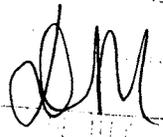


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COURT OF APPEALS

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BY  DATE

NO. 34109-3-II  
COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

DANIEL NORMAN AGUE-MASTERS,

Appellant,

---

APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
The Honorable Chris Wickham, Judge  
Cause No. 01-1-00560-2

---

BRIEF OF APPELLANT

---

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in failing to enter written findings of fact and conclusions of law following the denial of Ague's motion to suppress.
02. In denying Ague's motion to suppress, the trial court erred in entering its oral ruling finding that the police had legitimate business in going upon the property.
03. In denying Ague's motion to suppress, the trial court erred in entering its oral ruling finding that the premises was impliedly open to the public.
04. In denying Ague's motion to suppress, the trial court erred in entering its oral ruling finding that a reasonable respectable who had business with the residence would not assume that the premises was not open to the public because of the no trespassing sign.
05. In denying Ague's motion to suppress, the trial court erred in entering its oral ruling finding that there was nothing improper or illegal about the police going to the rear of the house because they heard a noise in that area.
06. In denying Ague's motion to suppress, the trial court erred in entering its oral ruling finding that the seizure and search of John Layton was legal.

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07. In denying Ague's motion to suppress, the trial court erred in entering its oral ruling finding that Ague had no standing to contest the search of John Layton.
08. In denying Ague's motion to suppress, the trial court erred in entering its oral ruling finding that even if Ague had standing to contest the search of John Layton, the search of Layton and the property was legal.
09. In denying Ague's motion to suppress, the trial court erred in entering its oral ruling finding that all information about John Layton and his association with methamphetamine was admissible evidence.
10. In denying Ague's motion to suppress, the trial court erred in entering its oral ruling finding that the evidence before the magistrate was sufficient for the issuance of the search warrant for John Layton and the premises.
11. The trial court violated Ague's Sixth Amendment right to a jury trial under Blakely v. Washington when it failed to sentence him under the statute in effect at the time of the commission of the offense, RCW 69.50.401(a)(1)(ii), where the jury was not required to identify the particular substance underlying Ague's conviction for manufacturing methamphetamine and where it cannot be determined based on the evidence presented that the jury premised Ague's conviction on methamphetamine base.

12. The trial court erred in permitting Ague to be represented by counsel who provided ineffective assistance by failing to object to the trial court's failure to sentence Ague under the statute in effect at the time of the offense, RCW 69.50.401(a)(1)(ii), and by failing to argue that a sentence under this statute based on the evidence presented would have violated Ague's Sixth Amendment right to a jury trial under Blakely v. Washington.
13. The trial court erred in allowing the jury to find Ague subject to the sentence enhancement for child on the premises where the evidence does not support such a finding.
14. The trial court erred in imposing a 60 month sentence enhancement for child on the premises that exceeded the statutory authority.
15. The trial court erred in permitting Ague to be represented by counsel who provided ineffective assistance by failing to object to the trial court's imposition of a sentence enhancement of 60 months for child on the premises that exceeded the statutory authority.
16. The trial court erred in allowing the jury to find Ague subject to the sentence enhancement for armed with a firearm where the evidence does not support such a finding.
17. The trial court erred in imposing a \$100 felony DNA collection fee.

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18. The trial court erred in imposing a sentence that exceeded the statutory maximum for the crime of conviction.
19. The trial court erred in permitting Ague to be represented by counsel who provided ineffective assistance by failing to object to the trial court's imposition of a sentence that exceeded the statutory maximum for the crime of conviction.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether Ague's conviction for manufacturing methamphetamine should be reversed and dismissed for the State's failure to file written findings of fact and conclusions of law following the denial of Ague's motion to suppress? [Assignment of Error No. 1].
02. Whether in denying Ague's motion to suppress, the trial court erred in entering its oral ruling finding that the evidence before the magistrate was sufficient for the issuance of the search warrant for John Layton and the premises? [Assignment of Error Nos. 2-10].
03. Whether with or without other illegally obtained information that should have been excised by the trial court, the application and affidavit for the telephonic search warrant failed to establish probable cause for issuance of the search warrant? [Assignment of Error Nos. 2-10].
04. Whether the trial court violated Ague's Sixth Amendment right to a jury trial under Blakely v. Washington when it failed to sentence him under the statute in effect at the time of the commission of the offense,

RCW 69.50.401(a)(1)(ii), where the jury was not required to identify the particular substance underlying Ague's conviction for manufacturing methamphetamine and where it cannot be determined based on the evidence presented that the jury premised Ague's conviction on methamphetamine base. [Assignment of Error No. 11].

05. Whether the trial court erred in permitting Ague to be represented by counsel who provided ineffective assistance by failing to object to the trial court's failure to sentence Ague under the statute in effect at the time of the offense, RCW 69.50.401(a)(1)(ii), and by failing to argue that a sentence under this statute based on the evidence presented would have violated Ague's Sixth Amendment right to a jury trial under Blakely v. Washington. [Assignment of Error No. 12].
06. Whether there was sufficient evidence to support the sentence enhancement for child on the premises? [Assignment of Error No. 13].
07. Whether the trial court erred in imposing a 60 month sentence enhancement for child on the premises that exceeded the statutory authority? [Assignment of Error No. 14].
08. Whether the trial court erred in permitting Ague to be represented by counsel who provided ineffective assistance by failing to object to the trial court's imposition of a sentence enhancement of 60 months for child on the premises that exceeded the statutory authority? [Assignment of Error No. 15].
09. Whether there was sufficient evidence to support the sentence enhancement for armed with a firearm? [Assignment of Error No. 16].

10. Whether the trial court erred in imposing a \$100 felony DNA collection fee under RCW 43.43.7541 for an offense committed before July 1, 2002? [Assignment of Error No. 17].
11. Whether, as a matter of law, the trial court erred in imposing a sentence that exceeded the statutory maximum for the crime of conviction? [Assignment of Error No. 18].
12. Whether Ague was prejudiced by his counsel's failure to object to the trial court's imposition of a sentence that exceeded the statutory maximum for the crime of conviction? [Assignment of Error No. 19].

C. STATEMENT OF THE CASE

01. Procedural Facts

Daniel Norman Ague-Masters (Ague) was charged by second amended information filed in Thurston County Superior Court on September 6, 2005, with unlawful manufacture of a controlled substance, to-wit: methamphetamine, with firearm and person under 18 upon the premises enhancements, contrary to RCWs 69.50.401(a)(1)(ii), 9.94A.128, 9.94A.310(3)(b) and 9.94A.125. [CP 113].

The court denied Ague's pretrial motion to suppress evidence but did not enter written findings of fact and conclusions of law. [RP 11/19/01 63-79].

Trial to a jury commenced on September 6, 2005, the Honorable Chris Wickham presiding. The jury returned a verdict of guilty as charged, including enhancements. [CP 135-37].

Ague was sentenced within his standard sentence range, including enhancements, and timely notice of this appeal followed. [CP 143-152].

02. Substantive Facts: CrR 3.6 Hearing

On March 31, 2001, Deputy Jason Casebolt, while driving his patrol vehicle, observed a vehicle parked “in a driveway” at a residence and “ran a license plate on that vehicle(,)” which revealed that it was registered to John Steven Hamm, the subject of a “felony warrant for escape(,)” [RP 11/19/01 (morning session) 6, 12-13]. Casebolt had no idea how or when the vehicle arrived at the location. [RP 11/19/01 (morning session) 39]. He also did not know Hamm “by face or anything else or previous contact(,)” and did not know who lived at the residence where the car was parked. [RP 11/19/01 (morning session) 11, 13].

