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COURT OF APPEALS

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STATE OF WASHINGTON

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NO. 31544-1

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

RAMOND K. HATCHIE

Appeal from the Superior Court of Pierce County
The Honorable Beverly Grant

Nos. 03-1-02900-1

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. Did the officers properly enter a home they reasonably believed to be Schinnell's in order to serve a valid arrest warrant? 1

2. May the defendant challenge the court's admission of evidence that was the result of an alleged invalid search where defendant fails to outline which evidence was the result of the illegal search and fails to look at the validity of the warrant independent of the alleged tainted evidence? ... 1

3. Did the trial court err in failing to give a unanimity instruction where such an instruction was never requested and where there were no separate acts alleged? 1

4. Did the trial court properly exercise its discretion where it allowed a trained methamphetamine officer to offer an opinion as to whether methamphetamine manufacturing occurred at a particular location?..... 1

5. Did the trial court properly exercise its discretion in admitting evidence at trial and was there a need for a limiting instruction with such evidence? 1

6. Did the defendant receive effective assistance of counsel?. 2

7. Did the prosecutor commit misconduct during opening and closing where he properly argued the law on reasonable doubt and where he made fleeting reference to the accomplice's plea agreement? 2

8. Did the court properly inquire of the defense prior to sentencing; and alternatively, has this issue been properly preserved for appeal where defendant remained silent below; and/or may this court apply a harmless error analysis?..... 2

9.	May the defendant claim cumulative error requires reversal where there was no error in the record below and where the evidence was overwhelming?	2
B.	<u>STATEMENT OF THE CASE</u>	2
1.	<u>Procedure</u>	2
2.	<u>Facts of Case</u>	8
C.	<u>ARGUMENT</u>	22
1.	THE OFFICERS PROPERLY ENTERED A HOME THEY BELIEVED TO BE SCHINNELL'S IN ORDER TO SERVE AN ARREST WARRANT	22
2.	DEFENDANT MAY NOT CHALLENGE THE SUPPRESSION OF EVIDENCE WHERE THE DEFENDANT FAILS TO STATE WHAT EVIDENCE WAS SEIZED OR EXAMINE THE VALIDITY OF THE WARRANT INDEPENDENT OF THE ALLEGED TAINTED EVIDENCE	38
3.	THE STATE DID NOT ALLEGE "SEPARATE ACTS" IN THIS CASE AND A UNANIMITY INSTRUCTION WAS NOT NEEDED	42
4.	THE TRIAL COURT PROPERLY ALLOWED OPINION TESTIMONY REGARDING THE MANUFACTURING OF METHAMPHETAMINE	46
5.	THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING EVIDENCE AT TRIAL AND A LIMITING INSTRUCTION WAS UNNECESSARY	49
6.	THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL	58

7.	THE PROSECUTOR'S ARGUMENTS REGARDING PLEA AGREEMENTS AND THE STANDARD OF BEYOND A REASONABLE DOUBT WERE SOUND, LEGAL ARGUMENTS AND THERE WAS NO MISCONDUCT.....	62
8.	THE COURT PROPERLY CONSIDERED DEFENDANT'S ALLOCUTION AND ADJUSTED HIS SENTENCE ACCORDINGLY. ALTERNATIVELY, THE DEFENDANT FAILED TO PRESERVE THIS ISSUE FOR APPEAL AND/OR THE ERROR IS HARMLESS.	71
9.	THERE IS NO CUMULATIVE ERROR REQUIRING REVERSAL.....	75
D.	<u>CONCLUSION</u>	76

Table of Authorities

Federal Cases

Brinegar v. United States, 338 U.S. 160, 175, 93 L.Ed. 1879,
69 S.Ct. 1302 (1949)..... 35

Payton v. New York, 445 U.S. 573, 603, 63 L.Ed.2d 639,
100 S.Ct. 1371 (1980)..... 23, 24, 26, 28, 32

Steagald v. United States, 451 U.S. 204, 212, 68 L.Ed.2d 38,
101 S.Ct. 1642 (1981)..... 23, 24, 26, 28

Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674,
104 S.Ct. 2052 (1984)..... 58, 62

Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968)..... 33

United States v. Christine, 687 F.2d 749, 758 (3d Cir. 1982) 39

United States v. Edmonds, 52 F.3d 1236, 1247-1248 (3d Cir.),
vacated in part on other grounds, 1995 U.S. App. LEXIS 16108
(3d Cir. June 29, 1995), *cert. denied*, 519 U.S. 927, 136 L.Ed.2d 214,
117 S.Ct. 295 (1996)..... 32

United States v. Gorman, 314 F.3d 1105, 1111-15 (9th Cir. 2002)..... 33

United States v. Lauter, 57 F.3d 212, 215 (2d Cir. 1995)..... 32

United States v. Magluta, 44 F.3d 1530, 1535 (11th Cir.),
cert. denied, 516 U.S. 869, 133 L.Ed.2d 126, 116 S.Ct. 189 (1995).... 32

United States v. Risse, 83 F.3d 212, 216 (8th Cir. 1996) 32

United States v. Roberts, 618 F.2d 530, 535 (9th Cir. 1980)..... 66, 67, 68

United States v. Route, 104 F.3d 59, 62 (5th Cir.), *cert. denied*,
521 U.S. 1109, 138 L.Ed.2d 998, 117 S.Ct. 2491 (1997)..... 32

United States v. Tham, 665 F.2d 855, 861(9th Cir. 1981)..... 67

Valdez v. McPheters, 172 F.3d 1220, 1224-1225 (10th Cir. 1999)..... 32

Washington v. Chrisman, 455 U.S. 1, 6, 70 L.Ed.2d 778,
102 S.Ct. 812 (1982)..... 25, 28

State Cases

American Legion Post No. 32 v. City of Walla Walla, 116 Wn.2d 1, 7,
802 P.2d 784 (1991)..... 38

Bellevue Sch. Dist. No. 405 v. Lee, 70 Wn.2d 947, 950,
425 P.2d 902 (1967)..... 50

City of Yakima v. Mollett, 115 Wn. App. 604, 63 P.3d 177 (2003) 36

Commonwealth v. Silva, 440 Mass. 772, 802 N.E.2d 535 (2004) 33

In re Detention of Swanson, 115 Wn.2d 21, 24, 793 P.2d 962 (1990)..... 36

In Re Marriage of Gibson, 70 Wn. App. 646, 855 P.2d 1174 (1993)..... 37

Morgan v. State, 963 S.W.2d 201, 204 (Tex. Ct. App. 1998) 33

State v. Anderson, 105 Wn. App. 223, 19 P.3d 1094 (2001) 27

State v. Asbury, 328 S.C. 187, 191-192, 493 S.E.2d 349 (1997) 33

State v. Beal, 26 Kan. App. 2d 837, 840-841, 994 P.2d 669 (2000) 33

State v. Bellows, 72 Wn.2d 264, 266, 432 P.2d 654 (1967)..... 34

State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)..... 46

State v. Blanco, 237 Wis. 2d 395, 2000 WI App 119,
614 N.W.2d 512, 516 (Wis. Ct. App. 2000) 33

State v. Bourgeois, 133 Wn.2d 389, 4, 945 P.2d 1120 (1997) 55, 66

State v. Braun, 11 Wn. App. 882, 884-85, 526 P.2d 1230 (1974)..... 34

State v. Carleton, 82 Wn. App. 680, 685, 919 P.2d 128 (1996) 54

State v. Chrisman, 100 Wn.2d 814, 676 P.2d (1984) . 24, 25, 26, 27, 28, 31

State v. Chrisman, 94 Wn.2d 711, 619 P.2d 971 (1980) 25

<u>State v. Coates</u> , 107 Wn.2d 882, 887, 735 P.2d 64 (1987).....	39
<u>State v. Cord</u> , 103 Wn.2d 361, 365-66, 693 P.2d 81 (1985).....	40
<u>State v. Crider</u> , 78 Wn. App. 849, 899 P.2d 24 (1995).....	72, 73, 74
<u>State v. Day</u> , 51 Wn. App. 544, 553, 754 P.2d 1021, <i>rev. denied</i> , 111 Wn.2d 1046 (1988).....	58
<u>State v. Delange</u> , 31 Wn. App. 800, 802-803, 644 P.2d 1200 (1982)	71
<u>State v. Dennison</u> , 115 Wn.2d 609, 629, 801 P.2d 193 (1990).....	38, 62
<u>State v. Dorsey</u> , 40 Wn. App. 459, 468, 698 P.2d 1109 (1985)	34
<u>State v. Ford</u> , 137 Wn.2d 472, 488, 973 P.2d 452 (1999)	49
<u>State v. Franklin</u> , 41 Wn. App. 409, 416, 704 P.2d 666 (1985)	35
<u>State v. Gaddy</u> , 152 Wn.2d 64, 93 P.3d 872 (2004)	34
<u>State v. Gallagher</u> , 112 Wn. App. 601, 614, 51 P.3d 100 (2002)	44, 56
<u>State v. Gentry</u> , 125 Wn.2d 570, 640, 888 P.2d 1105 (1995), <i>U.S. cert. denied</i> , ___ U.S. ___, 116 S.Ct. 131, 133 L.Ed.2d 79 (1996).....	62, 63
<u>State v. Gluck</u> , 83 Wn.2d 424, 426-27, 518 P.2d 703 (1974).....	34
<u>State v. Goble</u> , 88 Wn. App. 503, 509, 945 P.2d 263 (1997)	39
<u>State v. Gonzalez</u> , 51 Wn. App. 242, 247, 752 P.2d 939 (1988).....	59
<u>State v. Gonzalez-Hernandez</u> , 122 Wn. App. 53, 57, 92 P.3d 789 (2004).....	46, 51
<u>State v. Green</u> , 119 Wn. App. 15, 79 P.3d 460 (2003)	65
<u>State v. Green</u> , 133 Wn.2d 389, 400, 401, 945 P.2d 1120 (1997)	64
<u>State v. Green</u> , 94 Wn.2d 216, 221, 616 P.2d 628 (1980)	43

<u>State v. Guloy</u> , 104 Wn.2d 412, 421, 705 P.2d 1182 (1985), <i>cert. denied</i> , 475 U.S. 1020, 89 L. Ed. 2d 321, 106 S. Ct. 1208 (1986).....	50
<u>State v. Gunwall</u> , 106 Wn.2d 54, 58- 63, 720 P.2d 808 (1986).....	23
<u>State v. Harris</u> , 102 Wn.2d 148, 685 P.2d 584 (1984).....	60
<u>State v. Hill</u> , 123 Wn.2d 641, 647, 870 P.2d 313 (1994).....	30
<u>State v. Hoffman</u> , 116 Wn.2d 51, 804 P.2d 577 (1991)	62, 63
<u>State v. Huft</u> , 106 Wn.2d 206, 211, 720 P.2d 838 (1986).....	39
<u>State v. Hughes</u> , 2005 Wash. LEXIS 362. *50 (2005)	71, 72, 74
<u>State v. Johnson</u> , 128 Wn.2d 431, 443, 909 P.2d 293 (1996).....	30
<u>State v. Johnson</u> , 79 Wn. App. 776, 904 P.2d 1188 (1995), <i>rev. denied</i> , 128 Wn.2d 1023 (1996)	41
<u>State v. Jones</u> , 332 Or. 284, 290-291, 27 P.3d 119 (2001)	33
<u>State v. Jones</u> , 59 Wn. App. 744, 749-50, 801 P.2d 263 (1990), <i>rev. denied</i> , 116 Wn.2d 1021 (1991)	46
<u>State v. Jose Aguilar-Rivera</u> , 83 Wn. App. 199, 920 P.2d 623 (1996).....	72
<u>State v. Kitchen</u> , 110 Wn.2d 403, 409, 756 P.2d 105 (1988)	42, 43
<u>State v. Lough</u> , 125 Wn.2d 847, 853, 889 P.2d 487 (1995)	52, 69
<u>State v. Lundquist</u> , 60 Wn.2d 397, 374 P.2d 246 (1962).....	36
<u>State v. Mak</u> , 105 Wn.2d 692, 731, 718 P.2d 407, <i>cert. denied</i> , 479 U.S. 995, 93 L.Ed.2d 599, 107 S.Ct. 599 (1986).....	59
<u>State v. McKinney</u> , 49 Wn. App. 850, 857, 746 P.2d (1987).....	27
<u>State v. Myers</u> , 82 Wn. App. 435, 439, 918 P.2d 183 (1996), <i>aff'd</i> , 133 Wn.2d 26, 941 P.2d 1102 (1997).....	57
<u>State v. Northover</u> , 133 Idaho 655, 659, 991 P.2d 380 (Ct. App. 1999) ..	33

<u>State v. Olivas</u> , 122 Wn.2d 73, 82, 856 P.2d 1076 (1993)	23
<u>State v. Papadopoulos</u> , 34 Wn. App. 397, 400, 662 P.2d 59, <i>rev. denied</i> , 100 Wn.2d 1003 (1983)	67
<u>State v. Paul</u> , 95 Wn. App. 775, 778, 976 P.2d 1272 (1999).....	37
<u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984).....	42
<u>State v. Pirtle</u> , 127 Wn.2d 628, 672, 904 P.2d 245 (1995)	71
<u>State v. Powell</u> , 126 Wn.2d 244, 264, 893 P.2d 615 (1995).....	52, 54
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	67
<u>State v. Rice</u> , 120 Wn.2d 549, 844 P.2d 416 (1993).....	63
<u>State v. Russell</u> , 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), <i>cert. denied</i> , 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995)	69, 75
<u>State v. Sanders</u> , 66 Wn. App. 380, 832 P.2d 1326 (1992)	46, 47
<u>State v. Sardinia</u> , 42 Wn. App. 533, 539, 713 P.2d 122, <i>rev. denied</i> , 105 Wn.2d 1013 (1986)	59
<u>State v. Sargent</u> , 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985)	67
<u>State v. Tharp</u> , 27 Wn. App. 198, 205-06, 616 P.2d 693 (1980), <i>aff'd</i> , 96 Wn.2d 591, 637 P.2d 961 (1981)	46, 51, 55
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	58
<u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2003)	55
<u>State v. Trasvina</u> , 16 Wn. App. 519, 523, 557 P.2d 368 (1976).....	39
<u>State v. White</u> , 43 Wn. App. 580, 587, 718 P.2d 841 (1986)	55
<u>State v. Wood</u> , 45 Wn. App. 299, 725 P.2d 435 (1986)	26, 27, 28
<u>State v. Young</u> , 123 Wn.2d 173, 195, 867 P.2d 593 (1994)	39

<u>State v. Zunker</u> , 112 Wn. App. 130, 48 P.3d 344 (2002)	47-48
<u>V.P.S. v. State</u> , 816 So. 2d 801, 802-803 (Fla. Dist. Ct. App. 2002).....	33

Constitutional Provisions

Article 1, section 7, Washington State Constitution	23, 25
Fourth Amendment, United States Constitution	23, 24, 25

Statutes

RCW 9.94A.500	71, 73
RCW 9.94A.510	2
RCW 9.94A.530	2
RCW 69.50.401(a)(1)(ii)	2
RCW 9.41.010	2
RCW 9.94A.110	73
RCW 9.94A.500	71, 73
RCW 9A.08.020(3)(a)(i)(ii).....	44, 56

Rules and Regulations

CrR 3.6.....	3
CrR 7.1(a)(1).....	73
CrRLJ 3.2(a)	37
CrRLJ 3.2(h)	37
CrRLJ 3.2(k)(1).....	37
CrRLJ 3.2(n)	37
ER 103	50

ER 105	57
ER 401	46, 52
ER 403(b).....	50
ER 404(b).....	50, 52, 54, 55, 57
ER 704	46

Other Authorities

Code of Criminal Procedure, Section 178	24
WPIC 6.05.....	59

Appendices

Appendix A – F.

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

1. Did the officers properly enter a home they reasonably believed to be Schinnell's in order to serve a valid arrest warrant?

(Appellant's Assignment of Error Number One through Four).

2. May the defendant challenge the court's admission of evidence that was the result of an alleged invalid search where defendant fails to outline which evidence was the result of the illegal search and fails to look at the validity of the warrant independent of the alleged tainted evidence? (Appellant's Assignment of Error Number One).

3. Did the trial court err in failing to give a unanimity instruction where such an instruction was never requested and where there were no separate acts alleged? (Appellant's Assignment of Error Number Five).

4. Did the trial court properly exercise its discretion where it allowed a trained methamphetamine officer to offer an opinion as to whether methamphetamine manufacturing occurred at a particular location? (Appellant's Assignment of Error Number Six).

5. Did the trial court properly exercise its discretion in admitting evidence at trial and was there a need for a limiting instruction with such evidence? (Appellant's Assignment of Error Number Seven).

6. Did the defendant receive effective assistance of counsel?
(Appellant's Assignment of Error Number Eight).

7. Did the prosecutor commit misconduct during opening and closing where he properly argued the law on reasonable doubt and where he made fleeting reference to the accomplice's plea agreement?
(Appellant's Assignment of Error Number Nine).

8. Did the court properly inquire of the defense prior to sentencing; and alternatively, has this issue been properly preserved for appeal where defendant remained silent below; and/or may this court apply a harmless error analysis? (Appellant's Assignment of Error Number Ten).

9. May the defendant claim cumulative error requires reversal where there was no error in the record below and where the evidence was overwhelming? (Appellant's Assignment of Error Number 11).

B. STATEMENT OF THE CASE.

1. Procedure

On June 23, 2003, RAYMOND K. HATCHIE, hereinafter defendant, was charged with Unlawful Manufacture of a Controlled Substance- Methamphetamine with a firearm enhancement, contrary to RCW 69.50.401(a)(1)(ii); RCW 9.41.010, 9.94A.510, 9.94A.530. CP 1-2.

On December 4, 2003, the matter came before the Honorable Beverly G. Grant for a CrR 3.6 hearing. RP 4.¹ At the conclusion of the hearing the court denied the suppression motion, finding that the entry into the residence was justified based on an arrest warrant. RP 244. Findings of fact and conclusions of law were entered. CP 132-135, (Appendix A). On January 9, 2004, the jury returned a verdict of guilty as charged. CP 124-125.

On March 12, 2004, the matter came before the Honorable Beverly Grant for sentencing. RP 3 - SENTENCING. Both parties addressed the court regarding the appropriate sentence and the defense requested an exceptional sentence downward. RP 3-19. The court finally inquired whether defense counsel had “anything else,” and defense counsel went on with more argument without addressing his client. RP 18-19. The court then stated it was ready to rule and announced a standard range sentence of 55 months plus the three year firearm enhancement, “unless your client has something else to add or say . . . on his own behalf.” RP 19. The defense remained silent. RP 19. At the conclusion the State asked the court to “formally” inquire as to whether Hatchie wished to allocute. RP 19. The defense replied that the court had already ruled. RP 20. The court inquired again and the defendant addressed the court. RP 20-22.

