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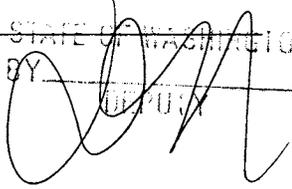
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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
BY  DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

LORIN HUBBARD, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Kitty-Ann van Doorninck

No. 07-1-05355-9

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court act within its discretion when it determined that charges did not count as one point for sentencing purposes where each charge required a different intent and was not part of the same criminal conduct?
2. Was trial counsel effective where she argued merger in her sentencing brief, the trial court correctly determined that the charges did not count as one point for sentencing purposes, and, even if the charges had constituted the same criminal conduct, the sentence would have been the same?
3. Should the sentence be affirmed where any potential error was harmless where any error would not alter the defendant's standard sentencing range?

B. STATEMENT OF THE CASE.

1. Procedure

The Pierce County Prosecutor's Office originally charged appellant, Lorin Hubbard ("defendant"), on October 17, 2007, with unlawful manufacturing of a controlled substance (methamphetamine) in

the Pierce County Superior Court Cause No. 07-1-05355-9. CP 1.<sup>1</sup> The State amended the charges on April 3, 2008, to add the charge of unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine. CP 3-4.

The Honorable Frederick W. Fleming conducted a pre-trial hearing on January 20, 2009. RP 1. At this hearing, the court denied the defendant's motion to suppress the evidence and dismiss the case. CP 7-12; RP 55-56.

Trial commenced on January 21, 2009, in front of the Honorable Kitty-Ann van Doorninck. RP I 60. On January 26, 2009, the jury found the defendant guilty of both charges – unlawful manufacturing of a controlled substance, methamphetamine and possession of pseudoephedrine with intent to manufacture methamphetamine. RP III 300-301; CP 45, 46.

Sentencing followed on February 13, 2009. RP IV 305. In the defendant's sentencing memorandum, defense counsel argued that punishing the defendant for both charges would violate double jeopardy and that both charges should merge. CP 70-74. In its response, the State contended that the intent required for each offense differed and, thus, that

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<sup>1</sup> Citations to the verbatim reports of proceedings will be to "RP." The volume of the report of proceedings cited will be indicated in Roman numerals after the designation, "RP." Citations to the verbatim report of proceedings from the pre-trial hearing will be simply RP, with no Roman numerals.

the counts should not merge. CP 121-123. The court accepted the state's calculated offender score of four (RP IV 308) and sentenced the defendant to 42 months in prison and 42 months of DOSA community custody for each count, to run concurrently. RP IV 315-316; CP 105-118.

The defendant filed a timely notice of appeal. CP 119.

## 2. Facts

On October 16, 2007, a pharmacist from a Tacoma Rite Aid called Deputy Mark Fry to report a suspicious pseudoephedrine purchase made by the defendant. RP II 78-79. Detective Fry had previously identified the defendant as a person of interest and had requested the pharmacists at Rite Aid to contact him any time the defendant purchased pseudoephedrine. RP II 132-133. Deputy Fry responded to the area with other officers to search for the defendant. RP II 78-79. Deputy Leach first spotted the defendant walking across the Rite Aid parking lot toward a nearby Value Village store. RP II 79. The officers followed him inside, where he purchased a small metal pot. RP II 79.

The officers then watched the defendant get on a Pierce Transit Bus. RP II 81. The officers followed the bus in unmarked cars and watched him get off of the bus and enter a Fred Meyer. RP II 81. There, the defendant purchased Drano and a small can of propane. RP II 82. In the same store, the defendant made a subsequent purchase of AA lithium batteries. RP II 83. After the defendant left Fred Meyer, he got back on

the bus and traveled to the Marketplace in Lakewood. RP II 83. At the Marketplace, the defendant purchased dry ice. RP II 83-84. Next, the defendant walked to a dollar store and purchased needle-nose pliers. RP II 84.