Casebolt contacted Deputy Hamilton in the “late morning” and the two went to the residence to look “for the person who was driving” the car registered to Hamm. [RP 11/19/01 (morning session) 13, 61]. They were going to contact Hamm and serve the arrest warrant. [RP 11/19/01 (morning session) 75]. Both deputies were in “Thurston County Sheriff’s Office uniforms.” [RP 11/19/01 (morning session) 69]. They entered the

premises through an open gate on the west end [RP 11/19/01 (morning session) 10, 13, 64, 73; RP 11/19/01 (afternoon session) 9-10]. “(I)t was definitely open.” [RP 11/19/01 (morning session) 42]. Casebolt noticed a sign hanging on what he thought was a tree above the gate at the head of the driveway. [RP 11/19/01 (morning session) 14-15, 43, 65]. Neither Hamilton nor Michael Morrison, a ride-alone with Casebolt that day, noticed the sign. [RP 11/19/01 (morning session) 64; RP 11/19/01 (afternoon session) 6, 10]. “It says something to the effect of keep out or no trespassing or no hunting or something to that effect.” [RP 11/19/01 (morning session) 14-15]. Casebolt admitted that the sign “probably did” concern him that the people who lived at the property did not want anyone coming down the driveway. [RP 11/19/01 (morning session) 14]. Even though Casebolt guessed “that is why somebody would post” such a sign [RP 11/19/01 (morning session) 14](,) he continued down the main driveway to the house, explaining:

I’m looking, going to make contact with the homeowner and ask him if he knows where the driver of this vehicle is because he has a felony warrant.

[RP 11/19/01 (morning session) 15].

Casebolt walked up to the mobile home and knocked on the door.

[RP 11/19/01 (morning session) 17]; Hamilton did not remember Casebolt

knocking on the door. [RP 11/19/01 (morning session) 66, 78, 81]. After knocking on the door for a minute and a half and getting no response, Casebolt could hear something outback and walked to the back of the house and contacted a person “who was welding on a Ford Broncho (sic).” [RP 11/19/01 (morning session) 17, 50]. “I was just following my ear to the sound. That is why I went back there.” [RP 11/19/01 (morning session) 18].

I contacted the individual that was welding on the bumper of this Ford Broncho (sic). And I asked him my first question. I said, Hey, is the homeowner home? And he was just very evasive with me. He didn't want to pay any attention to me. Almost like I wasn't even there.

After a short brief moment of - - I'm trying to contact the homeowner, looking for somebody here on the property, I asked, Is Steve here, Steve Hamm here? The guy associated with the vehicle.

He said, I don't know any Steve Hamm but I'll get the homeowner for you.

[RP 11/19/01 (morning session) 18-19].

The person then went to the backdoor of the house and began knocking on the door for at least two minutes, identifying himself as Steve and saying he had to call the homeowner, but the person inside the house would not open the backdoor. [RP 11/19/01 (morning session) 20].

And at the last second somebody opens up the door, a female. I could see it was a female. And he just

literally bolts into the house, I mean like a scared deer or something, he just jumps up and he runs inside the house.

[RP 11/19/01 (morning session) 21].

At this point, Casebolt is “beginning to think” that this person is Steve Hamm, “the person that I’m looking for.” [RP 21]. When the person attempted to shut the door, Casebolt grabbed on to him and “pulled him out of the house,” and “handcuffed him. Detained him, because, again, I’m thinking this is who it is.” [RP 11/19/01 (morning session) 23-24]. Hamilton told the person he was being detained “because he’s trying to get away from us.” [RP 11/19/01 (morning session) 68]. Casebolt had received a description of Hamm when he was informed of the outstanding warrant, which he compared to the person he had handcuffed.

Height and weight was consistent. Little things like eye color and stuff like that I had to later go back to my vehicle and confirm. But height and weight definitely.

[RP 11/19/01 (morning session) 23].

(W)hen I went back and looked at my MCT his eye color and eye color of the wanted person did not match.

[RP 11/19/01 (morning session) 31].

The air was saturated with the smell of propane. [RP 11/19/01 (morning session) 24, 74]. The person denied he was Hamm but would

not give Casebolt his name. [RP 11/19/01 (morning session) 24]. They then went to Casebolt's vehicle because it "started raining heavy." [RP 11/19/01 (morning session) 25]. "I told him, I'll get you out of the rain while we figure out who you are." [RP 11/19/01 (morning session) 26]. According to Hamilton, about five minutes after the detained person was brought down to Casebolt's vehicle [RP 11/19/01 (morning session) 72], the young female who had been in the house came out and made it clear to Casebolt and Hamilton that they were trespassing on the property and that they were to leave. [RP 11/19/01 (morning session) 46, 72, 77-78]. Casebolt ignored her and admitted he may have told her to shut up and go back into the house. "A lot of things were said during that time. I did not write anything down." [RP 11/19/01 (morning session) 46].

After the person denied having a weapon, Casebolt patted him down for weapons before putting him in his car and discovered a large knife inside his jacket and a large prescription pill bottle, "a half by five inches." [RP 11/19/01 (morning session) 26-27, 52]. "I had to pull the pill bottle out to get access to the knife." [RP 11/19/01 (morning session) 27].

When I found the knife I pulled the knife out of his pocket. Pill bottle was in there. I pulled everything out of the pocket. Everything in there along with the knife.

....

I had to pull the pill bottle out to get access to the knife.

....

It had a label on it. It was a label that was prescribed to a female.

....

Specifically labeled pseudoephedrine.

[RP 11/19/01 (morning session) 27-28].

Deputy Hamilton began talking to the young female who had come out of the house while Casebolt questioned the person he had detained. “He wasn’t going to tell me who he was.” [RP 11/19/01 (morning session) 29]. A check of a Washington State Identification card taken from the person revealed “there were no warrants on this individual.” [RP 11/19/01 (morning session) 30]. “I was confident by the time we left he was not John Steven Hamm.” [RP 11/19/01 (morning session) 31]. According to Hamilton, “we said we’ve been here 15, 20 minutes. Now we know it’s no Mr. Hamm. So we left.” [RP 11/19/01 (morning session) 71].

Eugene Howell testified for defense that the heating system in the trailer on the property ran on propane and that the main gates to the property were locked at night. [RP 11/19/01 (afternoon session) 12-13, 15]. “If I went over there at eight or 9:00 in the morning, the gates were all locked. But if I went back at 11, one or two, no, they weren’t locked.” [RP 11/19/01 (afternoon session) 16].

03. Substantive Facts: Trial

Deputy Hamilton assisted in the execution of the search warrant on April 3, 2001. [RP 09/07/05 129]. Ague was arrested at the residence. [RP 09/07/05 94]. His daughter, Starcia Ague, was released to a relative. [RP 09/07/05 94]. Hamilton described the daughter “as “(a) young teen, maybe 12 or 13 years old.” [RP 09/07/05 136]. Detective David Haller referred to Starcia as a “juvenile,” which he construed to be under the age of 18. [RP 09/07/05 84].

There was a search of the residence and outbuildings and vehicles located on the property. [RP 09/07/05 86]. The 12 x 12 shed contained “some pressurized gas cylinders and glassware and a very strong chemical odor(.)” [RP 09/07/05 135]. No items (“papers or anything else”) associated with Ague nor any weapons were found in the shed, which was located approximately 100 feet from the residence, a single-wide mobile home. [RP 09/07/05 62, 70, 72-73]. The only place where alleged lab-related items were discovered was within the shed. [RP 09/07/05 79]. Items seized in the residence included miscellaneous energy bills and other correspondence located in the bedroom that were addressed to the place being searched [RP 09/07/05 88, 91-92]. A safe was found in the master bedroom. [RP 09/07/05 62, 100]. “(A) locksmith had to come out and open it(.)” [RP 09/07/05 111, 165]. Items located inside the safe

included notes and records, a scale, four pistols, six shotguns and two rifles. [RP 09/07/05 154-164; CP 140]. A scale was found in the safe located in the shed or shop area. [RP 09/07/05 164-65, 167]. None of the items processed at the scene contained Ague's fingerprints. [RP 09/07/05 109-110].

Jane Boysen, a forensic scientist with the Washington State Patrol Crime Laboratory, discussed the process by which methamphetamine is manufactured [RP 09/07/05 173-77, 182-86], reviewed several items taken from scene, including liquids and crystal residue, and concluded that the substances indicated the presence of methamphetamine and were consistent with the manufacture of methamphetamine. [RP 09/07/05 121-25, 178-182].

Ague rested without presenting evidence. RP 09/08/05 207-08].

D. ARGUMENT

01. AGUE'S CONVICTION FOR MANUFACTURING METHAMPHETAMINE SHOULD BE REVERSED AND DISMISSED FOR THE STATE'S FAILURE TO FILE WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING THE DENIAL OF AGUE'S MOTION TO SUPPRESS.

As of this date, no written findings of fact and

conclusions of law have been filed following the denial of Ague's motion to suppress, even though the State assured the trial court that it would prepare the findings and conclusions at the completion of the hearing on November 19, 2001. [RP 11/19/01 (afternoon session) 79].

