved. Report of Proceedings at 47. Rosenow deployed his stun gun on Abbett, but Abbett pulled the wires from the cartridge. After squirting Abbett's face with pepper spray, the two law enforcement officers removed Abbett from the truck.

During a search incident to the arrest of Robert Abbett, Officer Cody Quantrell located a firearm and an ammunition magazine in a shoulder holster that Abbett wore. Abbett could not lawfully possess a firearm due to earlier felony convictions. Officers seized Abbett's truck and later executed a search warrant on the vehicle. The officers confiscated two scales, baggies, and \$690 in cash from the truck.

The Washington State Patrol Crime Laboratory tested the white substance found in the baggies and determined the substance to be methamphetamine. The Toppenish Police Department inadvertently destroyed the baggies and their contents after the crime lab returned the objects to the department. The police department preserved transmittal documents to and from the crime lab, the lab report, and a log maintained by the department.

#### PROCEDURE

Because Robert Abbett challenges the notice afforded him in the charging documents, we detail the contents of the many informations filed by the State. In its initial information, the State of Washington charged Robert Abbett with assault in the third degree, attempted second degree assault, unlawful possession of a firearm in the second degree, and violation of an order of protection. The State later filed an amended information. The amended information included two additional counts: possession of a controlled substance, methamphetamine, with intent to deliver and use of drug paraphernalia. The amended information stated that the maximum penalty for possession of a controlled substance with intent to deliver was “10 years imprisonment and/or a \$25,000.00 fine.” Clerk’s Papers (CP) at 11.

In a second amended information, the State switched the attempted assault in the second degree charge to a charge of assault in the second degree. The State also amended the unlawful possession of a firearm in the second degree charge to allege that Robert Abbett previously incurred felony convictions.

The State filed a third amended information. This last information removed one of the named officers as a victim of assault in the second degree. The third amended information also removed some of the earlier felony convictions alleged for purposes of the predicate conviction for unlawful possession of a firearm, deleted the use of the drug paraphernalia count, and added a firearm enhancement that alleged that Robert Abbett possessed a controlled substance with intent to deliver while armed with a firearm. As with the prior documents, the third amended information stated the maximum penalty of ten years imprisonment on count five. Count six of the last information changed the charge of use of drug paraphernalia to possession of a controlled substance, methamphetamine. The State of Washington never mentioned, in any of the charging informations, that it would seek to double the maximum penalty for the conviction of possession of a controlled substance with intent to deliver.

The prosecution proceeded to a jury trial. Both Officers Joshua Rosenow and Cody Quantrell testified, and the State played, for the jury, Rosenow's dash camera video

of the incident. The video contained no audio, and the State did not play the entire video. The trial court admitted State's identification numbers 15 and 16, photographs of the two baggies containing the white substance, over defense counsel's objection.

Prior to submitting the criminal charges to the jury for deliberation, the trial court dismissed the assault in the third degree charge. The jury found Robert Abbett guilty of unlawful possession of a firearm in the second degree, violation of an order of protection, and possession of a controlled substance with intent to deliver. The trial court dismissed the lesser crime of possession of a controlled substance because the jury returned a guilty verdict on possession with intent to deliver. The jury found Abbett not guilty of assault in the second degree. The jury rendered special verdicts that the no-contact order violation involved a household member and that Abbett armed himself with a firearm at the time of the commission of possession of methamphetamine with the intent to deliver.

Before sentencing, the State filed a sentencing memorandum that listed Robert Abbett's prior convictions and included a chart that calculated Abbett's offender score. The chart included a 2012 possession of a controlled substance, methamphetamine, conviction and sentence. Accordingly, the State wrote in its memorandum:

Also, as Defendant has a prior conviction under Chapter 69.50 RCW, the statutory maximum for Count 5 doubles from 120 to 240 months. *See* RCW 69.50.408(1).

CP at 120.