Subsequently, the defendant got back on the bus and traveled to a large wooded area in a park at the southwest corner of 56<sup>th</sup> and Tacoma Mall Boulevard. RP II 87-88. The officers arrived at the park at 2:10 p.m. and set up surveillance around the edge of the park to see if the defendant would exit. RP II 89-90. When the defendant did not leave the park, the officers requested the assistance of Tacoma officers and the Puyallup K-9 unit. RP II 89. After backup arrived, officers split up and went through various sections of the park. RP II 90.

After an hour and a half, Detective Hickman spotted the defendant's campsite while searching with Detective Fry and a Tacoma police officer. RP II 90. The campsite was located in a wooded, undeveloped area overgrown with brush. RP II 91. The area, while open to the public, did not allow camping and had signs posted saying as much. RP II 91. When they first approached, the officers saw a small dome tent with a camouflaged tarp hung over it. RP II 91. The officers saw the defendant inside the closed tent through the screen door. RP II 91. As soon as they spotted him, the officers ordered the defendant to come out of the tent. RP II 92.

As the defendant unzipped the door and exited the tent, the officers noticed a pot with loose red pills and white powder residue. RP II 94-95, 130. The defendant had started grinding up the pseudoephedrine. RP II 95. Detective Fry testified that this was the first phase of the methamphetamine manufacturing process, the ephedrine extraction stage. RP II 95. Outside of the tent, the detectives found a green jug that was “fuming,” with a cloud or haze coming out of it. RP II 96. The jug contained an acid with a pH of zero. RP II 98, 114. Acid gas, such as HCL gas, is used in the final stages of the manufacturing process. RP II 101. The gas is bubbled through a solvent containing methamphetamine base, causing finished methamphetamine crystals to form. RP II 101. The acid in the jug would be related to this final stage of the manufacturing process, also known as the gassing or salting out phase. RP II 102.

Upon his arrest, officers searched the defendant and found receipts verifying purchases of paper towels, dry ice, propane and Drano. RP II 110-111, 118. At trial, Detective Fry testified that the dry ice could be used in making anhydrous ammonia, used in the second phase of the “Nazi” method of manufacturing methamphetamine, the reaction phase. RP II 80, 111-112, 123. Paper towels can be used to filter out the waste binder and to capture methamphetamine. RP II 111.

In the front pocket of the defendant’s shirt, officers found unused coffee filters. RP II 112. Officers also found used and unused coffee filters inside the tent. RP II 112. Coffee filters, like paper towels, can be

used to filter out waste binders and waste materials when manufacturing methamphetamine and to capture finished methamphetamine. RP II 113.

Within the tent, officers found lithium batteries (RP II 117), empty pseudoephedrine blister packs (RP II 119), a can of Drano (RP II 120), and a bottle of acetone, or nail polish remover (RP II 120). The lithium batteries provide a source of lithium used during the second phase of manufacturing methamphetamine. RP II 87, 117. The pseudoephedrine blister packs provide the source of pseudoephedrine upon which the entire process is based. RP II 120. Propane can be used in the first stage of manufacturing methamphetamine by serving as a heat source for evaporating the liquid in which the ephedrine is extracted. RP II 118. Drano contains sodium hydroxide which, when combined with ammonium sulfate, creates anhydrous ammonia gas. RP II 118, 123. The anhydrous ammonia gas is condensed with the dry ice to create a liquid, which is then used in the reaction phase. RP II 123. Acetone is most commonly used to remove impurities and to whiten the finished product once methamphetamine has been created, at the end of the third phase. RP II 123.