As stated by our Supreme Court:

CrR 6.1(d) requires entry of written findings of fact and conclusions of law at the conclusion of a bench trial. (footnote omitted). The purpose of CrR 6.1(d)'s requirement of written findings of fact and conclusions of law is to enable an appellate court to review the questions raised on appeal. See City of Bremerton v. Fisk, 4 Wn. App. 961, 962, 486 P.2d 294 (1971), disapproved on other grounds by State v. Souza, 60 Wn. App. 534, 805 P.2d 237 (1991); cf. State v. McGary, 37 Wn. App. 856, 861, 683 P.2d 1125 (1984) (JuCR 7.11); State v. Stock, 44 Wn. App. 467, 477, 722 P.2d 1330 (1986) (CrR 3.6)...A trial court's oral opinion and memorandum opinion are no more than oral expressions of the court's informal opinion at the time rendered. State v. Mallory, 69 Wn.2d 532, 533, 419 P.2d 324 (1966). An oral opinion "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." Id at 533-34[.]

State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998).

The above rationale is also applicable to CrR 3.6 hearings. CrR

3.6(b) states:

If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

On appeal, the court reviews solely whether the trial court's findings of fact are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law. Mairs v.

Department of Licensing, 70 Wn. App. 541, 545, 954 P.2d 665 (1993).

Unchallenged findings of fact are verities on appeal and an appellate court “will review only those facts to which error has been assigned.” State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). The failure to challenge findings of fact is not a technical flaw contemplated in RAP 10.3(a)(3).  
See State v. Olson, 126 Wn.2d 315, 323, 893 P.2d 629 (1995).

For the reasons stated in Head, supra, without these written findings, which are long overdue, Ague is prejudiced in that he is unable to properly assign error to the trial court’s written findings and conclusions, and to prepare the appropriate analysis of the issues presented by the suppression hearing, with the result that he is without recourse to properly raise issues pertaining to the denial of his motion to suppress.

Based on the above, Ague respectfully requests this court reverse and dismiss his conviction for manufacturing methamphetamine because of the State’s failure to enter written findings and conclusions following the denial of his motion to suppress.

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02. WITH OR WITHOUT OTHER ILLEGALLY OBTAINED INFORMATION THAT SHOULD HAVE BEEN EXCISED BY THE TRIAL COURT, THE APPLICATION AND AFFIDAVIT FOR THE TELEPHONIC SEARCH WARRANT FAILS TO ESTABLISH PROBABLE CAUSE FOR ISSUANCE OF THE SEARCH WARRANT.<sup>1</sup>

02.1 Review of Application and Affidavit

In the Application and Affidavit for Telephonic Search Warrant executed on April 2, 2001, attached hereto as Exhibit "A", Deputy Steve Hamilton explained the facts [CP 56-57] previously set forth in the CrR 3.6 hearing, supra at 7-12, and requested a search warrant for (1) Steven Layton, who it turned out was the person Hamilton and Deputy Casebolt had contacted at the residence two days earlier on March 31, and (2) the premises where they had contacted Layton. [CP 54-55].

(Judge). OK, could you clarify for me specifically what elements you think lead ... lead to the fact that there's a meth operation there. You mentioned a couple of them, but you ... you want to put them all together for me?

(Hamilton). Right. Your Honor, based on the fact that the ... all of the people associated with the residence are known drug

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<sup>1</sup> This argument is presented should this court decide not to reverse Ague's conviction for unlawful manufacture of methamphetamine for the State's failure to file written findings and conclusions.

users, traffickers, uh convicted felons uh to the uh ... primary suspect I'm looking for, Mr. Layton ... uh has ... is a non methamphetamine trafficker and user. He was in possession of a ... what I consider a large amount of pseudoephedrine pills uh, in a prescription form that did not belong to him. Uh...

(Judge). OK, when you say large amount, more than personal use?

(Hamilton). Yes, defin...

(Judge). (Unintelligible)

(Hamilton). ...definitely. A full prescription bottle of uh ... uh ... the ... it's one of the large prescription bottles. Probably four inches tall, full of very small tablets. I would say 150 probably closer to 200 ephedrine ... pseudoephedrine pills.

(Judge). And what significance does that have to you?

(Hamilton). Pseudoephedrine is one of the primary precursors for the manufacture of methamphetamine.

(Judge). OK. And...

(Hamilton). Al...

(Judge). Go ahead.

(Hamilton). Also given the fact that there were three, what appeared to be brand new propane tanks on the back porch. And a very strong odor, like they had purged these tanks. The tanks need to be purged of all the uh propane that's inside them, so they can refill these tanks with anhydrous ammonia which there again, is a primary precursor to the manufacture of this controlled substance.

(Judge). OK, anything else?

(Hamilton). No Your Honor, I think that ... I'm thinking that covers it.

....

(Judge). Alright. I'll authorize the warrant for the prom ... property and premises that you described and also for the individual you described....

[CP 58-60].

## 02.2 Trial Court Ruling

While the trial court did not enter written findings of fact and conclusions of law, it did enter an oral ruling, which is summarized as follows:

01. The police had legitimate business on the property for the purpose of inquiring of the residents whether John Steven Hamm, the person associated with an arrest warrant,

was in fact on the property or lived there.  
[RP 11/19/01 (afternoon session) 65-66, 77].

02. The police entered an area impliedly open to the public and didn't deviate from that impliedly open area when they contacted John Layton. [RP 11/19/01 (afternoon session) 67-68, 77].
03. Based upon the location of the no trespassing sign and the location of the residence, a reasonable respectable citizen who had business with the residence would not assume that the premises was not open to the public. [RP 11/19/01 (afternoon session) 68].
04. There was nothing improper or illegal about the police going to the rear of the house because they heard noise in that area. [RP 11/19/01 (afternoon session) 69-70].
05. Ague has no standing to contest the search of John Layton. [RP 11/19/01 (afternoon session) 71, 77].
06. Even if Ague had standing to contest the search of Layton, the search of Layton was still legal. [RP 11/19/01 (afternoon session) 71-73, 77].
07. The Aguilar-Spinelli test was not satisfied as to the following information, which needs to be excised from the affidavit: that Ague was the renter of the premises, that Ague is a convicted felon, who has numerous arrests for drug charges and violent crimes, that people who stay at the residence or frequent it have misdemeanor convictions or warrants, felony convictions, including VUCSA offenses, and that all people

associated with the residence other than John Layton are known drug users, traffickers, convicted felons. [RP 11/19/01 (afternoon session) 76-77; CP 37-38].

08. The evidence before the magistrate was sufficient for the issuance of a search warrant for John Layton and the premises. [RP 11/19/01 (afternoon session) 78].

### 02.3 Overview Applicable Law

Probable cause is established in an affidavit supporting a search warrant by setting forth objective facts and circumstances, which, if believed, would lead a neutral and detached person to conclude, more probably than not, that evidence of a crime will be found at the search site. In re Det. of Peterson, 145 Wn.2d 789, 797, 42 P.3d 952 (2002). When information contained in an affidavit of probable cause for a search warrant was obtained, however, by an unconstitutional search, that information may not be used to support the warrant. State v. Ross, 141 Wn.2d 304, 311-12, 4 P.3d 130 (2000).

As a prerequisite to asserting an unconstitutional invasion of rights, a person must demonstrate that he or she has a legitimate expectation of privacy in the area or item searched. State v. Goucher, 124 Wn.2d 778, 787, 881 P.2d 210 (1994); State v. Jones, 68 Wn. App. 843, 847, 845 P.2d 1358, review denied, 122 Wn.2d 1018 (1997). A legitimate expectation of privacy exists if the “individual has manifested an actual subjective

expectation of privacy in the area searched or item seized and society recognizes the individual's expectation as reasonable." State v. Gocken, 71 Wn. App. 267, 279, 857 P.2d 1074, review denied, 123 Wn.2d 1024 (1994); State v. Jones, 146 Wn.2d 328, 331-34, 45 P.3d 1062 (2001); State v. Kypreos, 115 Wn. App. 207, 211-12, 61 P.3d 352, reviewed denied, 149 Wn.2d 1029 (2003).

The Fourth Amendment and art. I, § 7 of the Washington Constitution provide that warrantless searches are per se illegal unless they come within one of the few, narrow exceptions to the warrant requirement. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). In each case, the State bears the burden of demonstrating that a warrantless search falls within an exception. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999).