¹ Unless otherwise indicated, all references to the verbatim report of proceedings are for Volume I.

After hearing from the defendant the court altered the sentence to 53 months. RP 22, CP136-146.

a. Facts at CrR 3.6 Hearing.

On June 11, 2003, Pierce County Sheriff's Deputy Brockway and Deputy Fry were conducting an investigation into the purchase of precursor chemicals that are commonly related to the manufacturing of methamphetamine. RP 4-6, 98-100. Deputy Brockway and Fry were at the Ace Hardware Store on Pacific Avenue and were alerted that Eric Schinnell was purchasing muriatic acid, a component used in the third stage of manufacturing methamphetamine. RP 7, 99-100. The deputies followed Schinnell in unmarked cars to Walgreens where he purchased a four pack of lithium batteries. RP 8-9. The lithium metal from the batteries is used in the reaction stage of production. RP 9. Officers then followed him to Market Place where they observed him purchase two bottles of Red Devil Lie, a substance also used in the reaction stage. RP 10. Deputies then attempted to follow Schinnell, but Schinnell made numerous stops and turns. RP 11-13. Based on Deputy Fry's training in recognizing counter surveillance, Schinnell's driving seemed unusual. RP 101. Schinnell was looking in mirrors, pulling into a residential area and taking several turns. RP 103. The deputies made a determination to stop the vehicle. RP 105. However, before they could stop it the deputies lost

sight of him for approximately five to seven minutes. RP 10-11. They immediately located his car outside a duplex at 10137 Patterson Street South. RP 10-11. According to Deputy Brockway, there was a more direct route to this residence from the Market Place. RP 13.

Deputy Collier observed the vehicle at the residence and saw Schinnell walking away from his vehicle towards a trailer, but he was unable to observe whether he was walking to the residence or the trailer. RP 150-151.

Officers ran the registration for the vehicle and it came back to an Eric Schinnell. RP 13. The record's check also revealed that Schinnell's license was suspended and he had a misdemeanor warrant for his arrest. RP 13. The address on the warrant was 950 North Ducka Bush, Hoodspout. RP 65. Officers compared a booking photo of Schinnell to their observations of him and they appeared similar. RP 20.

Officers wanted to contact Schinnell regarding his warrant, his suspended license and the purchase of the three precursor chemicals. RP 18. Deputy Brockway felt an arrest at that time was appropriate based solely on the information of the warrant and the presence of a handgun. RP 31-32. Deputies waited approximately a half hour to 40 minutes for a marked patrol unit and uniformed officer to arrive before approaching the house. RP 19, 17.

Prior to entering, officers contacted neighbor Rowland who said that the vehicle they followed belonged to "Eric" but she did not know his last name. RP 21. Rowland said that Eric had been at the duplex earlier in the day and that he lived there. RP 21. Police also located a second vehicle parked on the lawn that was registered to Schinnell. RP 21. Deputies also contacted neighbor Huntsman. RP 21. Huntsman stated that there was a lot of traffic to and from the residence at all hours of the day and that people would come to Huntsman's residence looking for drugs. RP 21. When they were turned away they would go to 10137. RP 21. Huntsman believed there were up to six different people living there and he had seen Schinnell and his vehicle "around." RP 22. Officers also contacted neighbor Petticord, who reported that if the truck was at the residence, then "Eric" was at the residence. RP 179. Petticord also stated that Eric stayed at the residence but generally outside of the residence. RP 179. Petticord was arrested on an outstanding warrant. RP 179.

When deputies initially knocked on the residence at 10137 there was no answer. RP 22. Approximately 40-45 minutes later Donald Robbins answered the door. RP 22. Robbins had one hand in his pocket and one hand behind his back. RP 24. He stated that Eric was also in the residence. RP 24. Deputies performed a pat-down of Robbins because of the 45 minute delay answering the door, his hand placement and the

inherent danger at methamphetamine labs. RP 26-27. Robbins disclosed that there was a shotgun in the residence and that he had a hypodermic needle uncapped in his possession. RP 28.

Deputies showed Robbins a photo of Eric Schinnell and Robbins said “that’s Eric.” RP 28. At first Robbins reported that Schinnell was inside the residence. RP 28. Then Robbins said that he had been sleeping and that “he assumed Eric was home since the . . . truck was there.” RP 28. The deputies decided to enter the residence to arrest Schinnell on the warrant and to discuss with him the purchase of the items in his vehicle. RP 29. Prior to entry, police also observed a revolver in the front bucket seat of Schinnell’s vehicle. RP 30. With the door wide open to the residence, the officers announced their presence several times but Schinnell did not come to the door. RP 30.

Deputies entered the home to find Schinnell. RP 32. As they were looking for Schinnell they observed a drug pipe in the kitchen and a squirrel cage fan in the garage that is often used to vent chemicals, as well as other items used in the production of methamphetamine. RP 32, 33. Schinnell was located under the vehicle in the garage. RP 33-34. It took approximately five to seven minutes to locate Schinnell. RP 69. Deputies had to pull Schinnell out from under the vehicle. RP 36. Schinnell was

searched and a plastic baggy containing methamphetamine was recovered from one of his pockets. RP 931, 1009.

Later that night the deputies applied for a search warrant to search the residence and the warrant was served on June 12th. RP 4, 41-43.

2. Facts of Case

Deputy Brockway is with the Pierce County Sheriff's Department, Special Investigations Unit (SIU), which is responsible for narcotics investigation and follow up for methamphetamine labs. RP 421.

According to Brockway, high pedestrian traffic at a particular location at all hours of the night can be related to the distribution or manufacture of narcotics. RP 425.

On June 11, 2003, the SIU was conducting a surveillance at the Ace Hardware Store on Pacific Avenue related to the sale of precursor items involved in the manufacturing of methamphetamine. RP 426, 427. During the surveillance Detective Collier observed Schinnell purchasing a one-quart container of muriatic acid. Muriatic acid is used in the final stages of methamphetamine production. RP 428. After purchasing this item, Deputy Brockway followed Schinnell to Walgreens where Deputy Clark observed Schinnell purchase a pack of lithium batteries, which are also commonly used during the reaction phase of production of

methamphetamine. RP 430. Deputy Brockway then followed Schinnell to the Market Place store where Deputy Wylie observed Schinnell purchase two 18 ounce containers of Red Devil Lye, a substance that can be used in the reaction stage of production of methamphetamine. RP 432. After this purchase, Schinnell entered his vehicle and began driving in an unusual way, in what appeared to be an attempt to see if he was being followed. RP 433-34, 437. Deputies lost site of his vehicle for a short period, approximately three to four minutes. RP 434. Ultimately, at approximately 1907 hours Detective Collier noticed the vehicle parked in a driveway at 10137 Patterson Street South. RP 435. Also located at the residence was a blue Chevy Love [sic] pickup with a canopy, a Volkswagen van and a red Chevy Love pickup in the yard, and a white Buick. RP 439, 441. Inside Schinnell's vehicle officers noticed a revolver in the front bench seat of the truck, within access of the driver. RP 445, 686. Deputy Fry also observed a metal weed sprayer, Toluene, lithium batteries, walkie-talkies, and jars of Red Devil Lye. RP 682.

The units waited for a uniformed patrol vehicle to arrive before any attempts were made to contact the residence. RP 442. At approximately 1944 hours deputies approached a fifth wheel trailer where Schinnell was seen walking and knocked on the door. RP 442. No one answered. RP 443. Deputies also knocked on the door of the residence

and no one answered there as well. RP 443. Deputy Brockway observed a surveillance camera outside the house. RP 688. This raised concerns for law enforcement because the occupants knew exactly where the officers were standing. RP 688. Finally, Mr. Robbins answered the door. RP 444. After securing Mr. Robbins, officers entered the residence to search for Mr. Schinnell. RP 445-46. In the living room area was a TV monitor which appeared to be a surveillance monitor because it showed a quick display of the outside front of the residence. RP 446, 711. Later, officers located a surveillance camera mounted on the front door. RP 447. Blinds were also drawn for the front windows. RP 450. Deputy Brockway entered the kitchen and located a glass drug pipe sitting in a bag near the kitchen table. RP 451. Deputy Brockway then entered the garage where he observed a one gallon can of acetone. RP 523. Acetone can be used during the final stage of production to wash the methamphetamine and make it appear more white. RP 524. Also in the garage was a one gallon can of Toluene, which is used during the reaction stage of the production. RP 524. Schinnell was found hiding under a vehicle in the garage where he was forcibly removed. RP 528-529. During a search of Schinnell officers located a baggy of white substance that appeared to be methamphetamine. RP 530.

On June 12, deputies served a search warrant on the residence where Schinnell was arrested. RP 537. Deputies first searched the living room, where they documented the presence of a surveillance monitor, and used coffee filters with residue in it that tested positive for methamphetamine. RP 712, 932. Coffee filters are used in methamphetamine labs to filter out waste materials or capture the finished methamphetamine. RP 712. Also located in the entertainment center was a digital gram scale commonly used to weigh methamphetamine that tested positive for methamphetamine. RP 713, 933. On an end table officers located documents that belonged to Hatchie, as well as a picture of Hatchie. RP 550, RP 715.

Deputies next searched the kitchen. RP 719. Deputies uncovered a Black and Decker Handy Chopper with pink residue in it that tested positive for pseudoephedrine. RP 719, 934. Pink liquid is often found in methamphetamine labs because the pseudoephedrine tablets often have a red, pink, or blue coating on them that is sometimes visible during the extraction process. RP 736. Also in the kitchen was a power mixer/coffee bean grinder, that Schinnell identified to the jury as being used to grind up the pills containing pseudoephedrine. RP 721, 1146. A one quart can labeled denatured alcohol was located under the kitchen sink. RP 721. Denatured alcohol is used during the extraction process. RP 722. An

electric skillet was located underneath the kitchen sink, which may be used in the evaporation process. RP 724. In the freezer Deputy Fry located a quart glass jar half full of yellow liquid that remained unfrozen, indicating it was most likely a solvent and a chemical used in the manufacturing process, and which also tested positive for methamphetamine. RP 725.

Next officers searched the garage. RP 728. In the garage the officers uncovered numerous items associated with the manufacturing of methamphetamine. Included in these items were (1) a five pack of pseudoephedrine tablets inside the vehicle, empty Chorafed brand pseudoephedrine packs in the attic, and 15 empty blister packs of pseudoephedrine on the floor of the garage (RP 729-30, 754, 797), (2) unused coffee filters in two locations as well as paper filters that may be used like coffee filters (RP 729, 730, 738, 741), (3) two empty bottles of Heet, one with pink residue on the outside (Heet works the same as denatured alcohol) (RP 732, 750-51), (4) used glass drug pipe (RP 733), (5) a filtration system, consisting of a coffee filter inside black funnel and cup, with pink liquid on top that tested positive for pseudoephedrine (RP 735, 941), (6) small electric dryer that Schinnell used to extract ephedrine (RP 737-38, 745, 1151), (7) a box of rubber gloves that are often used as a safety precaution with methamphetamine cooks to protect themselves

from burning (RP 739), (8) three different containers of acetone, which is often used to spray on the methamphetamine to make it appear whiter (RP 740, 742, 744), (9) a gallon of Toluene and a red plastic funnel (RP 742), (10) a squirrel cage fan on the east wall of the garage that is often used as a venting system to remove dangerous fumes from the air (RP 745), (11) an electric skillet with a ground pink substance believed to be pseudoephedrine (RP 747), (12) vinyl tubing and two small propane tanks (RP 747), and (13) a half gallon pitcher one quarter full of pink sludge (RP 748).

Inside the bathroom, under the sink, were unused coffee filters. RP 754.

In the northeast bedroom belonging to Hatchie police uncovered documents belonging to Hatchie, including pay stubs, paperwork from place of employment, ID, passport, paperwork from the Department of Licensing, mail, court paperwork, and pictures. RP 544, 548, 551. On a top dresser drawer was a short straw with residue inside of it and a full package of Chorafed tablets. RP 756, 763. In the middle drawer of the dresser was a plastic baggy with white powder residue that tested positive for methamphetamine. RP 757, 950. Vinyl tubing was located on the floor and can be used to attach to glass pipes for smoking. RP 759. A pair of green latex gloves, similar to the ones located in the garage, was found

in the bedroom. RP 760. A programmable scanner was located by the head of the bed. RP 765. A scanner can give advance notice of police arrival or intent. RP 765.

In the southeast bedroom belonging to Robbins, police uncovered a 20 gauge single shot shotgun, used coffee filters, and two suspected containers of methamphetamine. RP 771, 772, 774, 777-78.

Next the officers searched Schinnell's red Ford pickup, which Schinnell described as his "personal every day vehicle." RP 800, 1140. Officers uncovered numerous items associated with the production of methamphetamine, including lithium batteries, Red Devil Lye, Toluene, respirator mask, garden sprayer, used coffee filters, rock salt, foil, two - 20 pound bags of ammonium sulfate (one half empty), 3 empty bags of dry ice, an empty cardboard box of commercial coffee filters, one quart of liquid drain opener, clear liquid. RP 800-17.

A blue Chevy Luv was searched next. RP 819. Inside the Luv they found many items associated with methamphetamine production. These items included vinyl tubing, unused coffee filters, used coffee filters with pink powder that tested positive for pseudoephedrine, funnel, three empty one gallon Toluene containers, an empty 1 and 5 gallon muriatic acid containers and tubing, aluminum foil, HCL generator, batteries,

pitcher with white residue, and coffee filters with tan powder. RP 819-29, 947-48.

An orange Chevy Luv was also searched. RP 832. Inside the orange vehicle were numerous items associated with the production of methamphetamine. Included in these items were ammonium sulfate fertilizer, coffee filters, Red Devil Lye, plastic tubing, ammonia generator, battery packaging, Toluene, yellow sludge, and yellow liquid white powder residue, liquid ammonia, aluminum foil, plastic funnel, muriatic acid, and an HCL gas generator. RP 832-49.

A search of a white Buick on the property uncovered some plastic tubing. RP 850.

Also located on the property was a vehicle registered to a Phillip Duncan. RP 628. Inside this vehicle was evidence of the "gassing out" phase of production. RP 623. The vehicle included a hydrochloric acid generator which is used in the salting out phase. RP 628.

The investigation uncovered several receipts indicating a purchase of methamphetamine products. RP 595. The first receipt dated June 2 for Red Devil Lye and alcohol was located in the driveway of Hatchie's residence as the deputies first approached the house. RP 618-19, 689-90, Ex. 1. Other receipts included (1) a February 29 receipt for Toluene located in the blue Chevy pickup (RP 640), (2) an April 23, 2003, receipt

for lithium batteries (RP 641), (3) June 6th receipt for two bottles of Red Devil Lye located in the red Ford (RP 639), (4) a June 10, 2003, receipt located in Schinnell's red truck for the purchase of Walfed cold tablets (RP 618, 620, 640, Ex. 62-b), and (5) a June 11, 2003, receipt for Red Devil Lye located in Schinnell's truck (RP 595, 621, Ex. 65).

At the end of the investigation, Deputy Fry concluded that methamphetamine had been manufactured at this site. RP 851.

Forensic Scientist Ed Broshears explained to the jury the process of making methamphetamine. RP 893, 921-27.

Deputy Brockway unsuccessfully attempted to contact Hatchie at his place of employment, the Boeing fire department. RP 552. On June 17, Deputy Brockway received a message that Hatchie had called the sheriff's department and wanted a call back at a phone number in Idaho. RP 558. Deputy Brockway returned the call and left a message with his name and phone number. RP 558. Ultimately, Deputy Brockway was able to contact Hatchie on the phone. RP 558-59. Hatchie stated that he had been camping with a friend in Idaho. RP 559. Hatchie wanted to know what was going on because his son had reported that the police had been at his residence. RP 559. Hatchie stated that he and Robbins lived at the residence but that no one else lived there. RP 559. Hatchie was concerned about his personal belongings, his legal paperwork and his dog.

RP 559. Hatchie stated that he would return the first part of the following week and Deputy Brockway provided him with his cellular number. RP 561. Finally, on June 20, when officers were conducting a continuing investigation at the Patterson Street residence, Hatchie drove by the residence. RP 555. They were able to stop him at a gas station approximately a quarter to a half-mile from his house and placed him under arrest. RP 1014-15.

Boeing Security Officer Oto searched Hatchie's firefighter locker at Boeing and uncovered a crystal methamphetamine pipe. RP 1100 (Ex. 118). The pipe was turned over to police on July 22, 2003. RP 1105.

Boeing first aid kits contain Chorafed, Swift brand cold medication, and it was available to employees. RP 1106. There was no inventory kept of the medication. RP 1106-07. Approximately a year and a half ago (from January 2004), Boeing identified that on at least three occasions quantities of this medication had shown up missing. RP 1109. Since that time it is only available at the medical facilities. RP 1109.

Deputy Brockway contacted Fred Meyer in Tacoma, off of 70th and Pacific, and was able to view surveillance video for the days of the receipts. RP 574. Deputy Brockway recognized Schinnell on the video tape surveillance. RP 575. The dates of the surveillance were June 2, 2003, June 11, 2003. RP 592.

According to Deputy Brockway, there was evidence of past manufacture of methamphetamine, the presence of actual methamphetamine that had already been produced, and the ingredients for future manufacture of methamphetamine. RP 649-50. According to Deputy Brockway it is not unusual to have more than one party involved in purchasing precursors. RP 637. This is because many of the clerks are aware of the different precursors involved and so they send people out to go and buy the precursors who go to several different locations to buy one item at a time. RP 638.

Neighbor John Huntsman lived right next door to Hatchie. RP 1051-52. He had lived at this home for three and a half years. RP 1059. He is a trained security officer who was unemployed the month of June. RP 1052-53. While he was home he noticed that there was a lot of traffic coming in and out of Hatchie's house. RP 1053. There were vehicles coming and leaving at all hours of the day and night. RP 1053. There were different people coming and they would only stay at the home for five to ten minutes. RP 1054. Often people would come up and knock on his door and ask for the person that lived at his residence before and then they would go next door. RP 1062.

Nineteen year old Patrick Huntsman also noticed a lot of unusual activity next door. RP 1079. People would come and go 24 hours a day.