In the tent, the officers also found an 8.5 ounce jar with clear liquid (RP II 124), a can of starter fluid (RP II 125) and a small Ziploc bag with residue inside of it (RP II 127, 130). Detective Fry testified at trial that, based on his experience, the clear liquid and used coffee filters indicated that the clear liquid was used solvent. RP II 124. This solvent could be

used to reabsorb the methamphetamine base out of the coffee filters and could be stored for use in the next reaction. RP II 124. Starter fluid, added at the end of the reaction phase, absorbs the methamphetamine base and creates methamphetamine oil. RP II 125. In the third phase, HCL gas is bubbled through the methamphetamine oil, creating finished methamphetamine. RP II 125. The Ziploc bag contained purified pseudoephedrine, created after the tablets had been ground up, alcohol had been added, the liquid had been filtered, the tablet binder had been removed and the liquid had been allowed to dry. RP III 244. The officers also recovered finished methamphetamine residue at the scene, which indicated that methamphetamine had been manufactured at the campsite in the past. RP II 134.

C. ARGUMENT.

1. THE TRIAL COURT CORRECTLY DETERMINED THE CRIMES DID NOT COUNT AS ONE POINT FOR SENTENCING PURPOSES WHERE THE CHARGES HAD DIFFERENT INTENTS AND WERE NOT PART OF THE SAME CRIMINAL CONDUCT.

The defendant argues that his convictions in Counts I and II involve the same criminal conduct under RCW 9.94A.589(1)(a) and should therefore be counted as one crime for sentencing purposes. Br. App, p. 4. In Count I the defendant was convicted of unlawful manufacture of methamphetamine, and in Count II the defendant was

convicted of unlawful possession of pseudoephedrine with intent to manufacture methamphetamine. CP 45, 46, 105-118.

At the sentencing hearing, the defendant argued in his sentencing memorandum that that the two counts “merged.” CP 70-74. The defendant made an express argument under double jeopardy. CP 71. But the defendant also made a more general argument for merger. CP 73.

The analysis under the doctrines of double jeopardy and “same criminal conduct” per RCW 9.94A.589 are analogous and the courts, in less than careful usage, have variously applied the term “merger” to both doctrines. *See, e.g., State v. Tongren*, 147 Wn. App. 556, 563, 196 P.3d 742 (2008); *State v. Johnson*, 113 Wn. App. 482, 488, 54 P.3d 155 (2002). In *Tongren*, the court claimed that the word “merge” can also refer to a “same criminal conduct analysis” for sentencing purposes, and in doing so relied upon *Johnson*. *Tongren*, 147 Wn. App. at 563 (citing *Johnson*, 113 Wn. App. at 488).

In *Johnson*, the court rejected the defendant’s claim that the trial court’s use of the word “merge” was limited to counting multiple convictions as one crime under the Sentencing Reform Act, holding in part that merger is not simply a creation of the Sentencing Reform Act and has its foundation in double jeopardy. *Johnson*, 113 Wn. App. at 488.<sup>2</sup>

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<sup>2</sup> Nonetheless, the court failed to note that the word “merge” occurs only once in the SRA, under 9.94A.411, where it occurs in the context of guideline examples on a prosecutorial decision not to prosecute charges.

Merger has also been given a third application and is used to refer to the principle of statutory interpretation where the legislature has imposed multiple punishments for a single act which violates several statutory provisions. *Johnson*, 113 Wn. App. at 489, n. 8 (citing *State v. Vladovic*, 99 Wn.2d 413, 419 n. 2, 662 P.2d 853 (1983)). The court in *Johnson* decided the case based on the fact that the sentencing court's use of the word "merge" was a reference not to the merger doctrine of statutory interpretation, but rather a recognition that the alternative means of felony murder and intentional murder were one offense and merged them together. *Johnson*, 113 Wn. App. at 489.

In *State v. Gaworski*, the court gave a different definition to the merger doctrine of statutory interpretation. *State v. Gaworski*, 138 Wn. App. 141, 146, 156 P.3d 288 (2007). In *Gaworski*, the court stated that:

The doctrine of merger is one means of determining whether the legislature intends multiple punishments, and applies when a crime is elevated to a higher degree by proof of some other crime.

*Gaworski*, 138 Wn. App. at 146 (citing *Vladovich*, 99 Wn.2d at 422.)