The exceptions to the requirement of a warrant have fallen into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and Terry investigative stops.

Hendrickson, 129 Wn.2d at 71.

One exception to the warrant requirement is a Terry investigative stop. Hendrickson, 129 Wn.2d at 71; see also Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). To justify such a stop under the Fourth Amendment and art. I, § 7, a police officer 'must be able to point to

particular facts from which he reasonably inferred that the individual was armed and dangerous.’ State v. Galbert, 70 Wn. App. 721, 725, 855 P.2d 310 (1993) (quoting Sibron v. New York, 392 U.S. 40, 64, 20 L. Ed. 2d 917, 88 S. Ct. 1889 (1968)).

“A ‘generalized suspicion’ is insufficient to justify a frisk”, State v. Sweet, 44 Wn. App. 226, 234, 721 P.2d 560, review denied, 107 Wn.2d 1001 (1986), even when a person is present at a location the police are authorized to search by a valid warrant. Ybarra v. Illinois, 444 U.S. 85, 92-94, 62 L. Ed. 2d 238, 100 S. Ct. 338 (1979); State v. Broadnax, 98 Wn.2d at 295.

State v. Galbert, 70 Wn. App. at 725.

Absent exigent circumstances, “(t)he Fourth Amendment ... prohibits the police from making a non consensual entry into a suspect’s home in order to make a routine felony arrest.” Payton v. New York, 445 U.S. 573, 590, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). The Washington Constitution, art. I, § 7, provides: “No person shall be disturbed in his private affairs, or his home invaded, without the authority of law(,)” which offers heightened protection. State v. Chrisman, 100 Wn.2d 814, 818, 676 P.2d 419 (1994).

Moreover, an arrest warrant for a suspect only suffices to allow entry into the suspect’s residence and not the residence of a third person. Hocker v. Woody, 95 Wn.2d 822, 825, 631 P.2d 372 (1981).

In deciding whether exigent circumstances justify a warrantless entry and arrest of a felony suspect, courts examine a number of relevant factors:

(1) a grave offense, particularly a crime of violence, is involved; (2) the suspect is reasonably believed to be armed; (3) there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) the suspect is likely to escape if not swiftly apprehended; and (6) the entry is made peaceably.

State v. Terrovona, 105 Wn.2d 632, 644, 716 P.2d 295 (1986).

An officer holds the same license to intrude as does a “reasonably respected citizen.” State v. Seagull, 95 Wn.2d 898, 902, 632 P.2d 44 (1981). Art. I, § 7 of our state constitution allows individuals to protect their private affairs in open fields if they have manifested their desire to exclude others from their open fields. State v. Johnson, 75 Wn. App. 692, 707, 879 P.2d 984 (1994), reviewed denied, 126 Wn.2d 1004 (1995).

Factors to determine if police exceeded the scope of the open view doctrine include whether the police: “(1) spied into the house; (2) acted secretly; (3) approached the house in daylight; (4) used the normal, most direct access route to the house; (5) attempted to talk with the resident; (6) created an artificial vantage point; and (7) made the discovery

accidentally.” State v. Myers, 117 Wn.2d 332, 345, 815 P.2d 761 (1991)  
(citing State v. Seagull, 95 Wn.2d at 905).

If a law enforcement officer or agent does not go beyond the area of the residence that is impliedly open to the public, such as the driveway, the walkway, or an access route leading to the residence, no privacy interest is invaded. Whether the intrusion into an area has substantially and unreasonably exceeded the scope of an implied invitation depends on the facts and circumstances of the particular case.

State v. Maxfield, 125 Wn.2d 378, 398, 886 P.2d 123 (1994) (footnotes omitted).

Before examining the Seagull inquiry, however, the first requirement of the “open view doctrine,” must be satisfied, i.e., whether the officers were conducting legitimate business when they entered the impliedly open areas of the curtilage. State v. Ross, 141 Wn.2d at 313.

In State v. Maddox, 152 Wn.2d 499, 505-06, 98 P.3d 1199 (2004), our Supreme Court addressed staleness:

Common sense is the test for staleness of information in a search warrant affidavit (citations omitted). The information is not stale for purposes of probable cause if the facts and circumstances in the affidavit support a commonsense determination that there is continuing and contemporaneous possession of the property intended to be seized (citations omitted).

An affidavit that fails to establish probable cause for a search is

invalid, and all evidence obtained as a result of the illegal search is tainted and must be suppressed. See State v. Huft, 106 Wn.2d 206, 720 P.2d 838 (1986).

#### 02.4 Argument

In light of the information excised by the trial court from the Application and Affidavit for the Telephonic Search Warrant, what remained of the Application and Affidavit did not support a finding of probable cause, whether viewed with or without other illegally obtained information that should have been excised by the trial court from the Application and Affidavit.

##### 02.4.1 Application and Affidavit Including Other Illegally Obtained Information

After excising the above-indicated information, supra at 20-21, the trial court was forced to rely upon a combination of the following in finding probable cause for issuance of the search warrant: (1) John Layton, who has a felony drug related criminal history and numerous misdemeanor convictions, was on the property and had fooled the police as to his identity two days earlier and was in possession of an estimated “150 to 200 pills of pseudoephedrine,” which is one of the primary precursors for the manufacture of methamphetamine [CP 55-56]; (2) the backyard area had a chemical “smell of propane” and

someone may have been purging the three propane bottles found on the back porch [CP 56]; and (3) the residence appeared to be disorganized with a lot of “quote projects” in the yard and engine assemblies and whatnot, which Deputy Hamilton believed was indicative of the “type of behavior when you’re using methamphetamine.” [CP 57].

Probable cause cannot be established by merely showing that a drug dealer lives at a particular residence. State v. Thein, 138 Wn.2d 133, 151, 977 P.2d 582 (1999); State v. McGovern, 111 Wn. App. 495, 499, 45 P.3d 624 (2002). Although the affidavit addresses the criminal history for John Layton, it cannot be reasonably inferred from this information that anyone was currently involved in criminal activity at the residence sought to be searched. And since the police during their initial encounter two days earlier with Mr. Layton found no reason to permanently seize the pills from him that were identified as pseudoephedrine, this is insufficient to support a finding of probable cause, especially since there was no indication that Layton, who had fooled the police and given them a false name two days earlier, would still be at the property at the time of the execution of the search warrant. Common sense does not support such a finding. See State v. Maddox, 152 Wn.2d at 505-06. And common sense also does not support a finding of probable cause based on Hamilton’s conclusion that a disorganized yard is indicative of drug use.

Concomitantly, when an officer bases a probable cause affidavit on detection of a controlled substance odor, a search warrant may be justified if that officer's experience and training in detecting such odors is in the search warrant affidavit. United States v. Kuntz, 504 F. Supp. 706, 710 (S.D. N.Y. (1980), review denied, 124 Wn.2d 1029, 883 P.2d 327 (1994). While the Application and Affidavit indicates Deputy Hamilton has multiple drug investigations, written numerous search warrants and has ongoing drug investigation experience [CP 58], it does not detail his experiences with clandestine methamphetamine labs nor his proven ability to discern specific odors associated with the manufacture of methamphetamine.

#### 02.4.2 Application and Affidavit Without Other Illegally Obtained Information

All of the above information used to support issuance of the search warrant was illegally obtained following the officer's intrusion upon the premises, and as such may not be used to support the warrant. State v. Ross, 141 Wn.2d at 311-12.

Ague had a legitimate expectation of privacy in the residence where he was residing and in the surrounding property searched by the police, in addition to the warrantless search prior to the issuance of the warrant of the person the police believed to be Hamm, who was "pulled ...

out of the house.” [RP 11/19/01 (morning session) 23-24]. State v. Kypreos, 115 Wn.2d at 211-12; State v. Jones, 146 Wn.2d at 331-34.

The State cannot sustain its burden of demonstrating that the warrantless search of the property and/or Layton falls within an exception to the warrant requirement. State v. Parker, 139 Wn.2d at 496. Initially, the reason for the police going onto the property is problematic. Deputy Casebolt never explained why he ran the license check on the vehicle and never checked to see if the property where the vehicle was parked belonged to Hamm, admitting on cross examination that he did not know what Hamm looked like and had no idea how the vehicle had got there or how long it had been there. [RP 11/19/01 39]. In addition, as Casebolt “had received information in reference to this house in the past [RP 11/19/01 (morning session) 13](,)” it appears the officers’ purpose for driving onto the property was not to attempt to make contact with Mr. Hamm but to obtain information in order to prepare an affidavit in order to obtain a search warrant, which they did. The officers were not lawfully on the property conducting legitimate business. See State v. Ross, 141 Wn.2d at 313.