RP 1079-80. People were also constantly moving stuff around the property for no apparent reason. RP 1080. During the day and night people on the property would go out to the vehicles and take something out of the vehicles or put something in there. RP 1057. Patrick saw Schinnell and Petticord moving a lot of stuff from the vehicles. RP 1086-87, 582, 1020. Huntsman also noticed that people would take black trash bags and pull them in and out of the manhole cover. RP 1062-63. He also saw younger people he recognized showing up at the house. RP 1081. He knew these individuals as marijuana smokers. RP 1083. Patrick also saw Hatchie at the property quite often and he socialized with the people who were coming and going. RP 1087-88.

According to Patrick there were at least six or seven “part-time residents” at the house, and Schinnell and Petticord were considered full time residents. RP 1054, 1055. Schinnell had lived at the residence as long as Huntsman had lived there. RP 1061. Also, Schinnell’s blue and red Chevy trucks had been on the property for the last year and a half. RP 440, 1056-57. People were also moving in and out of the red Chevy Luv pickup, taking things in and out. RP 1056. Schinnell’s red Ford was seen at the property “on and off” the whole time Huntsman lived there. RP 1057, 1138, 1162.

Eric Schinnell agreed to testify for the State and in exchange for that he was given a plea bargain that reduced his prison time from ten years to 0-12 months for his involvement in the criminal activity in this case. RP 1169.

On June 11, 2003, Eric Schinnell was working with people in the manufacturing of methamphetamine. RP 1123-24. On that day he went to several stores to purchase some chemicals for the production of methamphetamine, including Red Devil Lye and sulfuric acid. RP 1124. He also frequented Fred Meyer to purchase items and may have purchased some items from Fred Meyer the morning of his arrest. RP 1124. The actual pseudoephedrine needed for production of the methamphetamine was going to come from Hatchie. RP 1224.

Schinnell had been coming to the Hatchie home for approximately two months previous to his arrest. RP 1126. His friend, Tim Petticord, introduced him to the house. RP 1126. People came to this house to “get high and party and socialize.” RP 1128. The first time Schinnell went to the house he and Petticord just “sat down and smoked some meth and got acquainted.” RP 1128. Eventually Schinnell would stay overnight, approximately three nights a week, because he was homeless. RP 1129, 1130. During this time Hatchie worked straight 48 hour shifts at Boeing. RP 1223. When he was home he would do “Everything, a little bit of

everything. When I was there, we'd party, you know, we'd just hang out, socialize." RP 1223. Several people would stay the night at this residence, including Tim Petticord, and another unidentifiable man. RP 1131. Ray Hatchie and Don Robbins were the actual residents of the home. RP 1131.

In the manufacture process, Schinnell was a self-described middle man. RP 1134. He would collect material for the producers, such as ephedrine, and they would trade back the finished material to him. RP 1134. He would get the materials from Ray and Don. RP 1134. Hatchie would bring Chorafed Swift tablets home from work and Schinnell would trade them for raw material. RP 1106, 1135. Hatchie knew what Schinnell was going to be doing with the ingredients he was given. RP 1152. Approximately seven times in the two-month period that Schinnell knew Hatchie he was given "Chorafed tablets with the understanding that he . . . would return with finished product." RP 1166. Once Schinnell had completed his end of the bargain and made the methamphetamine he gave the product to Hatchie who used it. RP 1167. Schinnell had three vehicles at Hatchie's residence with Hatchie's permission, the red/orange Chevy Luv, a Ford pickup and another Chevy Luv. RP 1138, 1162.

During the days leading up to his arrest Schinnell would run methamphetamine errands approximately twice a week. RP 1141.

According to Schinnell there were several items in the garage associated with methamphetamine production, including paint with acetone, funnel, and a garden hose. RP 1141. He was unaware of whether they had actually been used to produce methamphetamine. RP 1142. According to Schinnell, methamphetamine was not made at the house while he was there, but it could have been made while he was “crashed” sleeping or away. RP 1157-58. Schinnell was surprised that there was methamphetamine oil located in the fridge because whenever he would help he “would try to get it done as fast as possible,” and you want to “get rid of it as fast as you can so you don’t get caught with it.” RP 1143-45. Also, the smell of ammonia would be unusual for the refrigerator. RP 1144.

C. ARGUMENT.

1. THE OFFICERS PROPERLY ENTERED A HOME THEY BELIEVED TO BE SCHINNELL’S IN ORDER TO SERVE AN ARREST WARRANT.

Defendant challenges the entry to the home on two grounds, (a) that although the officers were armed with an arrest warrant they did not have “probable cause” to enter a home they believed to be the defendant’s or exigent circumstances justifying entry, and (b) the arrest warrant was invalid. However, the law does not require an additional showing of

“probable cause” or exigent circumstances where law enforcement has an arrest warrant and they have reason to believe the person is within his home. Also, defendant’s argument does not attack the validity of the underlying arrest warrant.

a. The arrest warrant allowed entry into the home.

“For Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.” Payton v. New York, 445 U.S. 573, 603, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980). However, an arrest warrant does not justify entry into the dwelling of a third person in order to effectuate an arrest. Steagald v. United States, 451 U.S. 204, 212, 68 L.Ed.2d 38, 101 S.Ct. 1642 (1981).

The issue here, is whether police were justified in entering a home that they (1) reasonably believed was the suspect’s residence, and (2) entered on the basis of a warrant. In defendant’s brief he insists that this court treat misdemeanor warrants different than other arrest warrants.² This confusion on his part seems justified given several appellate court

² Defendant also attempts to argue that the search should be treated differently under article 1, section 7. Defendant fails to perform a Gunwall analysis and this court should decline to consider this argument. State v. Gunwall, 106 Wn.2d 54, 58-63, 720 P.2d 808 (1986); State v. Olivas, 122 Wn.2d 73, 82, 856 P.2d 1076 (1993).

cases that misuse language from Chrisman.³ A brief examination of Payton, Steagald, and Chrisman, will help clarify where this court's analysis should begin. The ultimate conclusion this court should reach is that the entry into the home with the arrest warrant was justified whether or not a stricter analysis is used.

In Payton, the U.S. Supreme Court was faced with the question of whether a New York statute⁴ allowing a warrantless entry into a person's home to arrest on a felony was permissible under the Fourth Amendment. 445 U.S. at 575. The court concluded that absent an arrest warrant for the person, the police were not justified in entering the person's home to make the arrest. Id. at 603. Two years later, in Steagald, the Supreme Court was presented with the question of whether officers may enter a third person's home to search for a person who is the subject of an arrest warrant. 451 U.S. 204, 206, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981). In Steagald, DEA agents were given a tip that a Ricky Lyons could be

³ 100 Wn.2d 814, 676 P.2d (1984).

⁴ The statute at issue in Payton, provided: 'A peace officer may, without a warrant, arrest a person When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it.'

Section 178 of the Code of Criminal Procedure provided: 'To make an arrest, as provided in the last section [177], the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance.'" Payton, 445 U.S. 578, n. 6.

reached at a certain telephone number “during the next 24 hours.” 451 U.S. 204, 206. They traced the telephone number to a physical address and sought to arrest Lyons on a 6-month-old arrest warrant on “their belief that Ricky Lyons might be a guest there.” Id. at 206, 213. Two days later, 11 officers drove to the address and forcibly entered the home in an unsuccessful attempt to arrest Lyons. Id. The court concluded that “in order to render the instant search reasonable under the Fourth Amendment, a search warrant was required.” 451 U.S. 204, 223.

In Chrisman II,⁵ the Washington Supreme Court examined under article 1 § 7 of the State constitution whether police could enter a residence without a warrant to complete an arrest. The court held that absent exigent circumstances, such a search violated article 1 § 7. There was no arrest warrant involved in Chrisman II; instead a Washington State University Police Officer arrested a minor for underage drinking. 100 Wn.2d at 816. The officer escorted him to his dormitory room to pick up

⁵ State v. Chrisman, 100 Wn.2d 814, 676 P.2d 419 (1984) (hereinafter Chrisman II). In State v. Chrisman, 94 Wn.2d 711, 619 P.2d 971 (1980) (Chrisman I), the Washington Supreme Court held that the officer’s warrantless entry into a dormitory room violated the Fourth Amendment. The United States Supreme Court reversed, holding that the decision was a “novel reading of the Fourth Amendment.” Washington v. Chrisman, 455 U.S. 1, 6, 70 L.Ed.2d 778, 102 S.Ct. 812 (1982). The court reversed and remanded the case and Chrisman moved for the court to consider whether article 1, section 7 afforded broader protection.

identification. Id. From the doorway entry the officer observed a small pipe and seeds on a desk in the dormitory room. Id. The officer then entered the room for a closer inspection of these items and discovered the seeds to be marijuana. Id. Citing to Payton, *supra*, the court held that the warrantless entry into the dormitory following a misdemeanor arrest “was not permitted because the officer was not presented with facts sufficient to demonstrate (1) a threat to the officer’s safety, or (2) the possibility of destruction of evidence of the misdemeanor charged, or (3) a strong likelihood of escape.” Chrisman II, 100 Wn.2d at 821. The court went on to note that the fact that the officer did not initially accompany Overdahl into the room shows the “absence of any concern for safety or the integrity of the arrest. Even if we agreed with the United States Supreme Court’s rule, we think the officer abandoned any claim of reasonableness by allowing Overdahl to enter alone.” Id. The court reiterated the need to look to the facts of each case, rather than having a bright line rule.

Since Payton, Steagald, and Chrisman, only a handful of Washington appellate courts have analyzed entry into a home on an arrest warrant; none of these cases are from Division II or the Supreme Court. See State v. Wood, 45 Wn. App. 299, 725 P.2d 435 (1986) (holding that where officers had “security reasons” and pursued an individual into a home on a felony arrest warrant the search was justified); State v.

McKinney, 49 Wn. App. 850, 857, 746 P.2d (1987) (holding that entry into a home on a misdemeanor arrest warrant was justified where there was a history of prior escape and the “integrity of the arrest was threatened”); State v. Anderson, 105 Wn. App. 223, 19 P.3d 1094 (2001) (holding that the entry into a third party’s home on a misdemeanor arrest warrant was unjustified).

None of these cases take into consideration that in Chrisman II there was no arrest warrant. Instead they pull language from Chrisman II in support of a heightened level of scrutiny for arrest warrants. It is this language that defendant relies on in this case in support of a higher standard. For example, in McKinney, the court states Chrisman II requires that there be a “strong justification for entering a private residence in the case of minor violations.” 49 Wn. App. 850, 857 (citing Chrisman II, at 822). Similarly in Anderson, the court cites McKinney, *supra*, and Chrisman, for the proposition that there must “be strong justification for forcefully entering even the suspect’s own residence in the case of a minor offense—here a misdemeanor.” 105 Wn. App. 223, 231.

In contrast, the court in Wood upheld a search of a home for a person on a felony warrant. 45 Wn. App. 299, 308. In Wood, police went to a third party’s home to execute an arrest warrant on Louis Marker. Marker opened the door when police arrived and stated that he was “ready

to go,” but then turned back into the inside of the home and an officer followed. In plain view an officer saw roach pipes and smelled marijuana. Wood then agreed to show the officer where the marijuana grow operation was in the home. Wood challenged the search of the home under the plain view doctrine, arguing that there was no prior justification for the intrusion. 45 Wn. App. at 302. The court upheld the arrest, first noting that unlike Steagald, the arrestee was identified and found within the house before the police entered and that pursuant to the arrest warrant the officer had a right to stay “literally at [Marker’s] elbow at all times.” Wood, 45 Wn. App. 299, 305 (quoting Washington v. Chrisman, 455 U.S. at 6). It further held that there were “specific articulable facts” to justify their entry into Wood’s home under Chrisman II, because it involved a felony arrest warrant.

If the officers have an arrest warrant and it is the person’s home then this should be the end of the inquiry. No further analysis should be needed. Destruction of evidence, hot pursuit, etc., all involve exceptions to the warrant requirement. A misdemeanor warrant carries with it the same safeguards of probable cause that a felony warrant does. “An arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe he is inside.” Payton, 445 U.S. at 602-603. Chrisman

did not involve a warrant and also seems outdated jurisprudence given the inherent risks in arrests.

Turning now to the facts of this case, because there was an arrest warrant for Schinnell and because the officers had a reasonable belief that it was Schinnell's home and he was in fact inside, the entry was justified.

The court's findings of fact include:

- (5) While waiting to make contact with the occupant(s) of the residence, deputies interviewed several neighbors, as well as Tim Peddicord, who had been standing in the yard of the residence. The information gathered from Peddicord and the neighbors indicated that Mr. Schinnell lived at the residence. Mr. Peddicord identified the truck Schinnell had been driving as Schinnell's truck, and told the officers that if the truck was at the residence, Schinnell would be at the residence. The officers waited outside for 45 minutes to one hour and 15 minutes before gaining entry.
- (7) Ultimately, Donald Robbins responded and opened the door. When asked if anyone else was inside, Robbins initially said that Schinnell was inside. Robbins then said that he assumed Schinnell was home, since his truck was parked in front of the house. Robbins also told the officers that there was a shotgun inside the house. The deputies repeatedly announced their presence, and asked Mr. Schinnell to come outside. Finally, the deputies entered the residence to arrest Schinnell on the outstanding misdemeanor warrant. Schinnell was found hiding under a vehicle parked in the garage. While inside the residence to arrest Schinnell, the deputies observed items consistent with the manufacture of methamphetamine. Their observations were later incorporated into a Complaint for a Search Warrant, which resulted in a Search Warrant being issued for the residence. The evidence

found in the execution of this warrant formed the basis for charges filed against Hatchie, Robbins, and Schinnell.

CP 132-134, Appendix A.

An appellate court reviews findings of fact from a suppression motion under the substantial evidence standard. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Id. at 644. Unchallenged findings of fact are verities on appeal and an appellate court “will review only those facts to which error has been assigned.” Id. at 647. Conclusions of law are reviewed de novo. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

Defendant contends that FOF 5 and 7 are not supported by substantial evidence. The written record supports the court’s findings that the officers believed Schinnell resided at the home. Neighbor Rowland confirmed that the vehicle they were following belonged to an “Eric”. RP 21. Rowland also confirmed that Eric had been at the duplex earlier in the day and that he lived there. RP 21. Police also located a second vehicle parked on the lawn that was registered to Schinnell. RP 21. Neighbor Huntsman believed there were up to six different people living at the residence and that he had seen Schinnell and his vehicle “around.” RP 22. According to neighbor Petticord, if the truck was at the residence, then

“Eric” was at the residence. RP 179. Petticord also stated that Eric stayed at the residence but generally outside of the residence. RP 179. Finally, when police initially contacted Robbins at the door he stated at first that Schinnell was inside the residence. RP 28. Then Robbins said that he had been sleeping and that “he assumed Eric was home since the . . . truck was there.” RP 28.

Assuming, *arguendo*, that the State must additionally show in the case of a misdemeanor warrant that there was a (1) threat to the officer’s safety, (2) possibility of destruction of evidence of the misdemeanor charged, or (3) a strong likelihood of escape, to serve a “compelling need” justifying entry, that standard was also met in this case. (See, Opening Brief of Defendant at 38, *citing* Chrisman II). Indeed, the trial court’s conclusions of law supports that such reasons existed. CP 134. Here, Schinnell clearly understood that he was under surveillance and attempted to evade police. RP 10-13, 103. Police observed a firearm in Schinnell’s vehicle and Robbins confirmed that there was a shotgun in the residence. RP 28, 30. Schinnell did not respond to officer’s requests to voluntarily come to the door. RP 28. Deputy Brockway stated that he would have arrested Schinnell based solely on the information of the warrant and the handgun. RP 31-32. Deputy Brockway also felt that there is an inherent danger at methamphetamine labs. RP 26-27. Given the totality of the

circumstances, there was a compelling need to enter the residence and arrest Schinnell. Schinnell obviously knew the officers were there. He had the ability to arm himself. He had several of the ingredients for methamphetamine, a very dangerous drug and there were civilians in the area.

Defendant also contends that the police failed to establish “probable cause” that this was Schinnell’s residence. The framework set forth in Payton for showing residency is that officers may enter a home in which the “suspect lives when there is *reason* to believe he is inside.” Payton, 445 U.S. 573, 602-03. Currently, the majority of Circuit courts⁶

⁶ See, e.g., Valdez v. McPheters, 172 F.3d 1220, 1224-1225 (10th Cir. 1999) (adopting “reasonable belief” standard); United States v. Route, 104 F.3d 59, 62 (5th Cir.), *cert. denied*, 521 U.S. 1109, 138 L.Ed.2d 998, 117 S.Ct. 2491 (1997) (“reason to believe” standard is distinct from “probable cause” and allows “the officer who has already been to the magistrate to secure an arrest warrant, to determine that the suspect is probably within certain premises without an additional trip to the magistrate and without exigent circumstances”); United States v. Risse, 83 F.3d 212, 216 (8th Cir. 1996) (“the officers’ assessment need not in fact be correct; rather, they need only ‘reasonably believe’ that the suspect resides at the dwelling to be searched and is currently present at the dwelling”); United States v. Lauter, 57 F.3d 212, 215 (2d Cir. 1995) (probable cause is “too stringent a test”; proper inquiry is “whether there is a reasonable belief that the suspect resides at the place to be entered to execute an arrest warrant, and whether the officers have reason to believe that the suspect is present”); United States v. Edmonds, 52 F.3d 1236, 1247-1248 (3d Cir.), *vacated in part on other grounds*, 1995 U.S. App. LEXIS 16108 (3d Cir. June 29, 1995), *cert. denied*, 519 U.S. 927, 136 L.Ed.2d 214, 117 S.Ct. 295 (1996) (although “the information available to the [police] clearly did not exclude the possibility that [the suspect] was not in the apartment, [they] had reasonable grounds for concluding that he was there”); United States v. Magluta, 44 F.3d 1530, 1535 (11th Cir.), *cert. denied*, 516 U.S. 869, 133 L.Ed.2d 126, 116 S.Ct. 189 (1995) (for police “to enter a residence to execute an arrest warrant for a resident of the premises, the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality, must warrant a reasonable belief that the location to be searched is the suspect’s dwelling, and that the suspect is within the residence at the time of entry”).

which have considered this issue have adopted the less stringent standard of “reason to believe,” and the 9th Circuit⁷ is the only court to adopt “probable cause” as the standard. Most State courts have also adopted the reason to believe standard.⁸

Adopting the “reason to believe” standard protects the public from unreasonable searches and gives law enforcement a tool that they are used to employing. See Commonwealth v. Silva, 440 Mass. at 779, n.8 (rejecting argument that this standard would be too “confusing for the police to apply.” The police are already familiar with a similar standard of “reasonable suspicion” based on “specific and articulable facts used in Terry-type investigatory stops). It may be prudent to define “reasonable belief” as “reasonable suspicion,” thus avoiding any confusion at all. See Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). Armed

⁷ United States v. Gorman, 314 F.3d 1105, 1111-15 (9th Cir. 2002) (concluding reasonable-belief standard of Payton embodies the same standard of reasonableness inherent in probable cause).