The three uses of the word "merger" are closely related even if each is rooted in a different source of legal authority.<sup>3</sup> However, properly, double jeopardy prohibits multiple prosecutions for the same offense.

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<sup>3</sup> I.e., the Fifth Amendment of the United States Constitution, RCW 9.94A.589, and common law rules of statutory interpretation.

*State v. Baldwin*, 150 Wn.2d 448, 453-454, 78 P.3d 1005 (2003). While the doctrine of “same criminal conduct,” on the other hand, relates solely to calculating offender scores for sentencing purposes and is derived entirely from the Sentencing Reform Act of 1981. RCW 9.94A.589.

Under RCW 9.94A.589(1)(a), two crimes shall be considered the “same criminal conduct” only when all three of the following elements are established: (1) the two crimes share the same criminal intent; (2) the two crimes are committed at the same time and place; and (3) the two crimes involve the same victim. *State v. Lessley*, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). “The legislature intended the phrase ‘same criminal conduct’ to be construed narrowly.” *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). If one of these elements is missing, then two crimes cannot constitute the same criminal conduct. *Lessley*, 118 Wn.2d at 778. An appellate court will generally defer to a trial court’s decision on whether two different crimes involve the same criminal conduct, and will not reverse absent a clear abuse of discretion or a misapplication of the law. *State v. Haddock*, 141 Wn.2d 103, 3 P.2d 733 (2000); *Flake*, 76 Wn. App. at 180.

Two crimes share the same intent if, viewed objectively, the criminal intent did not change from the first crime to the second. *Lessley*, 118 Wn.2d at 777. “In deciding if crimes encompassed the same criminal conduct, trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next.”

*Dunaway*, 109 Wn.2d at 215. To find the objective intent, the courts should begin with the intent element of the crimes charged. *See Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994); *State v. Dunaway*, 109 Wn.2d 207, 216, 743 P.2d 1237 (1987). A defendant's subjective intent is irrelevant. *Lessley*, 118 Wn.2d at 778.

In *State v. Burns*, Burns was arrested for selling cocaine to an undercover police officer. *State v. Burns*, 114 Wn.2d 314, 316, 788 P.2d 531 (1990). After the arrest, the undercover police officer searched Burns' van and found several little plastic bags containing small quantities of cocaine in a black vinyl case. *Burns*, 114 Wn.2d at 316. The State charged Burns with delivery of a controlled substance and possession with the intent to deliver. Upon his conviction, Burns argued that the two counts manifested the same criminal intent and, therefore, should be counted as one crime instead of two for purposes of calculating his offender score. *Burns*, 114 Wn.2d at 316. The trial court, however, held that "the two offenses encompassed separate subjective criminal intents, and consequently assigned Burns an offender score of 2." *Burns*, 114 Wn.2d at 316 (internal quotation marks omitted). In affirming his sentence, the Court of Appeals held that the criminal objective of each crime was realized independently of the other and noted,

When Burns delivered he committed one crime, but he still had in his possession a significant amount of cocaine which he intended to sell to others. The delivery did not further his intent to sell the remaining cocaine... Where, as in this

case, the evidence shows possession of a quantity greater than that delivered, that same evidence indicates an independent objective to make other deliveries. Under these circumstances, despite their contemporaneity, the crimes did not encompass the same criminal conduct.

*State v. Burns*, 53 Wn. App. 849, 854, 770 P.2d 1054, *aff'd* 114 Wn.2d 314, 788 P.2d 531 (1990). “[T]he offense of delivery and the offense of possession with intent to deliver are separate crimes... because they involve different criminal intents – an intent to deliver at the present versus an intent to deliver in the future.” *State v. Garza-Villarreal*, 123 Wn.2d 42, 48, 864 P.2d 1378 (1993) (citing *Burns*, 114 Wn.2d at 318-320).