And while the existence of a no trespassing sign on the property is not dispositive as to whether the property was impliedly open to the public, State v. Gave, 77 Wn. App. 333, 338, 890 P.2d 1088 (1995), in this

case the no trespassing sign posted near the entrance to the property is of great significance because Deputy Casebolt admitted that he saw the sign and that the sign “probably did” concern him that the people who lived at the property did not want anyone coming down the driveway. [RP 11/19/01 (morning session) 14]. In this context, it is less than comforting to find the deputies’ entry onto the property not unreasonable, especially given the manner in which they proceeded down the driveway and then around to the backyard. Under these facts, it cannot be said that the property was impliedly open to the public.

Nor can the seizure and search of Layton be justified as a Terry investigative stop. Seeing that Layton had no obligation to speak with the deputies, there were no exigent circumstances under State v. Terrovona, 105 Wn.2d at 644, and the deputies had no authority to “pull him out of the house [RP 11/19/01 (morning session) 24](,) where Ague clearly had an expectation of privacy, without first obtaining an arrest warrant. See State v. Payton, *supra* and Steagald v. United States, 451 U.S. 204, 221, 101 S. Ct. 1642, 68 L. Ed. 2d. 38 (1981) (a search warrant is required to enter the home of a third person in order to effect an arrest).

#### 02.5 Conclusion

The Application and Affidavit for the

Telephonic Search Warrant, whether viewed with or without the other illegally obtained information that should have been excised by the trial court, did not establish probable cause, the warrant should not have issued, and the trial court erred in not suppressing all evidence seized pursuant thereto. Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); State v. Soto-Garcia, 68 Wn. App. 20, 27-29, 841 P.2d 1271 (1992).

03. THE TRIAL COURT VIOLATED AGUE'S SIXTH AMENDMENT RIGHT TO A JURY TRIAL UNDER BLAKELY V. WASHINGTON WHEN IT FAILED TO SENTENCE HIM UNDER THE STATUTE IN EFFECT AT THE TIME OF THE COMMISSION OF THE OFFENSE, RCW 69.50.401(a)(1)(ii), WHERE THE JURY WAS NOT REQUIRED TO IDENTIFY THE PARTICULAR SUBSTANCE UNDERLYING AGUE'S CONVICTION FOR UNLAWFUL MANUFACTURE OF METHAMPHETAMINE AND WHERE IT CANNOT BE DETERMINED BASED ON THE EVIDENCE PRESENTED THAT THE JURY PREMISED AGUE'S CONVICTION ON METHAMPHETAMINE BASE.

03.1 Sentencing Hearing

At the sentencing hearing, the parties agreed that under the law in effect at the time of the offense, April 3, 2001, Ague's sentence range, based on an offender score of two, without consideration for the enhancements, was 62 to 82 months. See former

RCW 9.94A.360. [RP 11/04/05 3, 5]. The sentencing court, however, at the request of Ague's counsel, sentenced Ague under RCW 9.94A.517, which is applicable for offenses occurring after June 30, 2003, and which provides a sentencing range of 51 to 68 months. [RP 11/04/05 7].

Without having had additional briefing or time to evaluate the arguments of the parties, I will adopt the lower of the two ranges, attempting to show levity toward the defendant, and will select the mid point of that standard range or 60 months as the base sentence for him. With the enhancements, the total sentence will be 120 months.

[RP 11/04/05 7].

### 03.2 Argument

Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (citing State v. Moen, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996)). And while a defendant generally cannot challenge a presumptive standard range sentence, he or she can challenge the procedure by which a sentence within the standard range was imposed. State v. Ammons, 105 Wn.2d 175, 183, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986).

The Washington Supreme Court has held that that a sentence in excess of statutory authority is subject to collateral attack and "that a defendant cannot agree to punishment in excess of that which the

Legislature has established.” In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). In defining the limitations to this holding, the court, citing State v. Majors, 94 Wn.2d 354, 616 P.2d 1237 (1980) as instructional, went on to explain that waiver does not apply where, as here, the alleged sentencing error is a legal error leading to an excessive sentence, as opposed to where the alleged error “involves an agreement to facts (e.g., agrees to be designated as habitual offender in hopes of obtaining a shorter sentence), later disputed, or if the alleged error involves a matter of trial court discretion.” Id.

Since there was “simply no question that Goodwin’s offender score was miscalculated, and his sentence is as a matter of law in excess of what is statutorily permitted for his crimes given a correct offender score,” the court held that Goodwin “cannot agree to a sentence in excess to that statutorily authorized.” In re Goodwin, 146 Wn.2d at 876.

At the time of the charging period for Ague’s offense, April 3, 2001, RCW 69.50.401(a)(1)(ii)<sup>2</sup> read, in pertinent part:

(a) Except as authorized by this chapter, it is unlawful for any person to manufacture ... a controlled substance.

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<sup>2</sup> Former RCW 69.50.401(a)(1)(ii) was amended in 2003, effective date July 1, 2004, Laws 2003, ch. 53 § 331, and then again in 2005, effective July 24, 2005, Laws 2005, ch. 218 § 1, the latter of which inserted “including its salts, isomers, and salts of isomers” in 2(a), three times in 2(b), and in 2(d).

(1) Any person who violates this subsection with respect to:

....

(ii) amphetamine or methamphetamine, is guilty of a crime and upon conviction may be imprisoned for not more than ten years....

(iii) any other controlled substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years.

A criminal defendant has a constitutional right to be charged and sentenced under the law in effect at the time of the commission of the crime. See State v. Lindsey, 194 Wash. 129, 77 P.2d 596 (1938); State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004).

Ague should have been sentenced under former RCW 69.50.401(a)(1)(ii), which was in effect at the time of the commission of his offense, and such a sentence would have violated his Sixth Amendment right to a jury trial under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). “(T)rial court errors implicating constitutional rights may be raised for the first time on appeal.” State v. Thomas, 150 Wn.2d 821, 868, 83 P.3d 970 (2004); RAP 2.5(a). In addition, challenges to the sufficiency of the evidence implicate due process rights and may be raised for the first time on appeal. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983).

In State v. Morris, 123 Wn. App. 467, 472-73, 98 P.3d 513 (2004), this court held that the language of former RCW 69.50.401(a)(1)(ii) is “unambiguous,” and that “its prohibition only covers methamphetamine in its pure form, its base” and not “methamphetamine hydrochloride.” State v. Morris, 123 Wn. App. at 474.<sup>3</sup>; See State v. Evans, 129 Wn. App. 211, 118 P.3d 419 (2005).

The identity of a “controlled substance is an element of the offense where it aggravates the maximum sentence with which the court may sentence a defendant.” State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004) (citing Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). And the “statutory maximum” is “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” Blakely v. Washington, 124 S. Ct. at 2537.

Even though Ague should have been sentenced under former RCW 69.50.401(a)(1)(ii), it cannot be determined based on the evidence presented that the jury premised his conviction on methamphetamine base. The State introduced evidence of an ongoing process along with its

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<sup>3</sup> Cf. State v. Cromwell, 127 Wn. App. 746, 112 P.3d 1273, 1275 (2005), reviewed accepted, No. 77356-4 (January 19, 2006), where Division I of this court disagrees with this conclusion, reasoning that “the Legislature intended to penalize the possession with the intent to deliver ... methamphetamine in any form more harshly than the possession with intent and delivery of any controlled substances listed in the schedules.”

forensic expert's opinion that evidence from the scene, including liquids and crystal residue, indicated the presence of methamphetamine. [RP 09/07/05 121-25, 178-182]. 05 11-12]. The verdict form did not require the jury to identify the particular substance underlying the conviction. Instead, the jury convicted Ague of manufacturing methamphetamine "as charged in Count I." [CP 135].