⁸ V.P.S. v. State, 816 So. 2d 801, 802-803 (Fla. Dist. Ct. App. 2002); State v. Northover, 133 Idaho 655, 659, 991 P.2d 380 (Ct. App. 1999); State v. Beal, 26 Kan. App. 2d 837, 840-841, 994 P.2d 669 (2000); State v. Asbury, 328 S.C. 187, 191-192, 493 S.E.2d 349 (1997); Morgan v. State, 963 S.W.2d 201, 204 (Tex. Ct. App. 1998); Commonwealth v. Silva, 440 Mass. 772, 802 N.E.2d 535 (2004). *But see* State v. Jones, 332 Or. 284, 290-291, 27 P.3d 119 (2001) (requiring probable cause as matter of State constitutional law); State v. Blanco, 237 Wis. 2d 395, 2000 WI App 119, 614 N.W.2d 512, 516 (Wis. Ct. App. 2000) (explicitly requiring probable cause to believe suspect is home).

with this standard, and a valid warrant for a person's arrest, law enforcement may enter a person's home where they have a "reasonable belief/suspicion" that it is the person's home and the person is to be found within. This court should reject the 9th Circuit's lone approach of "probable cause." This standard is akin to adopting the requirement that a search warrant for the home must be sought prior to entry. Our courts have never taken that approach where the officer already has the probable cause for the arrest warrant.

Assuming *arguendo*, that this calls for a probable cause framework, this standard is easily met in this case. Probable cause exists "where the arresting officer is aware of facts and circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe a crime has been committed." State v. Gaddy, 152 Wn.2d 64, 93 P.3d 872 (2004) (*citing* State v. Gluck, 83 Wn.2d 424, 426-27, 518 P.2d 703 (1974); State v. Braun, 11 Wn. App. 882, 884-85, 526 P.2d 1230 (1974)). Probable cause is not a technical inquiry. Gaddy, at 70 (*citing* State v. Bellows, 72 Wn.2d 264, 266, 432 P.2d 654 (1967); State v. Dorsey, 40 Wn. App. 459, 468, 698 P.2d 1109 (1985)). A bare suspicion of criminal activity, however, will not give an officer probable cause to arrest. Id. (*citing* Brinegar v. United States, 338 U.S. 160, 175, 93 L.Ed.

1879, 69 S.Ct. 1302 (1949); State v. Franklin, 41 Wn. App. 409, 416, 704 P.2d 666 (1985).

Here the officers knew that (1) Eric Schinnell attempted to elude surveillance and went to the residence of 10137 Patterson Street South (FOF 1-3, CP 132-133); (2) the information from neighbors indicated that Mr. Schinnell lived at the residence (FOF 5, CP 133); (3) Robbins said that he “assumed Schinnell was home, since his truck was parked in front of the house.” (FOF 7, CP 133). Armed with this information, a reasonable officer would conclude that Schinnell lived at the residence. It is difficult to imagine what other information an officer in the field could obtain to verify a person’s residence. As the records demonstrate, the officers did not hastily rush into the residence, but waited to interview neighbors and secure a uniformed officer. They verified that not one, but two cars belonged to Schinnell. They verified that he was believed to live at the residence and that in fact several persons lived there. They personally observed the vehicle travel to the residence. Finally, the occupant of the home stated that he believed Schinnell was “home.” While it is correct that the residence was not the listed residence on the arrest warrant, there is no law to suggest that an arrest warrant may only be carried out at the listed address. It is no surprise that someone who is a fugitive from justice (here, Schinnell had failed to appear for sentencing)

may have a second residence where he is hiding out. CP 133. Based on this reasonably trustworthy information, a reasonable officer would believe Schinnell resided at this location.

b. Validity of warrant.

Defendant challenges the validity of the warrant issued for Schinnell. He contends that the court only had the *authority* to issue a bail warrant and not a “cash only” warrant for Schinnell. Defendant overlooks that what he alleges does not attack the validity of the warrant; in other words, whether the court had the authority to issue a warrant for Schinnell’s arrest. Instead, he challenges what conditions the court could set for making bail. This issue is entirely moot and an appellate court is unable to offer any form of relief to Schinnell. City of Yakima v. Mollett, 115 Wn. App. 604, 63 P.3d 177 (2003); In re Detention of Swanson, 115 Wn.2d 21, 24, 793 P.2d 962 (1990). Moreover, defendant has no standing to challenge whether there was “cash only” bail set for Schinnell. The issue of cash bail had no consequence for this defendant. A person cannot challenge the unconstitutionality of a statute unless he is harmed by the particular feature of the statute challenged. State v. Lundquist, 60 Wn.2d 397, 374 P.2d 246 (1962).

Even assuming that defendant could challenge this warrant, the court had authority to issue the cash only warrant. Defendant relies on City of Yakima v. Mollett, 115 Wn. App. 604, 63 P.3d 177 (2003). This

case is inapposite. This case analyzes CrRLJ 3.2(a) – the preliminary release rule. Schinnell’s warrant was for failure to appear at a post-conviction hearing, which is covered under CrRLJ 3.2(h), and provides that “After a person has been found or pleaded guilty, the court may revoke, modify, or suspend the terms of release and/or bail previously ordered.” CP 172, (Appendix C). Because Schinnell failed to appear for a sentencing hearing, the court had the authority to order a “cash only” bail to secure his presence for sentencing. At this point, the presumption of innocence is gone and a “cash only” bail is appropriate. (See In Re Marriage of Gibson, 70 Wn. App. 646, 855 P.2d 1174 (1993), noting “The constitution and statute encourage the release of parties who are *presumed innocent* until trial. . .”); see also, State v. Paul, 95 Wn. App. 775, 778, 976 P.2d 1272 (1999) (observing that courts may require the full amount of bail to be deposited in cash).

Also, under CrRLJ 3.2(k)(1) and (n) the court has clear authority to issue a warrant for one’s arrest after failing to appear. As argued *supra*, because the court had authority to issue a warrant for Schinnell’s arrest, the issue of whether it should be “cash only” or bondable does not affect the validity of the warrant.

2. DEFENDANT MAY NOT CHALLENGE THE SUPPRESSION OF EVIDENCE WHERE THE DEFENDANT FAILS TO STATE WHAT EVIDENCE WAS SEIZED OR EXAMINE THE VALIDITY OF THE WARRANT INDEPENDENT OF THE ALLEGED TAINTED EVIDENCE.

In the absence of argument and citation to authority, an issue raised on appeal will not be considered. See American Legion Post No. 32 v. City of Walla Walla, 116 Wn.2d 1, 7, 802 P.2d 784 (1991); see also State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990) (issue not reviewed because defendant failed to brief the issue and cite to authority).

Here, defendant complains that the trial court erred in not suppressing the evidence that was the result of the unlawful search. Defendant fails to brief this issue. He does not argue or examine what information contained in the search warrant is a “fruit of the poisonous tree.” Because the defendant fails to brief this issue it is difficult for the respondent or this court to address what portion of the warrant the defendant challenges. This court should refuse to consider this issue on appeal.

What defendant also overlooks is that even assuming the initial entry into the home was unlawful, the search warrant contains sufficient facts separate from the tainted evidence to establish probable cause. “[A] search warrant is not rendered totally invalid if the affidavit contains sufficient facts to establish probable cause independent of the illegally

obtained information.” State v. Coates, 107 Wn.2d 882, 887, 735 P.2d 64 (1987) (*citing* United States v. Christine, 687 F.2d 749, 758 (3d Cir. 1982)).

The burden of proof is on the defendant moving for suppression to establish the lack of probable cause. State v. Trasvina, 16 Wn. App. 519, 523, 557 P.2d 368 (1976). A neutral and detached magistrate must determine whether there is probable cause to issue a search warrant. State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997). To establish probable cause the evidence presented must lead a reasonable person to believe both (1) that the item sought is contraband or other evidence of a crime, and (2) that the item sought is likely to be found at the place searched. Id. at 508-509, *citations omitted*. Thus there must be “nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.” Id. The application for a search warrant must be judged in the light of common sense, with doubts resolved in favor of the warrant. State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). Generally, the probable cause determination of the issuing judge is given great deference. State v. Huft, 106 Wn.2d 206, 211, 720 P.2d 838 (1986). Probable cause for the issuance of a search warrant requires facts sufficient to establish a reasonable inference that the suspect is probably involved in criminal

activity and that evidence of the crime can be found at the place to be searched. State v. Cord, 103 Wn.2d 361, 365-66, 693 P.2d 81 (1985).

Assuming *arguendo* there is any merit to defendant's search claim, there is separate and independent evidence to establish probable cause consists of:

- (1) Officers observed Eric Schinnell purchase one quart container of muriatic acid, lithium batteries, and Red Devil Lye (all items used in the production of methamphetamine),
- (2) Officers attempted to follow Eric Schinnell but due to his evasive driving he was able to escape surveillance and his vehicle was eventually located outside the duplex of 10137 Patterson Street South, and Schinnell was observed out of the vehicle and walking by a 5th wheel trailer in the driveway,
- (3) Observed in plain view inside Eric Schinnell's vehicle #A401193, a Toluene can and metal weed sprayer (Toluene is used during the reaction stage of methamphetamine), and a black revolver near the center seat,
- (4) A second vehicle registered (78116Y) to Eric Schinnell in the north yard of the driveway,
- (5) Neighbor Rowland's statement that vehicle #A40119E belongs to "Eric" and he lived there,
- (6) Neighbor Huntsman stated that there is a lot of traffic to and from the residence at all hours of the day, and that different people would show up at his residence looking for drugs and when they were turned away they would go to 10137, that up to six different people lived there, that he has seen "Eric" around and vehicle #A40119E,

- (7) Donald Robbins answering the door to the residence and saying that “Eric” was inside, but then stating that he assumed Eric was home since his listed vehicle #A40119E was there,
- (8) a receipt in the driveway dated 6/2/03 for Red Devil Lye.

CP 179-187 (Appendix B).

This evidence is sufficient to establish a reasonable inference that Schinnell is “probably involved in criminal activity,” and that activity can be found at this home. Schinnell was observed purchasing several precursor methamphetamine products. There was also evidence of the previous purchase of such products that were brought to the home (the 6/2/03 receipt). Neighbor Rowland reported that Schinnell lived there and Donald Robbins indicated that he assumed Eric was “home.” Neighbors not only reported civilian traffic consistent with drug activity, but that individuals would mistakenly arrive at the wrong portion of the duplex looking for drugs, and when they were turned away they would go to 10137. Based on this information, there was probable cause to believe the home and vehicles searched contained evidence of a methamphetamine lab. See State v. Johnson, 79 Wn. App. 776, 904 P.2d 1188 (1995), *rev. denied*, 128 Wn.2d 1023 (1996) (holding odor of marijuana alone may justify the issuance of a search warrant for home).

3. THE STATE DID NOT ALLEGE “SEPARATE ACTS” IN THIS CASE AND A UNANIMITY INSTRUCTION WAS NOT NEEDED.

Defendant contends that the trial court erred in failing to give the jury a unanimity instruction. See Opening Brief of Defendant, at 41, citing State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984) (holding that when the “evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected”). Petrich, and Kitchen⁹ have absolutely nothing to do with this case and it is understandable that neither the defense, State, or court requested a unanimity instruction.

The State never alleged several distinct criminal acts. Instead, the State marshaled before the jury a mountain of evidence that showed the existence of a methamphetamine lab and Hatchie’s involvement with that lab. In particular defendant challenges that the State focused on (1) Hatchie’s providing pseudoephedrine tablets, and (2) that Hatchie provided his house as a “drug house.” These acts are but two pieces of an entire puzzle that show Hatchie’s liability as an accomplice. They are not two separate and distinct criminal acts in and of themselves. The defendant points to the State’s closing as evidence that it was relying on

⁹ 110 Wn.2d 403, 409, 756 P.2d 105 (1988).

separate acts. This closing does not support defendant's contention either.

In the closing the prosecutor summarized all of the evidence, including:

And when you look at the totality of the evidence in this case, it's really clear what was going on. Ray Hatchie was using drugs. Ray Hatchie was dealing drugs and Ray Hatchie was making drugs. In order to do that manufacturing in the legal sense of the word because he was promoting and acting as accomplice with others to manufacture methamphetamine by using his house as a center for it by giving people pseudoephedrine tablets to use in the process of manufacturing and then taking back the finished product after it had been made.

RP 1310.

Evidence of both Hatchie's supplying pseudoephedrine tablets and allowing his house to be used for the manufacture of methamphetamine support his guilt as an accomplice. (See accomplice liability argument *infra*).

Even assuming that a unanimity instruction was needed, any error was harmless where the evidence was overwhelming that Hatchie both supplied pseudoephedrine tablets and permitted the use of his home for the manufacture of methamphetamine in exchange for methamphetamine.

Unanimity is not required so long as substantial evidence supports each alternate means. State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d (1988). Substantial evidence exists if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). To prove accomplice liability the State had to show that Hatchie aided Schinnell in his

manufacturing of methamphetamine. RCW 9A.08.020(3)(a)(i)(ii).¹⁰ It is enough to show that Hatchie associated with the criminal venture and participated in it expecting success. State v. Gallagher, 112 Wn. App. 601, 614, 51 P.3d 100 (2002) (citations omitted).

Here, there is no doubt that Hatchie participated in the venture of manufacturing methamphetamine, expecting success in the form of a completed product he could use. The State presented sufficient evidence of each prong.

a. Evidence of Hatchie's home used for production.

Evidence of the manufacturing of methamphetamine was found throughout the home such that it was clear Hatchie not only condoned the use of his home for the manufacturing of methamphetamine, but supported it. Officers located products used to produce methamphetamine in the living room (688, 712-715), kitchen (719-25), and garage (729-797). Hatchie's home was also altered for production of methamphetamine. He had a squirrel fan in his garage used to output the chemical fumes. RP 745. He had a surveillance camera to watch who was approaching the home and a scanner in his room. RP 712, 765. The house was also armed.

¹⁰A person is an accomplice of another person in the commission of a crime . . . [w]ith knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it, or (ii) aides or agrees to aid such other person in planning or committing it[.]”

RP 771-72. Finally, there were four vehicles on Hatchie's property that contained methamphetamine products. RP 800-817, 819-29, 832-50.

b. Evidence of supplying Chorafed.

Aside from providing the home and property to produce the methamphetamine, Hatchie supplied a key ingredient – Chorafed. In his firefighter capacity at Boeing, Hatchie would take Chorafed tablets from Boeing first aid kits and supply them to Schinnell for methamphetamine production. RP 1100, 1106-09, 1130, 1166. Approximately seven times in the two month period that Schinnell knew Hatchie was given “Chorafed tablets with the understanding that he . . . would returned with finished product.” RP 1166. Evidence of these tablets were found throughout the residence, including in Hatchie's bedroom and the garage. RP 754, 763.

c. Evidence of Hatchie's interest in obtaining methamphetamine.

Finally, in support of both his home and supplying Chorafed, the evidence that Hatchie stood to benefit from this was produced to the jury. First, Hatchie's neighbors observed him socializing with the people who were coming and going from his residence. RP 1087-88. According to Schinnell, when Hatchie was home he would do “Everything, a little bit of everything. . . [W]e'd party, you know, we'd just hang out, socialize.” RP 1223. Hatchie's benefit of the end product is seen in the paraphernalia used to smoke methamphetamine found in his bedroom, and the crystal

methamphetamine pipe located in his locker at work. RP 756, 759, 763, 1100.

Because there was sufficient evidence of both means of accomplice liability there was no error in failing to give an instruction.

4. THE TRIAL COURT PROPERLY ALLOWED OPINION TESTIMONY REGARDING THE MANUFACTURING OF METHAMPHETAMINE.

Admission of evidence is reviewed under the abuse of discretion standard. State v. Tharp, 27 Wn. App. 198, 205-06, 616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981). A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds. State v. Gonzalez-Hernandez, 122 Wn. App. 53, 57, 92 P.3d 789 (2004). Evidence is relevant if it has “any tendency to make the existence of a fact of consequence to the determination of the action more or less probable than it would be without the evidence.” ER 401.

Under ER 704 “[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” State v. Sanders, 66 Wn. App. 380, 832 P.2d 1326 (1992) (quoting State v. Jones, 59 Wn. App. 744, 749-50, 801 P.2d 263 (1990), *rev. denied*, 116 Wn.2d 1021 (1991)). However, “[n]o witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.” Id., (quoting State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)).

Generally, in order for testimony to be considered an opinion as to the defendant's guilt, the testimony must relate directly to the defendant. Id.

In the instant case, the State asked Deputy Fry: "Based on your training and experience as a member of the clandestine lab team, did you have an opinion as to whether or not methamphetamine had been manufactured at this particular site?" RP 851. The Deputy responded, "I did." The State further inquired, "What was that opinion?" and the Deputy responded, "I believe manufacturing had occurred there." RP 851. It is this testimony that defendant objects to on appeal as impermissible opinion evidence as to his guilt.¹¹ See Opening Brief of Appellant at 48. However, the officer never testified that he believed "Hatchie" was manufacturing methamphetamine. This ultimate conclusion as to defendant's own guilt would surely be objectionable. Instead, the officer gave his opinion regarding whether this activity took place at that home. It was still within the jury's province to determine whether Hatchie aided in the production of methamphetamine. This testimony is similar to the testimony upheld in Sanders, *supra*. In Sanders the officer testified that the absence of drug paraphernalia in a home is inconsistent with a house used by drug users. 66 Wn. App. 385. The court concluded that the testimony "did not express any opinion as to the [defendant's] guilt or credibility." Id. at 388. See also, State v. Zunker, 112 Wn. App. 130, 48

¹¹ Defendant does not allege on appeal that there was a lack of foundation.

P.3d 344 (2002) (holding that the State properly laid the foundation for a detective as a methamphetamine expert).

In his argument, defendant overlooks the unique nature of methamphetamine trials. Jurors are flooded with exhibits that make murder cases look simplistic (here 119 exhibits). CP 153-161. Jurors have to examine common every day products used in strange ways, such as coffee filters, tubing and batteries. There is often evidence of labs in different stages of production. Finally, a forensic scientist tries to educate the jury as to how methamphetamine is produced. RP 893, 921-927. Ultimately all of the pieces can very easily be connected and summarized by a trained professional who has vast experience in these laboratories. This testimony is not any different than a medical examiner giving his ultimate opinion as to cause of death after he has outlined all of the injuries. Again, the jury is still left to figure out who pulled the trigger, but the medical examiner has educated the jury with the fact that a murder/death occurred.