Manufacturing methamphetamine and possession of pseudoephedrine with intent to manufacture methamphetamine require two separate intents. The charges in the present case are analogous to the charges in *Burns*. *Burns*, 114 Wn.2d at 314; *see also State v. Gave*, 77 Wn. App. 333, 890 P.2d 1088 (1995). To be convicted of manufacturing methamphetamine, one must have the intent to presently manufacture methamphetamine. To be convicted of possession of pseudoephedrine with the intent to manufacture methamphetamine, one must have the intent to manufacture methamphetamine in the future.

Upon the defendant’s arrest, officers found pseudoephedrine blister packs as well as evidence of each stage of the manufacturing process: the ground pseudoephedrine tablets, the coffee filters, the paper towels, and

the purified pseudoephedrine powder from phase one (RP II 95, 112, 119, 127, 130), the lithium, starter fluid, and receipts indicating purchases of dry ice from phase two (RP II 80, 110-112, 117, 125), and the Drano, the acetone and the green jug filled with acid from phase three (RP II 96, 98, 114, 120). This indicated an ongoing process.

The finished methamphetamine residue was consistent with methamphetamine having been manufactured at the campsite in the past and the clear solvent was consistent with an intent to manufacture again in the future. RP II 124, 134, 244. Moreover, the officers found red pseudoephedrine pills that had not yet been ground up, which independently established an intent to manufacture methamphetamine in the future. RP II 94-95. Because the two charges do not require the same criminal intent, they cannot comprise the same criminal conduct. *Lessley*, 118 Wn.2d at 778.

The double jeopardy clause of the Fifth Amendment to the United States Constitution and Article 1, Section 9 of the Washington State Constitution prohibit multiple prosecutions or punishments for the same offense. *State v. Baldwin*, 150 Wn.2d 448, 453-454, 78 P.3d 1005 (2003). “[T]he Double Jeopardy Clause prohibits prosecution of a defendant for a greater offense when he has already been tried and acquitted or convicted on the lesser included offense.” *Ohio v. Johnson*, 467 U.S. 493, 501, 104 S. Ct. 2536, 81 L. Ed. 425 (1984). The federal and state double jeopardy clauses provide identical protections. *State v. Gocken*, 127 Wn.2d 95,

107, 896 P.2d 1267 (1995). Beyond these constitutional constraints, the Legislature has the power to define criminal conduct and to assign punishment. *State v. Louis*, 155 Wn.2d 563, 568, 120 P.3d 936 (2005); *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). When a defendant raises a claim of improper multiple prosecutions, the appellate court must determine that the lower court did not exceed punishment authorized by the Legislature. *See Calle*, 125 Wn.2d at 776.

Although different, a double jeopardy analysis is analogous to a same criminal conduct analysis under RCW 9.94A.589 and produces the same result. Simultaneous convictions for unlawful manufacturing of a controlled substance, methamphetamine and unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine have been held not to violate double jeopardy. In discussing those exact charges, the Court of Appeals, Division 1 has held, “The two crimes do not require proof of the same facts, and we presume the legislature intended separate punishments.” *Gaworski*, 138 Wn. App. at 147. Therefore, one’s “conviction under both statutes does not violate double jeopardy.” *Gaworski*, 138 Wn. App. at 147.

The legislative intent becomes relevant under a double jeopardy analysis because “the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed.” *Vladovic*, 99 Wn.2d at 422.

The Court of Appeals, Division II has adopted the *Gaworski* analysis. *State v. Brewer*, 148 Wn. App. 666, 205 P.3d 900, *review denied*, *State v. Danielson*, 210 P.3d 1019 (2009). In *Brewer*, this Court held that, “Defendants’ two methamphetamine offenses do not meet the ‘same elements’ test, they do not merge, and the convictions do not violate the constitutional prohibitions against double jeopardy.” *Brewer*, 148 Wn. App. at 676 (rejecting defendants’ arguments that charges of manufacturing methamphetamine and possession of pseudoephedrine with the intent to manufacture methamphetamine should merge).