As previously set forth, Ague was given a standard range sentence, sans enhancements, of 60 months, the midpoint of his standard range of 51 to 68 months based on an offender score of two and a seriousness level of III under provisions of the Sentencing Reform Act applicable only to offenses occurring after June 30, 2003. RCW 9.94A.517. [CP 144]. As Ague's offense was committed on April 3, 2001, his seriousness level was actually VI under former RCW 9.94A.515 (classifying the "(m)anufacture, delivery or possess(ion) with intent to deliver narcotics from Schedule I or II" as an offense with a seriousness level of VI); RCW 69.50.206(d)(2) (classifying "(m)ethamphetamine, its salts, isomers, and salts of its isomers" as Schedule II drugs). Hence, Ague has a standard range, sans enhancements, of 21 to 14 months under RCW 9.94A.510.

The sentencing court should have sentenced Ague under former RCW 69.50.401(a)(1)(ii), and, under Blakely, by so doing would have invaded the province of the jury when it determined that Ague's

conviction was premised on methamphetamine in its pure form, its base, even where it can not be determined based on the evidence presented that the jury based Ague's conviction on methamphetamine base, with the result that Ague's sentence must be vacated and remanded for resentencing.

04. AGUE WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO OBJECT TO THE TRIAL COURT'S FAILURE TO SENTENCE AGUE UNDER THE STATUTE IN EFFECT AT THE TIME OF THE COMMISSION OF THE OFFENSE, RCW 69.50.401(a)(1)(ii), AND BY FAILING TO ARGUE THAT A SENTENCE UNDER THE CORRECT STATUTE BASED ON THE EVIDENCE PRESENTED WOULD HAVE VIOLATED AGUE'S SIXTH AMENDMENT RIGHT TO A JURY TRIAL UNDER BLAKELY V. WASHINGTON.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995).

Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of invited errors, see State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996), citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995).

Assuming arguendo, this court finds that trial counsel waived the issue relating to the trial court's sentencing of Ague as set forth in the preceding section of this brief, then both elements of ineffective assistance of counsel have been established.<sup>4</sup>

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to object to the trial court's sentencing

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<sup>4</sup> While it is submitted that the error at issue may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree.

of Ague. For the reasons set forth in the preceding section of this brief, had counsel done so, the trial court would not have so sentenced Ague.

Second, the prejudice is self evident: but for counsel's failure to object the trial court would not have imposed a sentence in excess of what is statutorily permitted.

05. THERE WAS INSUFFICIENT EVIDENCE TO UPHOLD AGUE'S SENTENCE ENHANCEMENT FOR PERSON UNDER 18 PRESENT IN OR UPON THE PREMISES OF THE MANUFACTURE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

The court instructed the jury that to impose the child on the premises enhancement, it had to find that Ague manufactured or was an accomplice

to the manufacture of a controlled substance which took place when a person under the age of eighteen was present in or upon the premises of the manufacture....

[CP 136].

Before a defendant can be subjected to an enhanced penalty, the State must prove beyond a reasonable doubt every essential element of the allegation, which triggers the enhanced penalty.

State v. Hennessey, 80 Wn. App. 190, 194, 907 P.2d 331 (1995) (quoting State v. Lua, 62 Wn. App. 34, 42, 813 P.2d 588, review denied, 117 Wn.2d 1026, 820 P.2d 510 (1991)).

#### 05.1 Under Age of 18

The State did not carry its burden of proving that Starcia Ague, Ague's daughter, was under the age of 18, offering only Deputy Hamilton's guess that she was a "young teen, maybe 12 or 13 years old [RP 09/07/05 136](,)" and Detective Haller's reference to her as a "juvenile," which he understood to be under the age of 18. [RP 09/07/05 84].<sup>5</sup> Since the term "juvenile" was not defined for the jury by the court to

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<sup>5</sup> Of note, at the CrR 3.6 hearing, Deputy Casebolt testified that when he encountered Starcia, he "thought she was probably 18, 19 years old, maybe." [RP 11/19/01 (morning session) 36].

mean a person under the age of 18, the statement that Starcia was a juvenile was not sufficient to show that she was under the age of 18, and the remaining testimony amounted to guesses by the officers, with the result that it was error to enhance Ague's sentence based on this factor. See State v. Duran-Davila, 77 Wn. App. 701, 706, 892 P.2d 1125 (1995) (testimony that officer saw drug transaction participant appear in juvenile court was insufficient to prove he was under 18 at time of offense); State v. Hollis, 93 Wn. app. 804, 816, 970 P.2d 813 (age element in RCW 69.50.401(f) was established by one participant's testimony that he was under 18 and by stipulation that another participant was under 18), review denied, 137 Wn.2d 1038, 980 P.2d 1285 (1999).

#### 05.2 Upon the Premises of the Manufacture

There was no evidence that the Starcia Ague was ever present in the shed where the items connected with the manufacture of methamphetamine were eventually seized. Also there was no evidence that any type of manufacturing occurred in the residence where Starcia was found on the day of the execution of the search warrant. And any argument that proving that Starcia was anywhere on the property was the same as proving she was present at the manufacturing location is misplaced. See State v. Poling, 128 Wn. App. 659, 669-670, 116 P.3d 1054 (2005) (child on premises enhancement reversed where trial court

instructed jury that “premises” includes any building, dwelling or real property).

Simply, there was insufficient evidence that Ague participated directly or as an accomplice in the manufacture of methamphetamine where a person under eighteen years of age was present in or upon the premises of the manufacture, with the result that it was error to enhance Ague’s sentence based on this factor.

06. AS A MATTER OF LAW, THE TRIAL COURT ERRED IN IMPOSING A 60 MONTH SENTENCE ENHANCEMENT FOR CHILD ON THE PREMISES THAT EXCEEDED THE STATUTORY AUTHORITY.<sup>6</sup>

The sentencing court imposed a 60-month sentence enhancement following the jury finding that the manufacture took place when a person under the age of 18 was present in or upon the premises of the manufacture. [CP 136]. See RCW 9.94.128, now codified RCW 9.94A.605. Under RCW 9.94A.310(6) and its predecessors only 24 months is permitted, with the result that this court should remand for resentencing.

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<sup>6</sup> For the sole purpose of avoiding needless duplication, the prior discussion relating to a collateral attack of a sentence in excess of statutory authority presented earlier in this brief, supra at 32-33, is hereby incorporated by reference.

07. AGUE WAS PREJUDICED BY HIS  
COUNSEL'S FAILURE TO OBJECT TO  
THE TRIAL COURT'S IMPOSITION  
OF A SENTENCE ENHANCEMENT  
THAT EXCEEDED THE STATUTORY  
AUTHORITY.<sup>7</sup>

Assuming arguendo, this court finds that trial counsel waived the issue relating to the trial court's imposition of the incorrect sentence enhancement of 60 months discussed in the preceding section, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to object. For the reasons set forth in the preceding section of this brief, had counsel objected, the trial court would not have imposed the sentence enhancement that exceeded statutory authority.

The prejudice here is self evident: but for counsel's failure to object, the trial court would not have imposed the sentence enhancement in excess of what is statutorily permitted.

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<sup>7</sup> For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier in this brief, supra at 37-38, is hereby incorporated by reference.

08. THERE WAS INSUFFICIENT EVIDENCE TO UPHOLD AGUE'S SENTENCE ENHANCEMENT FOR ARMED WITH A FIREARM AT THE TIME OF THE COMMISSION OF THE CRIME.<sup>8</sup>

To support a finding that a defendant was armed with a firearm during the commission of the crime for sentencing enhancement purposes, there must be proof beyond a reasonable doubt that at the time of the commission of the offense the weapon was easily accessible and readily available for use, either for offensive or defensive purposes. State v. Willis, 153 Wn.2d 366, 371, 103 P.3d 1213 (2005). Moreover, by the same standard, there must be a nexus between the defendant, the crime and the deadly weapon to find that the defendant was armed under the deadly weapon statute. Willis, 153 Wn.2d at 373. See Court's Instruction 18. [CP 132].

Concomitantly, to prove that Ague was armed with a deadly weapon, there must be, in part, proof of the nexus by a standard of beyond a reasonable doubt between the weapon and the crime. State v. Willis, 153 Wn.2d at 373. In this regard, this court should examine the nature of the crime (manufacture of methamphetamine), the type of weapon

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<sup>8</sup> The test relating to the sufficiency of the evidence vis-à-vis a sentencing enhancement previously set forth herein, supra at 39-40, is hereby incorporated by reference for the sole purpose of avoiding needless duplication.

(firearm), and the circumstances under which the weapon was found.

State v. Schelin, 147 Wn.2d 562, 570, 55 P.3d 632(2002).