The trial court properly allowed this testimony as it aided the trier of fact and did not state an opinion as to Hatchie's guilt or innocence. Finally, even assuming there was error, any error is harmless where similar testimony was elicited without an objection as to "opinion

evidence,” and the court permitted the testimony. RP 649, 650.¹² See State v. Ford, 137 Wn.2d 472, 488, 973 P.2d 452 (1999) (“[A] general objection with respect to a trial court decision is insufficient to preserve a specific issue for review.”).

5. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING EVIDENCE AT TRIAL AND A LIMITING INSTRUCTION WAS UNNECESSARY.

Defendant contends that the trial court erred in admitting evidence of (1) the presence of a methamphetamine pipe in defendant’s Boeing locker, (2) evidence of high foot traffic at the home at all hours of the day, and (3) evidence that some of the people showing up at the house were marijuana users. (See Opening Brief of Appellant at 50-51). Because this

¹² During redirect of Deputy Brockway the following questions and answers took place:

Q: From your knowledge of what was located at this residence, was there evidence of past manufacture of methamphetamine?

A: Yes.

MR. SCHWARTZ: Objection. Form and foundation.

THE COURT: Overruled, go ahead and he’s answered the question.

Q: Were there items at the residence that could be used in the future of manufacture of methamphetamine?

A: Yes.

Q: And was there actual methamphetamine at the residence?

A: Yes.

RP 649-50.

evidence is circumstantial evidence of defendant's guilt the trial court properly exercised its discretion. Defendant also argues that the trial court erred in failing to give a limiting instruction; the record shows there was either no request for an instruction or the instruction was unnecessary.

At the outset, defendant has failed to preserve for review two of these issues. ER 103 requires all objections to be timely and specific. Failure to object at trial waives the issue on appeal. State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 89 L. Ed. 2d 321, 106 S. Ct. 1208 (1986) (*citing* Bellevue Sch. Dist. No. 405 v. Lee, 70 Wn.2d 947, 950, 425 P.2d 902 (1967)).

Defendant appears to claim on appeal that this evidence was improperly admitted under ER 404(b) (although the brief says ER 403(b)). Below, the only 404(b) objection that was made was to the traffic issue. RP 324-333. As to the drug pipe, defendant's objection was that it was cumulative in nature.¹³ RP 519. Thus, the defendant has failed to preserve the admission of the drug pipe under ER 404(b). As to the marijuana testimony, counsel failed to object entirely. Initially counsel objected but when the State reformed the question he did not object to

¹³ The entire argument below regarding this piece of evidence is confusing. What the court and the parties set out to do was go through several pieces of evidence outside the presence of the jury and determine whether a limiting instruction was needed, and if so, what the limiting instruction should say. RP 459-473. At the outset of this argument defense stated, "[E]vidence that is indicative of say for instance use of methamphetamine, delivery of methamphetamine, any of those kinds of things, we believe it falls under the separate rubric of other bad acts and therefore a limiting instruction we think would be required. It's not that it's not admissible." RP 471.

admission of the marijuana testimony, but rather to how long the individuals would be at the residence.¹⁴ Having failed to object he has not preserved this issue on appeal.

a. Admission of drug pipe and foot traffic/people.

Admission of evidence is reviewed under the abuse of discretion standard. State v. Tharp, 27 Wn. App. at 205-06. A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds. State v. Gonzalez-Hernandez, 122 Wn. App. at 57. Evidence is relevant if it has “any tendency to make the existence of a fact

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Q: What was the activity that you have associated them with?

MR. SCHWARTZ: Objection based on personal knowledge unless he can testify that he’s witnessed anything or participated.

Q: Well, let me ask it this way. Do you know from personal knowledge that these individuals were associated with a particular type of illicit [sic] activity?

A: I do.

Q: What was that activity?

A: Pot smoking, Marijuana.

Q: And how long would these individuals be at the residence for?

MR. SCHWARTZ: Your Honor, I will object. What he’s offering to show this is for purposes of motive under 404b, not as to what this particular witness is testifying.

THE COURT: Mr. Hammond, under 404b which part of that?

MR. HAMMOND: From common scheme.

THE COURT: The objection is overruled. Go ahead.

RP 1083-84.

of consequence to the determination of the action more or less probable than it would be without the evidence.” ER 401. Generally, under ER 404(b) evidence of others crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith but may be admissible for other purposes such as proof of motive. A trial court’s ruling on the admissibility of evidence under ER 404(b) is reviewed for abuse of discretion. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). A court must determine on the record whether the danger of undue prejudice substantially outweighs the probative value of such evidence prior to admitting evidence under ER 404(b). State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995).

The State had to prove that defendant was aware of the manufacture of methamphetamine and that he aided in that production. As circumstantial evidence of that, the State produced testimony that defendant wanted methamphetamine and that he enjoyed the “party life” associated with its use. In order to make that connection the State had to show that defendant used methamphetamine and was interested in allowing his house to be used as part of the drug scene.

The importance of the existence of a drug pipe in the locker at Boeing is self-evident.¹⁵ Obviously if defendant had no interest in

¹⁵ By addressing the merits of defendant’s brief the State does not waive its failure to preserve error objection.

methamphetamine use then the State's theory that he supplied Chorafed tablets in exchange for some of the finished product would be implausible.

Evidence of the high foot traffic and marijuana users frequenting the house demonstrates the defendant's motive to support methamphetamine manufacturing because he was dependent on methamphetamine and its lifestyle. Witness/neighbor John Huntsman was a trained security officer. RP 1052. He testified that he found the high traffic and "vehicles showing up and leaving at all hours of the day and night" to be unusual. RP 1053. He also testified that he believed it to be unusual because, "I don't believe that there is that many people that have that many different friends that show up at their house." RP 1054. Deputy Brockway linked up this testimony by educating the jury that "high traffic at all different hours of the night can be related to the distributing and/or manufacturing of narcotics." RP 425. According to Patrick Huntsman, he also noticed the unusual activity and people would come and go 24 hours a day. RP 1079-80. Patrick also saw Hatchie at the property and observed him socializing with the people who were coming and going. RP 1087-88. Patrick testified that he knew some of the individuals who were coming and going and that there were involved with "pot smoking, marijuana." RP 1083. Finally, Schinnell testified that when the defendant was home he would do a "little bit of everything," including just "hang[ing] out" and "socializing." RP 1223.

The defendant's need to just "hang out" at his home and socialize with the party goers establishes what motivated him to be involved with the methamphetamine enterprise. The high foot traffic, the presence of other party-goers, and the fact that the house was open all hours of the night linked the defendant to this. If it had been the other way, and he was never home, or came home and kicked these people out of his house, then the evidence would tend to support that he did not aid in the production of methamphetamine. This was not the case and the trial court properly admitted the evidence under ER 404(b) to establish motive. It is also arguable that this evidence did not amount to "other bad acts" at all, but was simply circumstantial evidence of guilt.

Defendant also complains that the trial court did not properly engage in a balancing test prior to admitting this evidence. Where a trial court does not explicitly weigh the evidence on the record the record as a whole may still show that the court fulfilled the requirements of the rule. Powell, 126 Wn.2d at 265; State v. Carleton, 82 Wn. App. 680, 685, 919 P.2d 128 (1996). Here, the trial court carefully considered whether it was going to admit the traffic evidence. The trial court spent over 15 pages in transcript examining the issue. RP 315-333. Counsel and the court considered and discussed the probative versus the prejudicial effect and

the balancing involved. RP 324,¹⁶332. The record adequately demonstrates that the court took into consideration the weight, prejudicial nature of the evidence and the relevancy of such evidence prior to admitting this.

Assuming there was any error, the error was harmless. Reversal is not required where an error in the admission of 404(b) evidence does not result in prejudice to defendant. State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2003). An error in the admission of 404(b) evidence is nonconstitutional in nature. State v. White, 43 Wn. App. 580, 587, 718 P.2d 841 (1986). Where the error is nonconstitutional, the error is “not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). “The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.” State v. Bourgeois, 133 Wn.2d 389, 4, 945 P.2d 1120 (1997). To prove accomplice liability the State had to show that Hatchie aided

¹⁶ THE COURT: “And then the next thing is whether or not the motive is an essential ingredient . . . And then the final thing is you get into this balancing test of the probative value versus the prejudicial fact.” RP 324.
DEFENSE COUNSEL: . . .that’s why I am arguing it’s more prejudicial because they can’t establish it’s Mr. Hatchie as opposed to anybody else who was residing there. RP 324.

The court ultimately concluded that the motion was denied, subject to renewal. RP 333.

Schinnell in his manufacturing of methamphetamine. RCW 9A.08.020(3)(a)(i)(ii). It is enough to show that Hatchie associated with the criminal venture and participated in it expecting success. State v. Gallagher, 112 Wn. App. at 614.

Here, the evidence of guilt was overwhelming and any error in the admission of the complained evidence is of minor significance. Evidence of the manufacturing of methamphetamine was found throughout Hatchie's home. Officers located products used to produce methamphetamine in the living room (688, 712-715), kitchen (719-25), and garage (729-797). Hatchie's home was also altered for the production of methamphetamine. He had a squirrel fan in his garage used to output the chemical fumes. He had a surveillance camera to watch who was approaching the home and a scanner in his room. Finally, there were four vehicles on Hatchie's property that contained methamphetamine products. RP 800-817, 819-29, 832-50.

The State also presented evidence that in addition to the use of his home for production, Hatchie supplied a key ingredient – Chorafed. RP 1100, 1106-09, 1130, 1166. Approximately seven times in the two month period that Schinnell knew Hatchie he was given "Chorafed tablets with the understanding that he . . . would returned with finished product." RP 1166. Evidence of these tablets were found throughout the residence, including in Hatchie's bedroom and the garage. RP 754, 763.

Finally, the State also presented evidence of Hatchie's motive for producing methamphetamine. He stood to benefit from the product. First, Hatchie's neighbors observed him socializing with the people who were coming and going from his residence. RP 1087-88. According to Schinnell, when Hatchie was home he would do "Everything, a little bit of everything. . . [W]e'd party, you know, we'd just hang out, socialize." RP 1223. Hatchie's benefit of the end product is seen also in the paraphernalia used to smoke methamphetamine found in his bedroom, and the crystal methamphetamine pipe located in his locker at work. RP 756, 759, 763, 1100.

Given the overwhelming evidence in this case, there was no error in the admission of evidence.

b. Limiting instruction.

ER 105 provides that "when evidence which is admissible as . . . for one purpose but not admissible . . . for another purpose is admitted, the court, *upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly." (emphasis added). Generally this instruction is given when evidence is admitted under ER 404(b). See State v. Myers, 82 Wn. App. 435, 439, 918 P.2d 183 (1996), *aff'd*, 133 Wn.2d 26, 941 P.2d 1102 (1997). First, there was no limiting instruction requested for the traffic evidence and marijuana evidence. Again, this issue is not preserved. As to the pipe evidence, because the court did not admit it for a limited purpose, there was no need to give such an

instruction. RP 519. It is difficult to tell from the record if counsel suggested what limiting instruction should be given where his only objection was on cumulative grounds. RP 519. Assuming there was any error in failing to give a limiting instruction, such error was harmless. See argument *supra*.

6. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

The test for ineffective assistance of counsel is twofold: first, counsel's performance must be so deficient that it falls below an objective standard of reasonableness; and, second, the deficient performance must so prejudice the defendant that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. State v. Day, 51 Wn. App. 544, 553, 754 P.2d 1021, *rev. denied*, 111 Wn.2d 1046 (1988) (*citing* Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984); *see also* State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987)). With respect to the first prong of the test: scrutiny of counsel's performance is highly deferential, and there is a strong presumption of reasonableness. Strickland, 446 U.S. at 689; Thomas, at 226. If counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim of ineffective assistance. Day, at 553, 754 P.2d at 1025-26 (*citing* State v.

Mak, 105 Wn.2d 692, 731, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 93 L.Ed.2d 599, 107 S.Ct. 599 (1986). As for the second prong, a reasonable probability of a different outcome is a probability sufficient to undermine confidence in the outcome of the original proceeding. State v. Gonzalez, 51 Wn. App. 242, 247, 752 P.2d 939 (1988) (*citing State v. Sardinia*, 42 Wn. App. 533, 539, 713 P.2d 122, *rev. denied*, 105 Wn.2d 1013 (1986)).

Here, defendant alleges counsel was ineffective for (a) failing to request a cautionary accomplice instruction, (b) failure to propose a unanimity instruction, and (c) failure to request limiting instructions. Because none of these actions fall below an objective standard of reasonableness, defendant received proper representation.

a. Failure to request a cautionary accomplice instruction.

Here, accomplice Schinnell gave testimony for the State as part of a plea bargain. Defense counsel argued strenuously for the jury to consider carefully the veracity of his testimony and his motive for doing so. RP 1331-1334, 1337-1338. Defense counsel's failure to request an accomplice instruction¹⁷ may be viewed as a reasonable trial tactic where

¹⁷ WPIC 6.05 provides:

"The testimony of an accomplice, given on behalf of the plaintiff, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth."

he was able to effectively argue his case in closing without such an instruction and where there was sufficient corroborating evidence of Schinnell's testimony such that an instruction was unnecessary.

In State v. Harris, the court rejected defendant's contention that a trial court's refusal to give an accomplice instruction was reversible error. 102 Wn.2d 148, 155, 685 P.2d 584 (1984). The court also refused to adopt the standard that a "cautionary instruction is mandatory whenever accomplice testimony is used." Instead the court adopted the following test:

(1) it is always the better practice for a trial court to give the cautionary instruction whenever accomplice testimony is introduced; (2) failure to give this instruction is always reversible error when the prosecution relies solely on accomplice testimony; and (3) whether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends upon the extent of corroboration. If the accomplice testimony was substantially corroborated by testimonial, documentary or circumstantial evidence, the trial court did not commit reversible error by failing to give the instruction.

State v. Harris, 102 Wn.2d 148, 685 P.2d 584 (1984).

Here, the record is full of corroborating evidence. The record supports Schinnell's two main contentions that (1) Hatchie supplied pseudoephedrine in exchange for the finished product, and that (2) Schinnell purchased and brought methamphetamine precursor products to Hatchie's home. Hatchie was the named tenant and lived at the residence

where the manufacturing occurred. RP 1270. Evidence of the manufacturing was found throughout his home and yard. To corroborate that Hatchie supplied pseudoephedrine there was evidence that the same pseudoephedrine supplied at Hatchie's work was found in Hatchie's home. To corroborate that Hatchie had an interest in the use of methamphetamine the State presented evidence that he kept a pipe for smoking methamphetamine at his house and home. Given the level of corroborative evidence presented, there was no need for an accomplice instruction.

b. Failure to propose a unanimity instruction.

As argued *supra*, the evidence did not support a unanimity instruction. Defense counsel properly declined to request such an instruction and defendant cannot claim ineffective assistance of counsel.

c. Failure to request limiting instructions.

Defendant also contends that counsel was ineffective when he failed to request a limiting instruction for the marijuana and traffic evidence. Assuming *arguendo* that this evidence warranted a limiting instruction (see argument *supra* at 57), failure to request such an instruction was within the bounds of sound trial strategy. Often, to request and give a limiting instruction only highlights the prejudicial nature of such evidence and draws the jury's attention to it. Defendant has failed to meet his burden of showing ineffective assistance of counsel in this area as well.

Even assuming counsel erred, the error does not require reversal. Where alleging ineffective assistance, defendant must also show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Strickland, 466 U.S. at 687. Defendant has failed to meet his burden of showing that but for the ineffective assistance, there is a reasonable probability that the outcome would have been different. Strickland, 466 U.S. at 694. None of counsel's alleged errors would have affected the outcome of the trial given the overwhelming evidence of guilt in this case. See Argument *Supra* at 55-57.

7. THE PROSECUTOR'S ARGUMENTS REGARDING PLEA AGREEMENTS AND THE STANDARD OF BEYOND A REASONABLE DOUBT WERE SOUND, LEGAL ARGUMENTS AND THERE WAS NO MISCONDUCT.

Defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995), *U.S. cert. denied*, ___ U.S. ___, 116 S.Ct. 131, 133 L.Ed.2d 79 (1996) (*citing State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991)). Improper arguments are to be viewed in the context of the entire argument. Id.

When alleging misconduct by a prosecutor, defense must make a timely objection and request a curative instruction. Gentry, 125 Wn.2d at 640; State v. Dennison, 72 Wn.2d 842, 847, 435 P.2d 526 (1967). If a timely objection is not made, or a curative instruction is not requested,

then such failure constitutes waiver unless defendant demonstrates that it was so flagrant and ill-intentioned that it "evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Gentry, 125 Wn.2d at 640 (*quoting Hoffman*, 116 Wn.2d at 93.) "In closing argument, a prosecutor has wide latitude to draw and express reasonable inferences from the evidence." State v. Rice, 120 Wn.2d 549, 844 P.2d 416 (1993).

Here, defendant asserts that the prosecutor committed misconduct where he allegedly (a) referred to matters outside the record, (b) improperly used an immunity agreement, and (c) argued the reasonable doubt standard. There is no merit to any of these arguments.

a. Matters outside record.

Defendant complains that the prosecutor "misstated the law in front of the jury," regarding defendant's plea agreement. It is unclear what defendant means by this argument since it is difficult to state or argue the law during questioning. The following exchange took place during re-direct of Schinnell:

STATE: From your conversations with your attorneys, do you understand that you automatically get credit for time served, when you ultimately go to be sentenced?

SCHINNELL: No.

STATE: Could you in fact get 12 months?

SCHINNELL: Yes.

RP 1221.

Although inartfully stated, there were no misrepresentations. "Credit for time served" is a term of art used by prosecutors and defense that simply means the defendant will receive credit for the time he has already served and no further jail time will be imposed. If 12 months were ordered, he would obviously still get credit. The reason there was no objection below is because defense counsel did not believe this to be a misstatement. The defendant has failed to show any error.

b. Immunity agreement.

Defendant cites to State v. Green for the proposition that the State improperly referenced the plea agreement in this case. 133 Wn.2d 389, 400, 401, 945 P.2d 1120 (1997) (Opening Brief of Defendant at 62). It should be noted that defendant does not assign error to the testimony below regarding the agreement. Instead he assigns error to its use during opening and rebuttal closing. After examining the context of the prosecutor's use of the immunity agreement it is clear that no improper lines were crossed.