At sentencing, the trial court concluded that, because of the doubling provision in RCW 69.50.408(1), Robert Abbett's maximum sentence on count five, possession of a controlled substance with intent to deliver, was twenty years. The trial court sentenced Abbett to 43 months' confinement for unlawful possession of a firearm in the second degree, 364 days for violation of an order of protection, and 146 months for possession of a controlled substance with intent to deliver. The 146-month sentence on count five included a 36-month firearm enhancement. The sentencing court also imposed 12 months of community custody. The court ordered all sentences to run concurrently.

#### LAW AND ANALYSIS

On appeal, Robert Abbett contends that his sentence for possession of a controlled substance with intent to deliver exceeds the maximum for a class B felony and that the trial court's use of the doubling provision contained in RCW 69.50.408(1) violated his due process right to notice under the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington State Constitution. The jury convicted Robert Abbett of a class B felony, possession with intent to deliver, which carries a statutory maximum ten year sentence. But RCW 69.50.408(1) declares:

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.

RCW 69.50.408(1) doubles the maximum sentence of the underlying charge under chapter 69.50 RCW, not the standard sentence range. *In re Personal Restraint of Cruz*, 157 Wn.2d 83, 90, 134 P.3d 1166 (2006). When a defendant was earlier convicted under chapter 69.50 RCW, RCW 69.50.408 automatically applies to double the statutory maximum sentence. *State v. Cyr*, 8 Wn. App. 2d 834, 841, 441 P.3d 1238, *review granted*, 194 Wn.2d 1001, 451 P.3d 329 (2019). The trial court's discretion involves what sentence to actually impose within the doubled maximum and the standard range. *State v. Cyr*, 8 Wn. App. 2d at 841.

Robert Abbett concedes that the State previously convicted him of a drug crime. He also concedes that RCW 69.50.408(1) indicates that the maximum term for possession with intent to deliver may be twenty years instead of ten. Abbett contends, however, that the State never notified him in the many charging informations or in a separate pleading that he faced a penalty of twenty years.

*State v. McNeal*, 142 Wn. App. 777, 175 P.3d 1139 (2008) controls this issue. John McNeal argued that the trial court violated his due process right to notice under article I, section 22 of the Washington State Constitution and the Sixth Amendment to the United States Constitution because the State's charging document failed to assert the

existence of the condition precedent to the application of RCW 69.50.408(1)'s doubling provision, which precedent was McNeal's previous qualifying drug offenses. *State v. McNeal*, 142 Wn. App. at 785. The *McNeal* court disagreed. The court noted that the charging information need include only "the essential elements of the charged crime." *State v. McNeal*, 142 Wn. App. at 785. While relying on *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the *McNeal* court emphasized:

*"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."*

*State v. McNeal*, 142 Wn. App. at 786 (quoting *Blakely v. Washington*, 542 U.S. at 301).

Accordingly, the *McNeal* court reasoned that the State's failure to plead the doubling provision did not violate McNeal's due process right to notice of the charges against him. *State v. McNeal*, 142 Wn. App. at 786. Presumably, as long as the accused received notice of his charges, he may conduct the research needed to determine the full maximum of his possible sentence.

This court, in *State v. Roy*, 147 Wn. App. 309, 195 P.3d 967 (2008), followed the same reasoning as the *McNeal* court. We held that the State did not breach Nicholas Roy's due process notice rights when it did not give notice that his maximum sentence

could be doubled under RCW 69.50.408(1). We follow the teachings of *State v. McNeal* and *State v. Roy*.

In his reply brief, Robert Abbett cites *State v. Crawford*, 159 Wn.2d 86, 147 P.3d 1288 (2006). The *Crawford* court held that the State must give notice to an accused facing a determination of habitual offender status. Abbett equates a habitual offender charge and the doubling provision of RCW 69.50.408(1) for purposes of the notice the State must afford the accused. We disagree. As stated in *State v. Crawford*:

[P]rosecutors must set forth their intent to seek enhanced penalties for the *underlying* crime in the information and are not applicable where, as here, a defendant faces potential sentencing consequences because of convictions for *prior* crimes.