The nature and circumstances in this case do not support a finding that there was a sufficient nexus between Ague, the crime and the firearm. Generally, in drug cases, courts have found the required nexus between the drug crime and a weapon where there is evidence from which a jury can infer that the weapon was used to protect the possession, distribution or manufacture of the drugs, and was therefore used in furtherance of the crime. For example, in Schelin, the Court concluded that the jury could infer that the defendant was using the weapon to protect his marijuana grow operation, where the operation was located in the same room in which the officers found the defendant and the easily accessible weapon. 147 Wn.2d at 574-75. In State v. Gurske, 155 Wn.2d 134, 118 P.3d 333 (2005), however, our Supreme Court reversed a deadly weapon enhancement where the stipulated facts demonstrated that a handgun was in a backpack, behind the driver's seat and inaccessible unless the driver exited the vehicle or switched seats. Gurske, 155 Wn.2d at 143.

Here, unlike Schelin, neither Ague nor any firearms were found in the shed containing the items associated with the manufacture of methamphetamine, which was located approximately 100 feet from the residence where the firearms were seized after a locksmith opened the safe

found in what was termed the master bedroom. [RP 09/07/05 62, 70, 72-73, 100, 111, 165]. Moreover, unlike Gurske where the controlled substance and the gun were found in the same backpack, Gurske, 155 Wn.2d at 136, no lab related items were found in the residence where the firearms were discovered in the locked safe. Of course, “mere proximity or mere constructive possession” is insufficient to prove that a defendant is armed with a deadly weapon: “the weapon must be easily accessible and readily available for use.” Gurske, 155 Wn.2d at 138.

Simply, the firearms were not within arm’s reach of Ague and were not “easily accessible and readily available for use in a locked safe removed from the shed by over 100 feet. See State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). What is more, there was no evidence to support a conclusion that Ague possessed the firearms in order to further and aid the manufacturing of methamphetamine, and therefore no evidence to support a nexus between the firearms and the alleged manufacturing and Ague, with the result that the trial court improperly applied the firearm enhancement to Ague’s sentence for unlawful manufacture of methamphetamine.

09. THE TRIAL COURT ERRED IN IMPOSING A \$100 FELONY DEOXYRIBONUCLEIC ACID (DNA) COLLECTION FEE.

RCW 43.43.7541 requires a \$100 felony DNA collection fee for felonies committed on or after July 1, 2002, only.

Every sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 that is committed on or after July 1, 2002, must include a fee of one hundred dollars for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender....

Here, the sentencing court's imposition of this fee was improper because the crime was committed on or about June 21, 2002 [CP 113, 145], with the result that the matter should be remanded with instructions to strike this fee from Ague's judgment and sentence.

10. AS A MATTER OF LAW, THE TRIAL COURT ERRED IN IMPOSING A SENTENCE THAT EXCEEDED THE STATUTORY MAXIMUM FOR THE CRIME OF CONVICTION.<sup>9</sup>

A sentencing court "may not impose a sentence providing for a term of confinement or community supervision, community placement, or custody which exceeds the statutory maximum

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<sup>9</sup> For the sole purpose of avoiding needless duplication, the prior discussion relating to a collateral attack of a sentence in excess of statutory authority presented earlier in this brief, supra at 32-33, is hereby incorporated by reference.

for the crime as provided in chapter 9A.20 RCW.” RCW 9.94A.505(5); State v. Hudnall, 116 Wn. App. 190, 195, 64 P.3d 687 (2003); State v. Sloan, 121 Wn. App. 220, 221, 87 P.3d 1214 (2004) (the total punishment, including imprisonment and community custody, may not exceed the statutory maximum). Nothing in the statute grants the sentencing court the authority to speculate that a defendant will earn early release and to impose a sentence beyond the statutory maximum based on that speculation. If the Legislature had so intended, it would have made that provision.

In addition to sentencing Ague to the ten-year statutory maximum for unlawful manufacture of methamphetamine, the trial court imposed 9 to 12 months’ community custody. [CP 146-47]. As this sentence exceeds the statutory maximum sentence of ten years imprisonment, or a \$20,000 fine, or both, See RCW 9A.20.021(1)(b), this court should remand for resentencing within the statutory maximum for unlawful manufacture of methamphetamine, a class B felony.

11. AGUE WAS PREJUDICED BY HIS COUNSEL’S FAILURE TO OBJECT TO THE TRIAL COURT’S IMPOSITION OF A SENTENCE THAT EXCEEDED THE STATUTORY MAXIMUM FOR THE CRIME OF CONVICTION.<sup>10</sup>

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<sup>10</sup> For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier in this brief, supra at 37-38, is hereby incorporated by reference.

Assuming arguendo, this court finds that trial counsel waived the issue relating to the trial court's imposition of a sentence that exceeded the statutory maximum for the crime for which Ague was convicted, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to object. For the reasons set forth in the preceding section of this brief, had counsel objected, the trial court would not have imposed a sentence exceeding the statutory maximum.

The prejudice here is self evident: but for counsel's failure to object, the trial court would not have imposed a sentence in excess of what is statutorily permitted.

E. CONCLUSION

Based on the above, Ague respectfully requests this court to reverse and dismiss his conviction or to remand his case for resentencing consistent with the arguments presented herein.

DATED this 12<sup>th</sup> day of July 2006.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing same in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

James C. Powers	Daniel Ague Masters #774474
Senior Deputy Pros Atty	S.C.C.C. – G-B D11U
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DATED this 12<sup>th</sup> day of July 2006.

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EXHIBIT "A"



- J. So you want the warrant to cover all of the buildings and the uh...
- D. Correct, yes.
- J. ...outbuildings and the vehicles as well?
- D. Yes.
- J. Alright. What is it that you're searching for?
- D. I'm searching for the physical person of Steven John Layton. Date of birth 8-11-65. Drugs, drug paraphernalia associated with manufacture...or with methamphetamine and the manufacture of methamphetamine. Notes, records or documents uh related to controlled substances.
- J. So you're looking for methamphetamine?
- D. Correct, as well as all contraband. Including controlled substances, fruits of the crime or other things unlawfully possessed. Weapons or other things which would be a cr...a...which has been a crime committed or reasonably appears about to be committed. And weapons also uh...that are subject to forfeiture under RCW 9.41.098. Or any other property seizable under RCW 10105-010 or RCW 6950505. I think I'll explain that in my affidavit.
- J. Alright, go ahead.
- D. Uh...out...on 3-31-01 which was Saturday afternoon, myself and Deputy Casebolt um contacted each other on uh...roadside on 93<sup>rd</sup> Avenue He told me that he just ran a license plate of a vehicle at the 3001 104<sup>th</sup> Avenue address. Uh, this vehicle was an El Camino and it returned to a John Hamm. Mr. Hamm had a...a...felon...has an outstanding felony warrant at this time for uh a methamphetamine charge. Uh we drove back to this location to attempt to contact Mr. Hamm and serve this felony warrant out of Thurston County. We observed a man uh...welding on a Ford Bronco and the Ford Bronco was registered to a female named Danielle Dueuel. We contacted the man, he was very furtive. Uh, he distanced himself from us, so would not show his face. He kept his back towards us. Uh, we could tell immediately that the man was not going to be cooperative, so we asked to speak to the property owner at that location. Uh, the man uh continued to keep his back towards us and he walked towards the residence. Uh, this man matched the description of Mr. Steven or of Mr. uh Mr. Hamm. Uh, the general physical description. As he got to the door, he knocked on it a couple times and a female opened the door. He attempted to run inside the door, so myself and Deputy Casebolt uh could no longer be with him. However, uh we...we grabbed on...phys...physically grabbed him and detained him. We held him for approximately 15 minutes while we tried to identify him. Finally after some time we were able to determine that Mr. Hamm had blue eyes and the person that we were detaining had brown eyes. Which was basically the only real difference that we could see of the descriptors. Uh, prior to that we had patted the man down uh somewhat and found a large pill bottle on his person. The pill bottle was...was labeled pseudoephedrine and appeared to be very full of small