Nonetheless, it is possible that a defendant’s criminal conduct may constitute multiple crimes under a double jeopardy analysis but must still count as one crime for purposes of calculating an offender score. *State v. Marin*, 150 Wn. App. 434, 442, 208 P.3d 1184 (2009) (citing RCW 9.94A.589).

The two charges in this case do not represent the same criminal conduct because they each contain an element not required by the other. Thus, while the courts in *Brewer* and *Gaworski* analyzed the issue under double jeopardy, their reasoning applies to the analogous doctrine of “same criminal conduct” as well. *See Brewer*, 148 Wn. App. at 676; *Gaworski*, 138 Wn. App. at 147. The criminal code defines “manufacture” as

the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly or by extraction from substances of

natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container.

RCW 69.50.101(p).

A person who knowingly plays even a limited role in any of these processes manufactures methamphetamine, and a person can knowingly commit the crime of manufacturing a controlled substance without ever constructively possessing it.

*State v. Gaworski*, 138 Wn. App. 141, 147, 156 P.3d 288 (2007).

“Possession of precursor ingredients is not a required element of manufacturing.” *Gaworski*, 138 Wn. App at 147. One can be convicted of manufacturing methamphetamine without ever possessing psuedoephedrine. The criminal code defines the crime of possession with intent to manufacture as

It is unlawful for any person to possess ephedrine or any of its salts or isomers or salts of isomers, pseudoephedrine or any of its salts or isomers or salts of isomers, pressurized ammonia gas, or pressurized ammonia gas solution with intent to manufacture methamphetamine, including its salts, isomers, and salts of isomers.

RCW 69.50.440(1).

Since the two offenses require different intents and do not meet the ‘same elements’ test, they do not constitute the same criminal conduct. Since each crime is indicative of different criminal conduct, the trial court correctly held that the two charges should not count as one point for

sentencing purposes. The offender score should remain a four and the defendant's sentence should be affirmed.

2. THE TRIAL COUNSEL WAS NOT INEFFECTIVE WHERE SHE ARGUED MERGER IN HER SENTENCING BRIEF, THE TRIAL COURT CORRECTLY DETERMINED THE CHARGES DID NOT COUNT AS ONE POINT FOR SENTENCING PURPOSES, AND, EVEN IF THE OFFENDER SCORE HAD BEEN MISCALCULATED, THE SENTENCE WOULD REMAIN THE SAME.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution and in Article 1, Section 22 of the Constitution of the State of Washington. The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Cronin*, 466 U.S. at 656. The United States Supreme Court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that, “the essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial

balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect.”

The United States Supreme Court set forth the test to determine when a defendant’s conviction must be overturned for ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and the Washington Supreme Court adopted that test in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The test is as follows:

First, the defendant must show that the counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as “counsel” guaranteed by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction... resulted from a breakdown in the adversary process that renders the result unreliable.

*Jeffries*, 105 Wn.2d at 418. *See also State v. Walton*, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995); *State v. Denison*, 78 Wn. App. 566, 897 P.2d 437, *review denied*, 128 Wn.2d 1006 (1995); *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995); *State v. Foster*, 81 Wn. App. 508, 915 P.2d 567, *review denied*, 130 Wn.2d 100 (1996).

*State v. Lord*, 117 Wn.2d 829, 833, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 56 (1992), further clarified the intended application of the *Strickland* test:

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

*Lord*, 117 Wn.2d at 833 (citing *Strickland*, 466 U.S. at 689-90).

Under the prejudice prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Lord*, 117 Wn.2d at 883-884. Because the defendant must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding a lack of prejudice without determining if counsel's performance was deficient. *Strickland*, 466 U.S. at 697; *Lord*, 117 Wn.2d at 884.

Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d at 335 (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289, *cert. denied*, 510 U.S.

944 (1993). The defendant has the “heavy burden” of showing that counsel’s performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788, review denied, 130 Wn.2d 1013, 928 P.2d 413 (1996).

Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689; see also *Lord*, 117 Wn.2d at 883. The reviewing court will defer to counsel’s strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *In re Nichols*, \_\_ Wn. App. \_\_, \_\_, 211 P.3d 462, 468 (2009); *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), cert. denied, 489 U.S. 1046 (1989); *Campbell v. Knicheloe*, 829 F.2d 1453, 1462 (9th Cir. 1987), cert. denied, 488 U.S. 948 (1988).

When the ineffectiveness allegation is premised upon counsel’s failure to litigate a motion or objection, the defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objection had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991); *State v. Adamy*, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_ (No. 27206-1-III, August 13, 2009, WL 24617212). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

- a. Defense counsel argued merger in her sentencing brief and during the sentencing hearing.

This court must defer to defense counsel's strategic decision to present or forego a particular defense theory when the decision falls with the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *Layton*, 855 F.2d at 1419-1420; *State v. Marohl*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (No. 37566-4-II, August 4, 2009, WL 2371086).

In the present case, defense counsel made a strategic choice in her sentencing memorandum and at the sentencing hearing to argue both double jeopardy and merger. CP 70-74; RP IV 306-307. As indicated in section 1 above, the term "merger" can apply to both double jeopardy and "same criminal conduct" analysis and Washington courts have used the term merger in both contexts. *See Tongren*, 147 Wn. App. at 563.

In the defendant's sentencing memorandum, defense counsel argued merger and appropriately cited *State v. Vladovic*, 99 Wn.2d 413, 420-421 (1983), which discusses both double jeopardy and merger as a doctrine of statutory interpretation, even highlighting the fact that, in this context, merger is "a doctrine of statutory interpretation used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions." *Vladovic*, 99 Wn.2d at 419, N. 2; CP 73. The State understood defense counsel's argument to be one of "same criminal conduct" as its reply brief addressed

this very issue. CP 121-123. “The court should deny the defendant’s motion to find that the two offenses constitute the same course of conduct.” CP 121 (citing RCW 9.94A.589). This falls within the broad range of professionally competent assistance and the court should defer to counsel’s strategic decision. *Strickland*, 466 U.S. at 489. “If defense counsel’s conduct can be characterized as trial strategy or tactics, it does not constitute deficient performance.” *Marohl*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (No. 37566-4-II, August 4, 2009, WL 2371086).

At the sentencing hearing, defense counsel continued to argue both merger and double jeopardy. RP IV 306-307. At this time, the State still understood defense counsel’s “merger” argument to relate to calculating the offender score under RCW 9.94A.589, “There’s an issue before the Court as to the defendant’s offender score.” CP 121; RP IV 305. In response to the State’s argument, defense counsel stated, “I would ask that the Court find that those should be punished as the same conduct.” RP IV 307. “Same criminal conduct” is the precise language of RCW 9.94A.589(1)(a). By addressing “same conduct,” in a context where the State had expressly argued RCW 9.94A.589, defense counsel explicitly argued both double jeopardy and merger in relation to “same criminal conduct.” The competency of trial counsel is determined based on the entire record. *McFarland*, 127 Wn.2d at 335. After reviewing the entire record, the defendant has not met the “heavy burden” of showing that counsel’s performance was deficient in light of all circumstances where

she correctly briefed the court and argued both issues. *Hayes*, 81 Wn. App. at 442.

- b. The trial court correctly held that the charges did not merge.

As shown in part one above, the two charges for which the defendant was convicted do not constitute the same criminal conduct. For an allegation of ineffectiveness of counsel to be effective, a defendant must show that the legal grounds for making a motion or objection would have been meritorious. *Kimmelman*, 477 U.S. at 375. In this case, the defendant has failed to meet his burden because the two charges do not count as one point for sentencing purposes, as explained in section 1 above.

- c. Even if charges should have merged for sentencing purposes, the defendant cannot show prejudice.