The State referenced the agreement briefly during opening,¹⁸ and again during its rebuttal closing.¹⁹ As to the opening statement, the State briefly referenced the plea agreement in anticipation of an attack on Schinnell's credibility. This statement was made without objection. It is likely that both the State and defense knew that Schinnell's credibility would be attacked throughout the case and the defense gave the State some latitude in discussing this. It was only after Schinnell's credibility was strongly attacked during defense closing that the State sought to rehabilitate its witness during its rebuttal closing. (Appendix D, RP 1328-1334). All of the State's comments were directly related to the defense's theory that Schinnell concocted a "story." RP 1331. The State appropriately noted in rebuttal that Schinnell was not here to tell a "story" to convict anybody, and that the agreement "required truthful testimony, to tell the truth." RP 1343.

Although no court in Washington has examined the parameters of using plea agreements in closing, a look at State v. Green offers some guidance. 119 Wn. App. 15, 79 P.3d 460 (2003). In Green, over defense's objection, the State admitted the plea agreement as an exhibit.

¹⁸ "And Mr. Schinnell you will certainly have an emphasized [sic] to you is going to be testifying in this case because he took a plea bargain that included him testifying truthfully in this case." RP 15.

¹⁹ "Schinnell basically cut a deal, which required by the way not a story to convict anybody but required truthful testimony, to tell the truth." RP 1343.

Id. at 12. Included in the agreement was the language, “The intent of this agreement is to secure the true and accurate testimony of your client”

Id. at 12. At issue on appeal was whether the trial court erred in allowing the State to introduce the immunity agreement as an exhibit. Relying on Bourgeois²⁰ the court held that the State could inquire on direct as to the existence of an agreement and the witness’s reasons for cooperating, without introducing the agreement until the witness’s credibility was attacked. Id.

While the court concluded that to admit the agreement on direct was error, it also concluded that the error was harmless and much different from the use of an immunity agreement in United States v. Roberts, 618 F.2d 530, 535 (9th Cir. 1980). Id. at 25. A brief examination of federal law in this area is helpful since there are no Washington cases on point. In Roberts, the prosecutor argued that the government witness was bound to tell the truth by his plea agreement and also argued, without any evidence in the record to support this, that there was a government agent in the courtroom during the trial to monitor the witness’s testimony. Id. at 533-34. The court concluded that this line of argument was improper. Id. at 534. The court went on to offer guidance to the court on retrial, outlining what type of agreements may come in and the proper use of such agreements in closing. Id. at 536. In outlining what was permissible in

²⁰ State v. Bourgeois, 133 Wn.2d 389, 402, 945 P.2d 120 (1997).

argument it stated that (1) a prosecutor may not tell the jury that the government has confirmed a witness's credibility before using him, or (2) indicate that the government has taken steps to compel the witness to be truthful. Roberts, 618 F.2d at 536. It concluded that these arguments "involve improper vouching because they invite the jury to rely on the government's assessment that the witness is testifying truthfully." Id. See also, United States v. Tham, 665 F.2d 855, 861(9th Cir. 1981) (concluding that there was no misconduct where the prosecutor, in response to defense closing, argued that the witness had a motive for "telling the truth because his plea agreement obligated him to do so. The prosecutor argued that if [the witness] violated his plea agreement by lying, he would be subject to several prosecutions for murder.").

Another way to examine this purported misconduct is whether the State's acts amounted to vouching for the credibility of a witness. It is improper for a prosecutor to express his opinion about the credibility of a witness and the guilt or innocence of the accused in jury argument. State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984). "Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion." State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59, *rev. denied*, 100 Wn.2d 1003 (1983); see also, State v. Sargent, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985) ("I believe Jerry Lee Brown" is improper assertion of personal opinion).

In the instant case, the State made proper use of the immunity agreement. The State in no way impermissibly vouched for the credibility of Schinnell during its closing. The assertion was never that the State believed Schinnell was telling the truth, or that it could “verify” Schinnell’s veracity. Instead, the State aptly pointed out Schinnell’s obligations under the agreement, after his credibility was attacked during defense closing. Such an argument was proper rebuttal.

Even assuming that the prosecutor committed any error, it was not so flagrant and ill-intentioned that a timely objection and curative instruction would have failed to cure the error. If a timely objection was made, the court could have simply referred the jury to instruction Number One which provides that credibility determinations are for the jury. CP 102. Unlike Roberts, *supra*, the State in this case did not argue that it had the ability to verify the veracity of Schinnell’s testimony, nor did it argue it had the ability to compel such truth. The prosecutor here simply outlined what the agreement was (to testify truthfully), and what it was not (a story making).

Defendant also attempts to make an ineffective assistance of counsel argument in this assignment of error. It is the State’s position that this is not proper form and should not be considered. Even assuming it is properly presented, this can be characterized as trial tactics. Presumably it was clear to both defense and the prosecution that Schinnell’s credibility would be argued, attacked and commented on at every turn in this case.

The defense made much of Schinnell's agreement and "truthfulness" during its closing. RP 1328-1334. Defense counsel likely anticipated that the State would be allowed to make reasonable rebuttal and found no objection in this line of argument.

c. Beyond a reasonable doubt.

Finally, defendant complains on appeal that the prosecutor misstated the law in its closing. More specifically, he alleges that the State misstated the legal standard for "beyond a reasonable doubt."²¹ An examination of the argument in its entirety shows that no misconduct occurred and that the jury was cautioned to follow the court's instructions.

A court reviews allegedly improper comments in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995). A jury is presumed to follow the trial court's instructions. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995).

During closing the State made the following argument:

. . . The ultimate issue is do you believe that Ray Hatchie is guilty of this crime, as you understand the crime to be defined and as you understand particularly his role as an accomplice? That's what the issue is. Are you confident of

²¹ Defendant also states that defense objected below to the 'reasonable doubt' standard on pages 1318-1319 of the transcripts. (Opening Brief at 61, 63). There was no objection made below. (Appendix F). Because defendant asserts that the defense objected to these comments below, and analyzes this assignment of error under the stricter constitutional standard, the State will only address the line of argument objected to below.

that? Do you believe that? The law commands that if some of you have great and serious doubts about that, that you should acquit.

MR. SCHWARTZ: Objection, your Honor, he is mistaking [sic] the law.

MR. HAMMOND: This is argument.

THE COURT: Well, you should be advised that the law is controlled by the instructions and I've read them to you and not by argument of counsel, all right?

MR. HAMMOND: And that's absolutely correct, anything that either Mr. Schwartz or I say about the law, that's not the law. The law is in your hands right now. It's the instruction that you have. So if anything I say seems to conflict with the instructions, certainly the instruction is controlling.

RP 1317-1318, (Appendix F).

In his brief defendant completely overlooks the lengthy exchange that took place below regarding the jury's obligation to follow the court's instructions and not the attorney's arguments. First, the prosecutor's comments were within proper bounds of argument. He was not attempting to redefine the burden of proof but instead was focusing the jury's attention to the central issue of the case. Second, even assuming there was misconduct, it was immediately cured with a timely objection and a cautionary instruction from not only the court, but the prosecutor, that the jury must follow the instructions. Defendant did not suffer any prejudice from the State's fleeting reference to the legal standards where the court was quick to correct that it is the court's instructions that dictate the law.

Even assuming there was any prosecutorial misconduct, the defendant has failed to establish a showing of prejudice. In order to warrant reversal the defendant must show that there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). The State's entire case did not rest on the credibility of Schinnell. (See Argument *supra* at 58-59, arguing a cautionary accomplice instruction was unnecessary given the corroboration of Schinnell's testimony; see also, harmless error argument *supra* at 55-57).

8. THE COURT PROPERLY CONSIDERED
DEFENDANT'S ALLOCUTION AND ADJUSTED
HIS SENTENCE ACCORDINGLY.
ALTERNATIVELY, THE DEFENDANT FAILED TO
PRESERVE THIS ISSUE FOR APPEAL AND/OR
THE ERROR IS HARMLESS.

Under the SRA a court "shall . . . allow arguments from the . . . offender . . . as to the sentence to be imposed." RCW 9.94A.500. The right to allocution is statutory in nature and not constitutional. State v. Hughes, 2005 Wash. LEXIS 362. *50 (2005). Failure to solicit a defendant's statement in allocution constitutes legal error. Id. Whether such error warrants resentencing is open for debate. See State v. Delange, 31 Wn. App. 800, 802-803, 644 P.2d 1200 (1982), Div. III (holding that where the court has not pronounced a formal sentence and where defendant is immediately given an opportunity to address the court once

he has objected, an inadvertence in allowing him to speak did not mandate remand for resentencing); *But see State v. Crider*, 78 Wn. App. 849, 899 P.2d 24 (1995), Div. III, (holding that where a court imposes sentence and then allows defendant to address the court after a request to do so, a defendant's right to statutory allocution is violated and no harmless error analysis may be applied); *see also, State v. Jose Aguilar-Rivera*, 83 Wn. App. 199, 920 P.2d 623 (1996), Div. I (following *Crider*, adopts the rule that no harmless error analysis may be applied once the court inadvertently overlooks a defendant's right to allocution and allows him to address the court once a sentence is announced).

The State asks this court to reject *Crider* and find (1) that the statute was complied with and/or that the issue is waived, or (2) assuming any error, harmless error analysis may be applied. *Crider* was decided pre-*Hughes*, *supra*. In *Hughes* the Supreme Court addressed the SRA's right to allocution²² for the first time and held that the right was statutory in nature and did not permit an objection to be raised for the first time on appeal. 2005 Wash. LEXIS 362, *50. In *Hughes*, the court had heard arguments from both counsel and asked if they were "all done." The court then pronounced a sentence without objection. *Id.* The court in *Hughes*

²² *See Crider*, for a history of the right of allocution in Washington. 78 Wn. App. 849, 855-859.

properly framed the issue as a statutory right that requires some preservation below.

In contrast, the court in Crider grafted language into former RCW 9.94A.110 (9.94A.500), stating that it still had to look to former CrR 7.1(a)(1)'s requirement that the court must personally address the defendant. 78 Wn. App. at 857. Former CrR 7.1(a)(1) provided, "Before disposition the court shall afford counsel an opportunity to speak and shall ask the defendant if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment." CrR 7.1(a)(1) was repealed three years after the effective date of the SRA. If the legislature intended the SRA to mirror the court rule then certainly the legislature was capable of making this change to RCW 9.94A.110. This was not done.

Here, RCW 9.94A.500's provision that the court "shall . . . allow arguments from the offender . . . as to the sentence to be imposed" was met. The court "allowed" all sides to make lengthy arguments regarding sentencing. Here, both the defense and prosecution were given an opportunity to address the court prior to sentencing. RP 3-19.²³ After a lengthy discussion regarding an exceptional sentence downward the court inquired of the defense, "Anything else, Mr. Schwartz?" RP 18 (Appendix E). At that time defense counsel made further argument but

²³ All references to the VRPs in this section may be found in the SENTENCING volume.

did not inquire of his client. RP 19. The court then stated, “All right. The court is ready to rule. The standard sentence range will be adopted and 55 months plus the three years for the deadly weapon firearm enhancement, unless your client has something else to add or say, Mr. Schwartz, on his own behalf. RP 19. At this point, the defendant remained silent and the court continued. RP 19. The court did nothing to prevent the defense from addressing the court. Instead, she provided ample opportunity for comment and the defense chose to remain silent.

Moreover, given that the defendant remained silent in the presence of a request from the court to address her prior to the formal sentence, this court should find that defendant failed to preserve for review this issue. Here, the record is clear that the court asked defense if they had anything more. Counsel and defendant then stood by silently and waited for the court to pronounce the sentence. The defense made no objection and in fact refused to address the court when asked if there was anything further. RP 20. It was only after the State made the formal request that the defense reluctantly addressed the court. RP 19. This is the type of practice Crider has encouraged. Defense counsels routinely stand by, waiting for the court to pronounce a sentence without “formally asking.” This court should reject Crider and adopt a rule that if the court invites argument from all of the parties, and the defendant remains silent, then the court has satisfied the statute and the defendant cannot claim error on appeal under Hughes.

Finally, harmless error can be easily applied and should be applied. Assuming that the court must personally invite the defendant to address the court, any error if failing to do so was harmless in this case. This court should look to whether the defendant was still able to meaningfully address the court. After the court gave its preliminary ruling the defendant decided to address the court at length. RP 20-22. The fact that the defendant delayed in his allocution did not affect his ability to meaningfully address the court. Instead, after hearing from defendant the court did in fact change its sentence from 55 months, to 53 months. RP 22. Given the record in this case the defendant's right to allocution was honored.

9. THERE IS NO CUMULATIVE ERROR REQUIRING REVERSAL.

Nor is there cumulative error in this case that requires reversal. The cumulative effect of errors may mandate reversal if the errors materially affected the outcome. State v. Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994). It is the State's position that there were not any, much less "cumulative" errors committed in this case. Nor has defendant articulated how the alleged errors materially affected the outcome of the trial. As argued above, the evidence was overwhelming, and any error was harmless.

D. CONCLUSION.

For the foregoing reasons the State respectfully requests that this court affirm defendant's conviction for unlawful manufacturing of a controlled substance.

DATED: May 17, 2005.

GERALD A. HORNE
Pierce County
Prosecuting Attorney

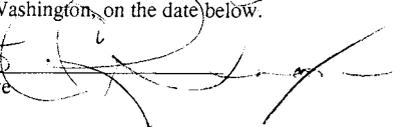


MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 27088

Certificate of Service:

The undersigned certifies that on this day she delivered by ^{US mail} ~~ABC-LML~~ delivery to the attorney of record for the appellants and appellants c/o their attorneys 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.

5-17-05
Date


Signature

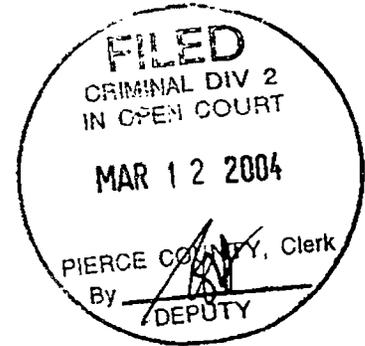
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BY 
DEPUTY

APPENDIX “A”

Findings and Conclusions on Admissibility of Evidence CrR 3.6



03-1-02900-1 20660389 FNFL 03-15-04



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 03-1-02900-1

MAR 12 2004

vs.

RAYMOND K. HATCHIE,

FINDINGS AND CONCLUSIONS ON
ADMISSIBILITY OF EVIDENCE CrR
3.6

Defendant.

THIS MATTER having come on before the Honorable Beverly Grant on the 4th & 5th day of December, 2003, and the court having rendered an oral ruling thereon, the court herewith makes the following Findings and Conclusions as required by CrR 3.6.

FINDINGS OF FACT

1. That on June 11, 2003, members of the Pierce County Sheriff's Department Special Investigation Unit were conducting a surveillance operation targeting individuals purchasing precursors associated with the manufacture of methamphetamine. During the course of this operation, Eric Schinnell was observed purchasing muriatic acid at an Ace Hardware store. Schinnell was kept under surveillance as he proceeded to two other stores, purchasing other items associated with making methamphetamine at each store.
2. During the course of the surveillance, Schinnell began employing counter surveillance techniques that included abrupt turns and other evasive maneuvers. Sometime during the

02-1-05337-0

surveillance, deputies learned of an outstanding misdemeanor warrant for Schinnells' arrest, stemming from his failure to appear for sentencing on February 12, 2003.

3. The deputies intended to conduct a traffic stop of Mr. Schinnell's vehicle, to contact him regarding his outstanding warrant and the items he had purchased. However, Mr. Schinnell successfully escaped their surveillance before they were able to pull him over. The next time Mr. Schinnell was spotted, he was in the driveway of a residence located at 10137 Patterson Street South.

4. The officers involved in the surveillance operation took up positions around the residence at 10137 Patterson Street South, but waited for a uniformed/marked patrol unit to arrive before approaching the residence to contact Mr. Schinnell. When the officers did ultimately knock on the door of the residence, no one answered.

5. While waiting to make contact with the occupant(s) of the residence, deputies interviewed several neighbors, as well as Tim Peddicord, who had been standing in the yard of the residence. The information gathered from Peddicord and the neighbors indicated that Mr. Schinnell lived at the residence. Mr. Peddicord identified the truck Schinnell had been driving as Schinnell's truck, and told the officers that if the truck was

at the residence, Schinnell would be at the residence. *The officers waited outside for 45 minutes to one hour and 15 minutes, before giving up.* *W/A* *DDH*

6. The Declaration filed by Mr. Schinnell's attorney indicated that Mr. Schinnell did not have a permanent address, but "would occasionally spend nights on the sofa" of the residence, which Mr. Hatchie and Mr. Robbins shared. *Pido*

7. Ultimately, Donald Robbins responded and opened the door. When asked if anyone else was inside, Robbins initially said that Schinnell was inside. Robbins then said that he assumed Schinnell was home, since his truck was parked in front of the house. Robbins

02-1-05337-0

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2 also told the officers that there was a shotgun inside the house. The deputies repeatedly
3 announced their presence, and asked Mr. Schinnell to come outside. Finally, the deputies
4 entered the residence to arrest Schinnell on the outstanding misdemeanor warrant.
5 Schinnell was found hiding under a vehicle parked in the garage. While inside the
6 residence to arrest Schinnell, the deputies observed items consistent with the manufacture
7 of methamphetamine. Their observations were later incorporated into a Complaint for a
8 Search Warrant, which resulted in a Search Warrant being issued for the residence. The
9 evidence found in the execution of this warrant formed the basis for charges filed against
10 Hatchie, Robbins and Schinnell.
11

12 CONCLUSIONS OF LAW

13
14 Entry into a third party's dwelling to arrest the subject of a misdemeanor warrant can
15 only be permitted under state law when the arresting officer possesses specific articulable facts
16 justifying entry into the home. State v. Wood, 45 Wn.App 299, 725 P.2d 435 (1986), citing State
17 v. Chrisman, 100 Wn.2d 814, 820, 676 P.2d 419 (1984)(*Chrisman II*). In this case, the officers
18 possessed an arrest warrant for Mr. Schinnell, based on his failure to appear for sentencing. The
19 officers had legitimate concerns regarding the evasive maneuvers employed by Mr. Schinnell
20 and his failure to answer the door after the officers knocked and repeatedly announced their
21 presence. The officers had reasonable grounds to believe Mr. Schinnell was inside the house,
22 based on the information they obtained from neighbors, Mr. Peddicord, and Mr. Robbins.
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02-1-05337-0

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2 Finally, the officers had been told that there was a firearm in the house. In considering the
3 totality of the evidence presented in this case, the Court concludes that the deputies had specific
4 and articulable facts justifying their entry into the residence to arrest Mr. Schinnell on his
5 outstanding warrant.
6