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pills. I'd say 150 to 200 pills of pseudoephedrine. Uh Mr. uh...at that time the...the...the person identified himself as uh...excuse me for my disorganization here...described himself des...told us he was Chester Lyon was his name. Uh so we continued to try to identify him. He ran Mr...Mr. Chester Lyon. We did not find a record of him. Uh, we finally were able to discover a Washington State Driver's License on this man. And uh we did find a record of a Chester Lyon. We were somehow uncomfortable with the fact that he wasn't who he said he was. However we were butting up against a time frame issue now, and we knew that he wasn't Mr. Hamm. So we released him. Uh, we also released the large bottle pseudoephedrine tablets to him. While we were contacting uh this gentleman at this residence, there were three propane bottles on the back of this porch where we contacted him. The entire area s...smelled of chemical smell. Mainly a...a smell of propane. Uh, like they may have been purging this tanks. Uh, we commented...myself and Deputy Casebolt on the fact that the man had been welding out there on this Bronco and what an explosion risk that might be. After the man was uh...identified, or at least we thought he was Mr. Lyon we did release him at that time. I described the pseudoephedrine pills to you, I also noted that they were to a...a (unintelligible) female, that was not him. We asked the subject why he had the pseudoephedrine, he told us he had a cold. The man did not appear to have a cold to us. He...he did not have a runny nose, did not have any watery eyes, or symptoms associated with a cold. At that time we uh...left the area and determined that that was not Mr. Hamm. Although we weren't totally sure who it was. Today on 4-2 -01 a citizen contacted me and he wanted to provided an anonymous tip about a man that had been bragging that he had fooled the police yesterday. Uh, this citizen contact told me that the person was actually Steven J. Layton. Who's date of birth is 11 or 8-11-64. They said that Mr. Layton is wanted. Uh, he also gave me names of several associates that uh...either stay at this residence or frequent this residence uh...a large amount of time. And I'll outline those individuals and their criminal histories later in my affidavit. I checked with uh Thurston County Dispatch and conducted a check on Mr. Layton and determined that he did have a...a felony warrant. But wh...the felony warrant has been confirmed and it's for failure to appear for a sentencing hearing. The charge is UPCS...UPCS Meth with intent to deliver and unlawful possession of a firearm in the first degree. Also attempted manufacture of unlawful...attempted unlawful manufacturing of methamphetamine. Uh, I also requested a picture of Mr. Layton. I looked at the picture after I received it and I positively identified Layton as the man who gave me the false name on Saturday. Mr. Layton has a long criminal history. Including three uh felony drug related convictions. He also has three current convictions that he did not appear for the sentencing hearing for. He has nine...nine gross misdemeanors, seven misdemeanors and three classification unknown type crimes. One of which is a drug crime. Uh, this citizen relayed to me some of the persons staying at this residence. Uh, the person that is in actual, physical control of the residence, the renter...is a Dan N. Ague-Masters. Date of birth 5-29-68. Uh, Mr. Masters is a convicted felon. He has numerous arrests for drug charges and violent crime.

Several of the associates that either stay at this residence, or frequent this residence often are Eric T. Larsen. Mr. Larsen has three current misdemeanor warrants, uh which total a bail of \$2,300 dollars and he has one misdemeanor conviction. Also Glen N. Larsen, 8-12-60. Mr. Larsen has a possession of stolen property 1<sup>st</sup> degree conviction, a PSP 2<sup>nd</sup> degree conviction and two violation of the Uniformed Controlled Substance Act convictions. Another person associated or possibly staying at this location is a Steven Onama, date of birth 03-05-62. He is also a convicted felon that has one UPSA conviction. He has one VUCSA charge pending in Thurston County, he has a possession a dangerous weapon charge pending in Thurston County and he has another UPCS meth charge pending in Thurston County. The final person is Danielle Dueuel. She is also a convicted felon for Univers...uh the UPCS. Uh additional comments that I might add to that. When we were out there at that residence, on Saturday, uh the residence appears to be quite disheveled. There are vehicles uh parked uh sporadically all over, uh different locations. They are in various stages of disarray, being torn apart. Uh, which is in my training and experience indicative with uh the use of uh methamphetamine and the type of culture therein. Uh, the residence appeared to be very disorganized. Uh, with a lot of uh...quote projects in the yard. Engine assemblies and whatnot. Uh, that also are indicative to this type of behavior when you're using uh methamphetamine. And that...that's the affidavit. Uh, and I would like to request to search uh all the above described areas.

J. OK, now you're only searching for one person?  
D. I'm sear...I'm searching for...correct. Mr. Layton.

J. And he has warrant...  
D. Specifically.

J. ...a felony warrant?  
D. Correct.

J. OK now...  
D. And also one thing I forgot Your Honor...

J. Uh huh.  
D. Yesterday when we contacted Mr. Layton who con...called himself Chester Lyon, when I asked him his address he provided the address of 3001 104<sup>th</sup> Avenue. He told me he lived there.

J. Which is different from the address you want to search.  
D. No, no that is where I want to search.

- J. OK, I'm sorry.
- D. I want to search 3001 104<sup>th</sup> Avenue. And that is what Mr. Layton, who was calling himself Chester Lyon told me where he lived. In fact, he asked a 13 year old girl there, he says what is the address, this is where I live.
- J. OK
- D. Wasn't even sure of his own address.
- J. OK. And now is it...in reference to the drugs. You think that there is a meth lab at this location...
- D. That's....
- J. ....is that what...
- D. ...correct...
- J. ...you want to search for?
- D. ...Your Honor. Yes.
- J. Uh, you want to explain to me what your uh training and experience is in detecting uh...indicators of that?
- D. Well, Your Honor, I was hired as a Reserve Deputy Sheriff for Lewis County back in early 1988. I rec...I attended a 160 hour Reserve Academy, and then I cont...I finished a 500 hour field training program as a reserve. A short time later, I was hired with the Napavine Police Department for a short time. And then in April of 1989 I was hired with Lewis County. I spent nine years with Lewis County. Three, over three years of that was spent in the detective division. Uh, I was sent to numerous, ongoing training classes for investigations, uh interviewing techniques, uh...have had ongoing drug investigation experience. Including uh search warrants written for meth labs, uh in Thurston and well as Lewis Counties. Uh, when I came to work for Thurston County in 1998 I conducted on going drug investigations here as well. I was also selected to the Thurston County Street Narcotic Enforcement Team and we've done uh multiple drug investigations and I've written numerous search warrants on methamphetamine labs uh in Thurston County. And all of my warrants since I started in law enforcement have all been successful.
- J. OK, could you clarify for me specifically what elements you think lead...lead to the fact that there's a meth operation there. You mentioned a couple of them, but you...you want to put them all together for me?
- D. Right. Your Honor, based on the fact that the...all of the people associated with that residence are known drug users, traffickers, uh convicted felons uh to the uh...the primary suspect I'm looking for, Mr. Layton...uh has...is a non methamphetamine trafficker and user. He was in possession of a...what I consider a large amount of pseudoephedrine pills uh, in a prescription form that did not belong to him. Uh...

- J. OK, when you say large amount, more than personal use?  
D. Yes, defin...
- J. (unintelligible)  
D. ...definitely. A full prescription bottle of uh...uh...the...it's one of the large prescription bottles. Probably four inches tall, full of very small tablets. I would say at least 150 probably closer to 200 ephederin...pseudoephederine pills.
- J. And what significance does that have to you?  
D. Pseudoephederine is one of the primary precursors for the manufacture of methamphetamine.
- J. OK. And...  
D. Al...
- J. Go ahead.  
D. Also given the fact that there were three, what appeared to be brand new propane tanks on the back porch. And a very strong odor, like they had purged these tanks. The tanks need to be purged of all the uh propane that's inside of them, so they can refill these tanks with anhydrous ammonia which there again, is a primary precursor to the manufacture of this controlled substance.
- J. OK, anything else?  
D. No Your Honor, I think that...I'm thinking that covers it.
- J. Alright, did you also want to ask for destruct order, or do you want and see what you...  
D. Your Honor, I'd like to wait on that.
- J. OK  
D. If I could. I don't have the language in front of me.
- J. OK  
D. At this particular time.
- J. That's fine.  
D. Uh, when we go out there and we serve the warrant. When it is successful uh, we will probably re-contact you, uh and request a destruct order at that time.
- J. Alright. Uh, anything else you'd like to add at this time.  
D. Uh, no Your Honor.

- J. Alright. I'll authorize the warrant for the prom...property and premises that you described and also for the individual that you described. And you can go ahead and put my name on the warrant. For the record if you'll please state the time it is currently.
- D. Uh, Your Honor it is 0548 hours on uh April 2<sup>nd</sup>, 2001.
- J. Thank you.
- D. Thank you, Your Honor. Bye-bye.