Even if trial counsel had erred, the error would not require reversal. Where alleging ineffective assistance of counsel, the defendant must not only show error on the part of trial counsel, but also must show that counsel's errors were so serious as to prejudice the defendant and to deprive him of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687; *Lord*, 117 Wn.2d at 883-884. Since the defendant must prove both ineffective assistance of counsel and resulting prejudice, the court can resolve this issue by solely finding a lack of prejudice. *Strickland*,

466 U.S. at 697; *Lord*, 117 Wn.2d at 884. Here, the defendant has failed to meet the burden of showing that but for the ineffective assistance of counsel, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 994.

First, even though defense counsel at sentencing did not specifically refer to RCW 9.94A.589 in her memorandum, she did refer to merger generally. CP 73. Moreover, in its response, the State expressly raised the applicability of RCW 9.94A.589 in its response to the defendant's motion. CP 121. So, that the matter was in fact before the court at the sentencing. Where RCW 9.94A.589 was before the court, even if defense counsel had been ineffective for failing to raise it herself, the error was harmless.

Further, the defendant cannot show he was prejudiced by the court's determination of his offender score as his sentence would not change even if the court found the two charges constituted the same criminal conduct. The standard range sentence for manufacturing methamphetamine with an offender score of three to five is 68 to 100 months in prison. RCW 9.94A.517. The standard range sentence for possession of pseudoephedrine with intent to manufacture methamphetamine with an offender score of three to five is also 68 to 100 months. RCW 9.94A.517.

If the two charges counted as one point for sentencing purposes, the defendant's offender score would be reduced from a four to a three.

The defendant's range under each offense would remain 68 to 100 months, regardless of whether his offender score was a three or a four. RCW 9.94A.517. The defendant cannot show that he was prejudiced by trial counsel failing to argue 'same criminal conduct' where the two charges do not count as one point for sentencing purposes and, even if they did, the standard sentencing range would remain the same.

3. THE SENTENCE SHOULD BE AFFIRMED AS ANY POTENTIAL ERROR IN THIS INSTANCE WOULD BE HARMLESS.

The central purpose of a criminal trial is to determine guilt or innocence. *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). "Reversal for error, regardless of its effect on judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Neder v. United States*, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotations omitted). "[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials." *Brown v. United States*, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973) (internal quotation omitted). "[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Rose*, 478 U.S. at 577. Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial and acknowledges the fact that all trials inevitably contain

errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Rose*, 478 U.S. at 578.

Even if the court finds error in the present case, that error would be harmless as the defendant's standard range sentence would not change. Moreover, when the defendant has raised a sentencing issue, the correct remedy to any error would be to correct the sentence imposed, not to reverse the conviction.

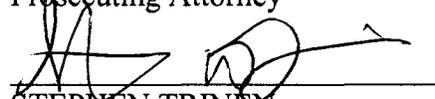
D. CONCLUSION.

The trial court correctly determined that the two crimes did not count as one point for sentencing purposes because the charges had different intents and were not part of the same criminal conduct. Neither was trial counsel ineffective for failing to raise the issue. Trial counsel did raise the general issue of merger. The State treated trial counsel's argument as one under RCW 9.94A.589 and argued it as such, and trial counsel responded to that argument. Even if the trial counsel was ineffective, the defendant cannot show prejudice where the counts should not have been treated as one point for sentencing purposes, and even if they had, this would not affect his sentencing range. Moreover, because

any error did not affect the defendant's sentencing range, it was harmless. Accordingly, the State respectfully requests this Court to deny the appeal and affirm the convictions and sentence below.

DATED: AUGUST 31, 2009

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney



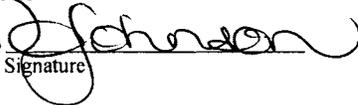
STEPHEN TRINEN  
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Jacquie St. Romain  
Appellate Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8/31/09   
Date Signature

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STATE OF WASHINGTON  
BY   
COURT OF APPEALS  
DIVISION II