*State v. Crawford*, 159 Wn.2d at 94. RCW 69.50.408(1) imposes a doubling measure on the existence of a prior conviction.

Robert Abbett also contends the RCW 69.50.408(1)'s doubling provision parallels an aggravating circumstance under RCW 9.94A.537(1) such that the State must have afforded him notice of the doubling provision. Once again, we disagree. On the one hand, RCW 9.94A.537(1) directs the State to give notice that it intends to seek a sentence above the standard range “[a]t any time prior to trial or entry of the guilty plea,” and that “[t]he notice shall state aggravating circumstances upon which the requested sentence will be based.” On the other hand, the doubling provision of RCW 69.50.408(1) modifies

only the maximum penalty for the offense, not the standard range penalty. *In re Personal Restraint of Cruz*, 157 Wn.2d at 90 (2006).

Finally, Robert Abbett argues, in the alternative, that, if RCW 69.50.408(1) does not constitute an aggravating circumstance, the statutory subsection metes an enhanced sentence. Abbett cites *State v. Theroff*, 95 Wn.2d 385, 622 P.2d 1240 (1980), that compares the doubling provision to enhanced penalties such as firearm and deadly weapon enhancements. Nevertheless, Abbett cites no authority mandating that due process notice requirements, applicable when the State seeks enhanced penalties, apply to when the State seeks to apply the doubling provision under RCW 69.50.408(1). We decline to extend the rule in this appeal.

We also observe that Robert Abbett shows no prejudice resulting from application of RCW 69.50.408(1). He does not contend he would have changed his trial strategy or any negotiation tactic assuming notice from the State of the doubling statute.

#### Statement of Additional Grounds

Robert Abbett raises three arguments in his statement of additional grounds for review (SAG). First, Abbett complains about the the destruction of exculpatory evidence before trial. Although not expressly stated by Abbett, he probably references the inadvertently destroyed baggies containing methamphetamine.

To comport with due process, the prosecution must disclose material exculpatory evidence to the defense and preserve such evidence for use by the defense. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *State v. Wittenbarger*, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994). Contrary to Abbett’s contention, the actual baggies and the encased substance would have implicated him, not exculpated him.

Second, Robert Abbett contends that his trial counsel performed ineffectively when counsel failed to object to the State’s introduction of only a portion of the video captured by the law enforcement officer camera. Abbett asserts that his counsel should have insisted on the playing of the full video because its entirety “would clearly [have] established what really happened.” SAG at 8. Nevertheless, Abbett does not indicate whether establishing what really happened would have benefited or prejudiced him.

Robert Abbett’s second assigned error pertains to matters outside the record, which we cannot address in direct appeal. The entire video is not before us. A personal restraint petition is the proper means to introduce evidence outside the record on appeal. *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

Third, Robert Abbett contends that the destruction of the methamphetamine and the State’s showing of only a portion of the dash camera video qualifies as prosecutorial misconduct. Abbett cites only RPC 8.4 in support of this assigned error.

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Abbett fails to cite this general principle. He also fails to show any prejudice.

CONCLUSION

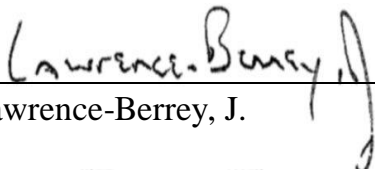
We affirm Robert Abbett's convictions and sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

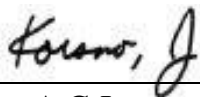


\_\_\_\_\_  
Fearing, J.

WE CONCUR:



\_\_\_\_\_  
Lawrence-Berrey, J.



\_\_\_\_\_  
Korsmo, A.C.J.

**December 04, 2020 - 9:45 AM**

**Filing Petition for Review**

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