7 DONE IN OPEN COURT this 12th day of March, 2004.

8 *Dorely H. Grant*
9 JUDGE

10 Presented by:

11 *[Signature]*
12 PATRICK HAMMOND
13 Deputy Prosecuting Attorney
WSB # 23090

14 Approved as to Form:

15 *M.S. Schwartz*
16 MICHAEL SCHWARTZ
17 Attorney for Defendant
WSB # 21824

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FILED
CRIMINAL DIV 2
IN OPEN COURT
MAR 12 2004
PIERCE COUNTY, Clerk
By *[Signature]*
DEPUTY

APPENDIX "B"

Complaint for Search Warrant

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE
COMPLAINT FOR SEARCH WARRANT AND DESTRUCTION ORDER
(CONTROLLED SUBSTANCE)

STATE OF WASHINGTON)
) SS No. _____
COUNTY OF PIERCE)

COMES NOW DEPUTY BYRON M. BROCKWAY of the Pierce County Sheriff's Department Special Investigations Unit, who being first duly sworn on oath complains, deposes, and says:

That he has probable cause to believe, and in fact does believe, that on the 11th day of June, 2003 in the state of Washington, County of Pierce, felonies to wit;

- *R.C.W. 69.50.401 Unlawful Manufacture of a Controlled Substance*
- *R.C.W. 69.50.401 Unlawful Possession of a Controlled Substance*

These violations were committed by the act, procurement, or omission of another, and that the following evidence is material to the investigation:

- 1) Methamphetamine;
- 2) Ephedrine, Pseudo-ephedrine, or Ephedra type derivatives;
- 3) Books, records, receipts, notes, ledgers, and other papers relating to the manufacture, distribution, transportation, ordering, and/or purchasing of methamphetamine or related chemicals;
- 4) Addresses and/or telephone numbers relating to the manufacture, distribution, transportation, ordering and/or purchasing of methamphetamine or related chemicals;
- 5) Books, records, receipts, recipes, bank statements, money drafts, letters of credit, passbooks, safes, lock boxes, safety deposit boxes, bank checks, and other items evidencing the obtaining, secreting, transfer and/or concealment, and/or expenditure of money;
- 6) Video tapes and/or photographs of co-conspirators, assets, methamphetamine or related chemicals, firearms, manufacturing operations, chemicals, and/or equipment;
- 7) Illegal drug paraphernalia including syringes, pipes, packaging materials, and/or weighing equipment;
- 8) Indicia of occupancy, residency, and/or ownership of the premises described in the search warrant, including but not limited to utility bills, telephone bills, cancelled envelopes, registration certificates, and/or keys;
- 9) United States currency, stolen property, and other items evidencing and exchange for methamphetamine, chemicals, and/or equipment;
- 10) Laboratory glassware/equipment used in the manufacture of methamphetamine, including but not limited to round bottom reaction flasks, reflux condensers, separator funnels, buchner funnels, graduated cylinders, compressed gas cylinders, glass drying pans, heating mantels, and/or rheostats;
- 11) Precursors, reagents, chemicals, and solvents used in the manufacture of

Exh. B

- methamphetamine;
- 12) Firearms, ammunition, and/or other weapons;
 - 13) Computer hardware, computer software, computer files, and computer record storage systems, relating to the manufacture, distribution, transportation, ordering, and/or purchasing of methamphetamine or related chemicals, and evidencing the obtaining, secreting, transfer and/or concealment, and/or expenditure of money, and identification records or co-conspirator's.

Such items are material to the investigation or prosecution of the above described felonies for the following reasons: evidence of the above criminal acts, those subjects involved in the above criminal acts and any other criminal acts that we have not yet discovered.

I. Description of Properties

Your Affiant verily believes that the above evidence is concealed in or about a particular premise or place, vehicle, person or thing to-wit:

1) The following residence: a beige with blue trim one story duplex with attached one vehicle garage commonly known as 10137 Patterson St S. Tacoma, Pierce County Washington 98444. The duplex is divided into two halves. The north half of the duplex is the one in question. There is no access between the two halves. The numbers 10137 are posted near the front door located on the west side of the duplex.

2) The following vehicles:

1.) License #A40119E a 1985 Ford F 2 pick up registered to Eric A Schinnell 950 N. Duckabush Hoodspport WA 98548.

2.) License #78116Y a 1979 Chevy Luv pick up registered to Eric Alan Schinnell 950 N. Duckabush Hoodspport WA 98548.

3.) License #A60728G a 1979 Chevy Luv pick up registered to Philip T Duncan 10510 Vickery Ave E Tacoma WA 98446.

4.) License #051PZR a 1985 Buick Century 4 door registered to Donald Edwin Robbins 10137 Patterson St S. Tacoma WA 98444.

II. Affiant's Training and Experience

Your Affiant, Deputy Byron Brockway, is a Deputy Sheriff employed by the Pierce County Sheriff's department. He has been so employed for the last 6 years. He is currently assigned to the Special Investigations Unit, as a Narcotics Investigator. He is responsible for Criminal and Narcotics Investigations. Before being assigned to the Special Investigations Unit, your Affiant was assigned to the Patrol Division of the Sheriff's Department. In patrol, your Affiant had been involved in numerous narcotics related arrests. Your Affiant has been in involved in hundreds of criminal investigations. Your Affiant has also gained specific training and accreditation by completing the following courses of instruction related to various aspects of criminal investigations:

- Washington State Basic Corrections Officer Academy
- Basic Law Enforcement Academy
- 90 hour Undercover Operations Course
- 40 hour Cadre Clandestine Laboratory Operations Course
- DEA Clandestine Laboratory Re-certification Training
- Clandestine Laboratory Supervisor Training
- Monthly Clandestine Laboratory Training
- Washington State University Criminal Justice Course
- Eyewitness Testimony Research at Washington State University

Your Affiant is a certified member of the Pierce County Clandestine Laboratory Team. Your Affiant has assessed and processed over 100 labs over the past three and ½ years. Your Affiant has assisted in searching and documenting the service of numerous narcotic search warrants. Your Affiant has personally written and served 18 narcotics related search warrants. These search warrants have resulted in criminal charges being filed. I have contacted, interviewed, and arrested numerous subjects for the possession, use and distribution of controlled substances. Based on your Affiant's training and experience, he recognizes that the listed items are evidence of the above listed violations for the following reasons:

- a) In addition to the Methamphetamine being sought in the search warrant, methamphetamine manufacturers, dealers and users often possess more than one illicit substance; for variety in personal use, to diversify and monopolize the illicit drug market, to supply a broader base of clients, and to maximize their potential profits;
- b) Ephedrine, Pseudo-ephedrine, or Ephedra type derivatives are necessary precursors in the production of methamphetamine. Ephedrine is commonly found in powder, pill, tablet and caplet form;
- c) Information regarding the manufacture, distribution, sale and use of Methamphetamine are found in books, records, receipts, notes ledgers, research products, papers, microfilms, video/audio tapes, films developed and undeveloped and other assorted media;
- d) Methamphetamine manufacturers, dealers and users commonly keep the names, addresses, and phone numbers of other conspirators, drug associates, and sources for equipment, chemicals and other controlled substances. This information is valuable in the furtherance of other related methamphetamine and/ or controlled substance investigations and prosecutions;
- e) Records of Methamphetamine production; receipts, banks funds transfers, money orders, wire orders, and other ledgers that show Methamphetamine and /or other controlled substance transactions;
- f) Methamphetamine manufacturers take or cause to be taken photographs or video movies of themselves, their co-conspirators, their property, and assets purchased with drug proceeds which are normally kept in their possession and/or residence. This could include pictures (developed and undeveloped) of the suspects, co-conspirators, and drug associates' receipts, formulas, chemicals, firearms, manufacturing operations and equipment;
- g) Methamphetamine manufacturers, dealers and users will have materials in their products, and equipment in their possession to further their business. This could

- include, but is not limited to; glassware, tubes, and assorted cookware for manufacture of narcotics, bags, scales, and packaging material for the distribution of narcotics. Pipes, bong, torches, and assorted drug paraphernalia for usage;
- h) Papers showing ownership, residency, occupancy, and other indicia corroborate the length of times narcotics activity has occurred, location of occurrence, conspirator's involvement, and constructive possession of evidence. Methamphetamine cooks, dealers, and users commonly use false names on rental agreements, ownership papers and certificates to avoid being associated with a location or property. Utility bills, telephone bills, cancelled envelopes, and keys often prove residency, occupancy, and/or ownership of a location and/or property;
 - i) Methamphetamine manufactures, dealers and users will trade, exchange, and sell almost anything for Methamphetamine and/or including money, food stamps, food, electrical equipment, jewelry, clothing, stolen property, guns/firearms, other drugs, cigarettes and any other tangible or intangible property;
 - j) Methamphetamine manufactures will have material, products and equipment in their possession to further production. This could include, but is not limited to, glassware, tubes, reaction flasks, reflux condensers, separator funnels, graduated cylinders, compressed gas cylinders, glass drying pans, heating mantles, and other assorted cookware for manufacture of methamphetamine;
 - k) Methamphetamine production can require the use of literally hundreds of different chemicals, precursors, and reagents including but not limited to, Ephedrine, Pseudo-Ephedrine, Ephedrine based products, Lithium, Anhydrous Ammonia, Denatured Alcohol, Hydrochloric Acid, Red Phosphorous, Sodium Hydroxide, Toluene, Acetone, Ether, Organic Solvents, Propane, Rock Salt, and numerous other chemicals;
 - l) Guns, firearms, files, pistols, shotguns, and all types of dangerous weapons are utilized by Methamphetamine manufactures, dealers, users, to protect themselves from robbery, police intervention, self defense, and to protect their profits, assets, narcotics, to support their drug habits;
 - m) Computers are commonly used for delivery records; gain media access to information, communicate with co-conspirators, transfer funds, store information, and enhance the efficiency of methamphetamine transactions. Digital pagers, cellular phones and other communications equipment assist manufactures to negotiate deals, contact conspirators, conduct business transactions, and communicate.

III. Probable Cause to Search Properties

Your Affiant's belief is based upon the following facts and circumstances:

On 06-11-03 at around 1835 hours, myself and other members of the Pierce County Sheriff's Department Special Investigations Unit were on a surveillance detail at the Ace Hardware located at 15615 Pacific Ave. The surveillance detail related to the sale precursor components involved in the unlawful manufacturing of methamphetamine.

At around 1844 hours, a white male suspect with a beard wearing a dark colored t-shirt around 6'01" 175 pounds entered the Ace Hardware. The manager of the Ace indicated to Det. Collier that the suspect picked up a 1 qt. container of Muriatic acid and walked toward the counter. Det. Collier observed the suspect carrying a container of acid. (Both muriatic and sulfuric acid can be used during the salting out phase of

methamphetamine production). The suspect purchased the acid and it was placed into a plastic bag. The suspect then left the store. The suspect walked toward the listed vehicle #1 Washington license #A40119E a red Ford pick up parked in the parking lot. The suspect placed the plastic bag in a grey metal storage area on located on the driver's side bed rail towards the tailgate of the listed vehicle. The suspect then got into the driver's side of the vehicle.

The suspect was the only person in the vehicle. The vehicle headed northbound through the lot and then pulled into the parking lot of Walgreens located at 15225 Pacific Ave. At 1850 hours, the suspect parked on the west side of the building and went inside. Deputy Clark observed the suspect purchase one four pack of Energizer AA lithium batteries. (Lithium metal is stripped from lithium batteries during the reaction stage). The suspect exited the store got back into the listed vehicle. The vehicle headed north on Pacific Ave and then west on 149th St. While this was occurring, Deputy Harms checked the registration and pic number of the vehicle through the Department Of Licensing on a routine check. The vehicle was registered to an Eric A Schinnell with a driving status that is suspended third degree in Washington. LESA records also indicated there was an outstanding misdemeanor warrant for Schinnell's arrest out of Puyallup for DWLS 3rd. The warrant listed the same address as the registration on vehicle of 950 N Duckabush in Hoodspport. I found a booking photo from 93' on my computer for Schinnell. The driver of the vehicle looked similar in appearance to Eric Schinnell.

The vehicle made a turn northbound on "C" St S. The vehicle continued northbound on "C" St. The vehicle turned off a side street. At 1855 hours, the vehicle was located parked at the Market Place located at 13322 Pacific Ave S. Deputy Wylie went inside and observed the suspect purchase two bottles of Red Devil Lye. (Lye can be used during the reaction stage of production). The suspect exited the store and got back into the listed vehicle. The vehicle headed west and then north on "C" St S. The vehicle continued north on "C" St and then turned east on 112th St S.

At around 1900 hours, the vehicle made a turn into the parking lot of the QFC just west of Pacific Ave. The vehicle entered the lot and then did a quick u-turn to head back westbound on 112th St S. It appeared as though the driver of the vehicle was doing some counter surveillance to see if he was being followed. The vehicle headed north on "C" St, west on 108th St S and then north on 5th Ave S. The vehicle continued northbound. The vehicle was lost for a short period. At around 1907 hours, Det Collier observed the vehicle parked in the driveway of the listed duplex at 10137 Patterson St S. Det. Collier observed the suspect out of the vehicle and walking by a 5th wheel trailer in the driveway.

The surveillance units set up in the area. The misdemeanor warrant for Schinnell was confirmed through records. At around 1944 hours, Deputy Carey #415 in a fully marked patrol uniform and vehicle arrived to assist us. All individuals were in marked police attire. The listed vehicle (#A40119E) was parked at an angle in the driveway facing towards the north side of the duplex. As Deputy Fry walked by the vehicle, he noticed in plain view a 1 gallon can of Toluol Toluene and a metal weed sprayer in the bed of the vehicle. (Toluene is used during the reaction stage). Deputy Fry also noticed from the outside of the vehicle, a plastic bag sitting on the bench seat with a package of lithium batteries. Next to the plastic bag, was a black revolver near the center of the seat. He also noticed the Red Devil Lye containers in a bag on the passenger floorboard. Deputy Fry also found a receipt in the driveway from Fred Meyer dated 06-02-03 for Red Devil Lye and alcohol. We knocked on the fifth wheel trailer as the others knocked on the listed duplex. The fifth wheel appeared to be empty.

Suspect Timothy Peddicord was detained in the yard just north of the duplex. He

was arrested for a misdemeanor warrant. He was advised of his rights and denied staying there and did not know about anything going on inside. As the other Deputies continued to knock on the door, I contacted a neighbor witness Rowland. I asked her about the listed vehicle (#A40119E) in the driveway. She said it belonged to Eric and did not know his last name. She said saw him at the duplex earlier in the day. She mentioned he lived there.

I contacted another neighbor witness John Huntsman and his children. He said there is a lot of traffic to and from the residence all hours of the day. He said different people would show up at his residence looking for drugs and when they were turned away, they would then go over to the residence at 10137. He said up to six different people lived there. He said he has seen the listed vehicle (#A40119E) there before. He said he has seen Eric around.

Eventually after knocking for some time, suspect Donald Robbins came to the door. He identified himself and Deputy Wylie asked if anyone else was inside the duplex. He said "Eric". We had Robbins step away from the house. I showed Robbins the past booking photo of Erick Schinnell. He said "that's Eric". He then changed his story and said he had been sleeping and assumed Eric was home since his listed vehicle #A40119E was there. We asked him about weapons inside and he mentioned there was a shotgun. He was patted down for officer safety and he mentioned having an uncapped hypodermic needle in his possession. Deputy Fry removed a hypodermic needle from Robbins's pants pocket.

We checked the license number of another of the listed vehicles in the yard north of the driveway. License #78116Y (vehicle #2) was registered to Eric A Schinnell and showed the misdemeanor warrant associated with that vehicle. Based upon the registered owner Schinnell having the misdemeanor warrant, the driver of the vehicle that we were following being similar in appearance to Schinnell, and statements from the neighbors and suspect Robbins, we decided to make entry into the duplex through the open front door.

We knocked and announced police again and gave the suspect plenty of opportunity to come outside. At around 2043 hours, we walked into the residence and continued to announce our presence. The suspect we had been following, was found hiding under a vehicle in the attached garage. He was taken into custody and identified as Eric Schinnell. ~~While in the garage plain view~~, the following items were observed by Deputy Fry and I. ~~The rest house had been cleared during a protective sweep for officer safety.~~ The items in the residence were consistence with the manufacturing of methamphetamine;

- In the east wall of the garage near the ceiling, squirrel gage fan blowing out a hole in the wall (fans can be used to blow out the chemical fumes from methamphetamine production)
- Near the east wall of the garage, a 1 gallon can of Toluol Toluene with spray paint over the label (Toluene is used to the reaction stage of production)
- Near the east wall of the garage, 1 gallon can of Acetone (Acetone can be used to make the final methamphetamine product appear more white)
- Near the east wall of the garage, red plastic funnel (funnels can be used to hold coffee filters, which filter off unwanted pill binder from pseudoephdrine pills)

- In front of the vehicle in the garage, vinyl tubing (tubing is often used to create HCL generators in the salting out phase)
- Inside the vehicle in the garage, visible from the outside, a plastic bag with what appeared to be boxes pseudoephedrine/ephedrine pills and unused coffee filters (pseudoephedrine is a necessary pre-cursor in production. Coffee filters are used to filter off the unwanted pill binder from pseudoephedrine pills)
- In the attic above the garage, several propane tanks (anhydrous ammonia is often stolen and stored in propane tanks)
- On the kitchen table, a glass drug pipe (methamphetamine can be smoked or injected)
- In a southeast bedroom, a shotgun (methamphetamine cooks and users often have guns for protection)
- In the living room there was a monitor plugged into a camera located on the gutter outside the front door (counter surveillance is often found in methamphetamine labs)

Schinnell was Mirandized and asked for an attorney. In a search of Schinnell incident to arrest, Deputy Harms located the following items; a baggy with a white substance in his left front pocket which field tested positive for methamphetamine, a hypodermic needle in the same pocket and in his left rear pocket in his wallet with a bag containing a green leafy substance which field tested positive for marijuana.

Deputy Fry did a quick safety assessment of the other listed vehicles on the property. He observed the following items in plain view from the outside;

- In vehicle #2 located in the yard west of the house; plastic tubing in the bed of the vehicle (tubing can be used to create HCL generators)
- In vehicle #2 a 1 gallon can of Toluene in the bed of the vehicle (Toluene is used during the reaction stage)
- In vehicle #3 located in the yard northwest of the duplex, 1 gallon chemical cans on the passenger floor board (contain unknown chemicals)
- In vehicle #3 in the bed of the vehicle, plastic storage container (storage containers are often used to store box labs)
- In vehicle #4 located in the driveway near the garage, leather gloves ✓ on the rear passenger floorboard (gloves can be used for protection from the chemicals)

Robbins was advised of his Miranda Rights which he understood. He said found the syringe in the garage and that it did not belong to him. He denied using any other drug aside from weed. He said he had been living at the duplex for the past 3 months with "Ray". He said Ray works as a firefighter for Boeing and was currently at work. He said Eric stayed there off and on for the past 2 months. He said he stays in the bedroom near the bathroom (southwest) and claimed not to pay attention to where Eric sleeps. I asked him about the shotgun he told us about initially. He said it was a 20 gauge and it belonged to Eric. He denied know anything about methamphetamine production and denied anything in the garage belonged to him. He said he owned the vehicle in the driveway (vehicle #4). I asked him about his criminal history. He said in

1974 he was arrested for armed robbery and that he had been the driver, but he did not serve any time.

I checked the criminal histories of Schinnell, Peddicord, and Robbins. Schinnell has criminal history for UPCS marijuana. Peddicord has criminal history for unlawful carry/sell weapon and assault. Robbins has history in other states for sell/transport marijuana, robbery, obstructing/resistant public officer, felony weapons, UPCS. Deputy Carey and Deputy Fuller stayed at the scene for security pending the service of a search warrant. Schinnell, Peddicord and Robbins were transported to the Pierce County Jail.

V. Conclusion

Based on your Affiant's training and experience with Clandestine Labs and their manufacturing process and upon the training and experience of knowledgeable Law Enforcement Officers with whom your Affiant is associated, your Affiant recognized the described items as being indicative of the equipment used in the manufacture of methamphetamine.

Your Affiant knows through his training and experience specifically with Clandestine Drug Labs and Unlawful Manufacturing of Controlled Substances that:

Vehicles are commonly used to secure, hide, and transport illegal Drug Labs, their associated chemicals, and associated money and other valuables gained through the manufacture and sale of illegal Drugs, including methamphetamine;

Unmarked glass bottles, mason type jars, paper coffee filters, rubber tubing, and propane type fuel cylinders are commonly used in the methamphetamine manufacturing process and these bottles, jars, paper coffee filters rubber tubing commonly have trace chemicals and residue from this process even after the methamphetamine manufacturing process is complete;

Individuals maintain documents, receipts, addresses, telephone numbers, and letters relating to criminal activity with the other associates;

Individuals often possess firearms or other deadly weapons to protect themselves and/or their activities from other criminals and/or law enforcement.

Based upon the above information, your Affiant believes that a search of the described residence will produce evidence of the previously described Unlawful Manufacturing of Controlled Substance and Unlawful Possession of a Controlled Substance. Your Affiant respectfully requests permission to search the described location and vehicles.

In the Affiant's opinion, the above described equipment, chemicals and circumstances seen in the described location on June 11th 2003 are consistent with items that would be required during the manufacture of methamphetamine, and that those items present a health and safety hazard to both individuals and the environment as defined in R.C.W. 70.105D.020(5), and should be destroyed pursuant to R.C.W. 69.50.511. If improperly disposed, the items found in the vehicle pose an explosion and fire hazard, or

may contaminate the premises or environment, or result in an uncontrolled release of toxic and irritant gases, all of which pose a serious risk to the health and safety for the community.

B. Brockway #9608133A
DEPUTY BYRON BROCKWAY
Pierce County Sheriff's Department
Special Investigations Unit

SUBSCRIBED AND SWORN TO BEFORE ME this 12 day of June, 2003.

Vicki Hogar
Judge

APPENDIX “C”

Warrant of Arrest

WARRANT OF ARREST

W.C.
 the PUYALLUP MUNICIPAL Court

The City of _____

CITY OF PUYALLUP, STATE OF WASHINGTON
 202 W. PIONEER, PUYALLUP, WA 98371
 Plaintiff

vs.

Jame SCHINNELL, ERIC ALAN
 address 950 N DUCKABUSH
 HOODSPORT WA 98548

STATE OF WASHINGTON } Defendant
 COUNTY OF PIERCE } ss
 CITY OF _____

The City of Puyallup to all Peace Officers,

Meetings:
 A complaint/information under oath or certification has been filed in this court, charging the defendant with the crimes hereon described.

Therefore, in the name of the City of Puyallup, you are commanded to arrest the defendant and keep the defendant in custody until the defendant is discharged according to law, and make due return of this warrant with your manner of service endorsed thereon. Cash or surety bond to be approved by court. Service of this warrant by telegraph or teletype is authorized. Reason for issuance:

- Failure to Post Bail, Appear or Arrange Personal Recognizance
- Failure to Appear for Hearing *Sentencing*
- Failure to Comply with Court Order
- Failure to Pay Fine or Appear - Bail will be applied to fine
- CASH BAIL ONLY - No Personal Recognizance or Bail Bond

Bail	Court Case No.				Warrant Expiration Date			
<i>Cash</i> 500.00	PUY C00042485				02/24/2006			
Originating Agency	Sex	Race	D.O.B.	Hgt.	Wgt.	Eyes	Hair	
PUY	M	W	04/09/1965	6 1	195	BLU	BRN	
Place of Employment		Social Security No.			Originating Agency Case No.			
CONT. CONSTRUCTION		535-70-3798			02-8623			
Operator License No.	State	Expires	Citation Number		Violation Date			
SCHINEA359JZ	WA	02	C00042485		10/24/2003			
License Plate No.	State	Expires	Year	Make	Type	Color		
78L16Y	WA		79	CHE		BLU		

Description of Charge(s) --	
Narrative	RCW/Ordinance
DWLS 3RD DEGREE	45.20.342.10

RECEIVED
 JUN 12 2003
 PUYALLUP MUNICIPAL COURT

Officer Number	Complainant - Under Oath or Certification
00235	SCARBORO, DENISE A

Additional Identifying Data
OK to BF if posts
(360)8770841 HM

I Hereby Certify That I Arrested the Named Defendant _____ Given Under My Hand This _____
 On The _____ Day of _____ 20____ 12 Day of February 2003
 Officer _____ Agency _____ Judge *Stephen Shelton*

SHELTON, STEPHEN R

Exh. A

APPENDIX "D"

Report of Proceedings 1328-1334

1 where he was at that bench, where there were
2 other obvious items of manufacture of
3 methamphetamine. Right there. This was behind
4 him in a bag that was inside in a nonrunning
5 older vehicle described by the police right
6 there. I mean Eric Schinnell said not only
7 that, Schinnell said he bought these. He said
8 he bought these. So they didn't actually link
9 this to anything.

10 They have another real problem with their
11 proposition that this slide by Mr. Hatchie was
12 used in the manufacture of methamphetamine and
13 that evidence was this is -- there is
14 overwhelming evidence here that establishes
15 that and I will get to that point in just a
16 minute. But they know that Mr. Hatchie is not
17 there that day. The police investigate and
18 they find out that on the 11th he was gone from
19 6 in the morning until 6:00 the next day. So
20 whatever was going on in that house, he
21 obviously wasn't there to participate in it.
22 Okay. So they have a problem.

23 Well, what do they do? Got to get
24 somebody to help out and that's Mr. Schinnell.
25 Okay. That's Mr. Schinnell, the guy who owns

1 three vehicles that are full of material, every
2 item that they recovered here. And Mr.
3 Schinnell says, yes, that's mine. It's in my
4 car. That's mine, yes, that's mine. Yes,
5 that's mine. Mr. Schinnell who clearly
6 established that he has the knowledge and the
7 wherewithal to be able to make
8 methamphetamine. He clearly has the knowledge
9 to do that. I mean he described it to you the
10 recipe and every step along the way. He was
11 able to do that. But this is Mr. Schinnell's
12 story. Okay. Mr. Schinnell's story is, well,
13 all I was was a middle man. All I did was I
14 gathered out the raw materials and I gave them
15 to somebody else and that person across the
16 Narrow's bridge on his property, a person name
17 Chuck. I don't know his last name. I don't
18 know anybody's last name. That person actually
19 made the stuff, gave it back to me and I came
20 back and I gave some of it to Ray Hatchie.
21 That's his story, right. Believable?

22 Well, if that's the case, if that's what
23 he is doing, if that's how he gets
24 methamphetamine, if that's the truth, why is he
25 extracting pills in the garage of the house

1 that day? Because that's what he said he did.
2 Remember when he was shown the photograph of
3 the skillet with the pink residue that was
4 found underneath the clothes in the garage, and
5 I asked him -- or actually it was Mr. Hammond
6 that asked him, where did that come from? He
7 said, I did that. He did that. He did. Not
8 Mr. Hatchie.

9 In fact I asked him several times, did
10 Mr. Hatchie ever participate in that? Nope.
11 When he was asked about the coffee grinder and
12 was asked what -- he was asked what that was
13 used for. Schinnell said, well, that's for
14 grinding up the pills. Well, did you do that?
15 Yes, I did. Mr. Robbins, he's done it
16 sometimes. Mr. Hatchie, no, Mr. Hatchie didn't
17 do that. Okay.

18 So the evidence was limited to
19 Mr. Hatchie's participation based solely on the
20 supply of the pseudoephedrine, the Chorafed.
21 Schinnell said that's the only thing he did.
22 In fact all these other things, even the scale
23 which Mr. Hammond says, well, that's in the
24 common area of the living room. Schinnell said
25 that's mine. The guy that stole the -- or came

1 over with the stolen wallet and the credit
2 cards, he brought that to me. That's mine.
3 Okay. He didn't say that was Mr. Hatchie's.
4 He said it was his.

5 Now, let's consider something. Think
6 about it, Eric Schinnell is sitting in jail for
7 a hundred and some odd days. He's been told
8 that there is a likelihood that they are going
9 to drop ten years on him for what he got caught
10 with, okay. So he is sitting there. He is
11 thinking, okay, a weak link here is
12 Mr. Hatchie. He is not even there. All I
13 really have to do is give them Mr. Hatchie.
14 That's all I have to do. And he does. Okay.
15 But he knows he can't put Mr. Hatchie in the
16 house doing anything that day. He knows
17 Mr. Hatchie is there and the police have
18 already figured that out. He knows he can't do
19 that. So he has to come up with this story and
20 say on at least seven different occasions
21 during the two months prior to this, okay, Mr.
22 Hatchie gave me these Chorafed tablets and then
23 I went and did it.

24 And again, if that's his way for getting
25 methamphetamine, why is he cooking on that

1 particular day and why does he have this
2 particular stuff in his house? That's all he
3 has to say. And on the day he enters a plea
4 and promises I will tell on Hatchie, he gets
5 out of jail. Okay.

6 There are only two things that shouldn't
7 be for sale, love and justice, only two
8 things. Okay, those are the only two things
9 that shouldn't be for sale and maybe just I'm a
10 capitalist at heart but, hey, I think those are
11 the two things primarily that we would hope you
12 wouldn't have to buy, okay. But in Mr.
13 Schinnell's case he's bought and paid for and
14 you might, say, look ten years and he only does
15 109 days. Ten years that's probably worth a
16 lot of money to any of us. Maybe not so much
17 to him. He finishes concrete. I will talk
18 about that in a minute, but imagine in ten
19 years that's 3650 days minus the 109 that he
20 gets out of behind bars. And all he has to do
21 is say Hatchie did this. That's it.

22 It doesn't make any difference if he tried
23 to steal money from somebody's account. It
24 doesn't make any difference that he
25 manufactured methamphetamine only on a number

1 of occasions and it doesn't make any difference
2 that he didn't tell the whole truth, that he is
3 being deceptive because he doesn't want to tell
4 anything. All you got to do is tell on
5 Mr. Hatchie. That's your reward.

6 Well, it also shouldn't be for sale.
7 Remember Mr. Schinnell said that he makes about
8 \$15 an hour as a cement finisher. Well, based
9 on a 40 hour work week, that actually comes to
10 about \$30,000 a year, not a bad living, not a
11 great living but it's not a bad living. Okay.

12 So what did he get? Let's assume he
13 straightened his life out and he never goes
14 back to using drugs or making drugs and he just
15 becomes a cement finisher. He marries. He has
16 kids. He buys a house. At the very least you
17 can put a price tag at least for his purposes
18 of what he got.

19 Now, the state's argument to you was, hey,
20 you know, who would you expect to find around a
21 drug house? Drug users, drug dealers, drug
22 makers, right? That's not what Mr. Hatchie
23 is. He's fireman. And so what they are saying
24 is, please, excuse us; please, excuse us, if
25 our star witness is a meth cook, a thief and a

1 liar. Please, excuse us that. Well, I am not
2 prepared to do that.

3 Now, why did the state not meet their
4 burden in this case? Well, they didn't meet
5 their burden because one of their own witnesses
6 that they presented here established that Eric
7 Schinnell lied, that in the two months prior to
8 June 11th of 2003 Raymond Hatchie was supplying
9 him with Chorafed tablets from Boeing. That he
10 would go to Boeing, get the tablets, bring them
11 to him on seven separate occasions. That was
12 his testimony, remember that. That's what he
13 said, okay.

14 And if Mr. Schinnell is to be believed,
15 well, I guess, that Mr. Hatchie, I guess, would
16 be guilty because they actually found the empty
17 Chorafed tablets. Here's the problem. Do you
18 remember investigator Johnny Barker who
19 testified for the state? He was from Boeing.
20 He was asked about Chorafed tablets, okay.
21 There were two very interesting things he
22 says. One of them slightly undermines the
23 state's case, but one of them that clearly
24 undermines the state's case, one of them is is
25 that the Chorafed tablet comes from a

APPENDIX "E"

Report of Proceedings 18-22, Sentencing

1 kitchen, there was a jar of meth oil, which
2 Mr. Schinnell knew nothing about and the sheer
3 volume of evidence of manufacturing, you had it
4 all laid out before you on the bar of your
5 courtroom, more than a hundred exhibits. It
6 indicates that there was not just a single cook
7 or even two cooks. There were many different
8 cooks going on.

9 On those facts it simply does not seem
10 that Mr. Hatchie is deserving of the leniency
11 of the Court even if you do have technically a
12 legal out that would allow you to exercise your
13 discretion and give him an exceptional downward
14 and in fact given the magnitude of narcotics
15 activity that was going on at the residence, we
16 think the high end is frankly warranted.

17 THE COURT: Anything else, Mr. Schwartz?

18 MR. SCHWARTZ: Your Honor, I would only
19 point out that with respect to Mr. Hatchie's
20 role with what the Court can consider was what
21 was proven at trial and not what is
22 substantively argued by the prosector here.
23 The Court permitted in to evidence what were
24 essentially illusions to what the officer's
25 believed were drug dealing but there was --

1 there was no testimony about that and contrary
2 to what counsel is stating, I don't recall
3 Schinnell ever saying that the defendant was
4 involved in drug dealing. Only that in fact
5 Schinnell was the one who opted out when there
6 were things that were within the residence of
7 the living room. He said that was mine, that
8 was mine and that was mine, rather than that
9 not being the defendant.

10 THE COURT: All right. The Court is ready
11 to rule. The standard sentence range will be
12 adopted and 55 months plus the three years for
13 the deadly weapon firearm enhancement, unless
14 your client has something else to add or say,
15 Mr. Schwartz, on his own behalf. I am really
16 concerned. I did look at that BTC record and
17 Mr. Hammond is correct, it was totally
18 unsatisfactory. There appears to be no attempt
19 by your client to say that he wants help and I
20 realize if you are involved in drugs and you're
21 an addict, that sometimes it's often hard to
22 accept or request for help but here was an
23 opportunity he certainly could have exercised.

24 MR. HAMMOND: Your Honor, I think probably
25 before you make a final ruling on sentence, we

1 should ask formally whether Mr. Hatchie wishes
2 to allocute.

3 MR. SCHWARTZ: Well, Your Honor, the Court
4 has already ruled so his allocution really for
5 nothing now.

6 THE COURT: If he has something to say
7 that you have not said, that I don't know
8 about, I will consider it.

9 MR. SCHWARTZ: I know he does want to
10 address the Court, Your Honor.

11 THE COURT: Go ahead.

12 THE DEFENDANT: Your Honor, I would like
13 to thank you for letting me have this
14 opportunity to address the Court. I would like
15 to say this whole experience has been the most
16 humbling and trying time of my life. My
17 decision to take my case to jury trial was
18 based on my trust in the American justice
19 system. And with that trust I thought I would
20 be found innocent at the conclusion.

21 How little did I know about the American
22 justice system is it's a system, yes, Your
23 Honor but not always liberty and justice for
24 all. Did I receive my fair justice? Well, you
25 could say I did. I would like to say that you

1 know if there is any positive thing to come out
2 of this, then I will try to get it. I will try
3 to get treatment. I am an addict. There is
4 not much else I can say except I am sorry.

5 THE COURT: Why did you blow the BTC
6 opportunities?

7 THE DEFENDANT: Your Honor, just this
8 whole thing came on me, you know, from a rush
9 from last summer and my head just wasn't there,
10 you know.

11 THE COURT: Now, you will have to refresh
12 my recollection. There was a request I thought
13 by the defense for him to self-report?

14 THE DEFENDANT: I did self-report.

15 THE COURT: I thought there was a request
16 for him to have some time to self-report and
17 then I said, no, he was going in that day; is
18 that right?

19 MR. HAMMOND: I believe so.

20 MR. SCHWARTZ: Correct.

21 THE COURT: All right. And he wanted to
22 get some affairs or something like that
23 together, right?

24 MR. SCHWARTZ: Correct, he had a fifth
25 wheel. He was living on some property and he

1 had some personal items he needed to have put
2 in storage and the like.

3 THE COURT: All right. Mr. Hatchie, I
4 want you to get some help and in part of
5 getting some help is recognizing that you need
6 help and that's why I was concerned with the
7 BTC situation. I will knock off a couple
8 months, I think to a 53 month plus three years
9 for deadly weapon and firearm.

10 MR. HAMMOND: Your Honor, we didn't talk
11 about the costs. The state was asking for the
12 usual \$500 victim assessment, the \$110 in Court
13 costs, \$100 DNA fee. We would also ask that
14 the Court impose jury costs of \$2000. This
15 tied up this department for a full month and
16 that's a legitimate cost to impose and in terms
17 of the crime labs, there was a substantial
18 number of items that they had to sample. I
19 would ask for a \$500 crime lab fee as well.

20 MR. SCHWARTZ: What's the authority for
21 \$2000 of jury costs?

22 THE COURT: Is that by statute?

23 MR. HAMMOND: There is a statute on jury
24 costs, yes, Your Honor.

25 MR. SCHWARTZ: For civil cases, not for

APPENDIX “F”

Report of Proceedings 1317-1319

1 does that have anything to do with whether or
2 not Ray Hatchie is manufacture
3 methamphetamine? That's the sort of thing
4 that's interesting point of the discussion that
5 may help you resolve other issues in terms of
6 credibility and reliability of different
7 witnesses but it doesn't go to the ultimate
8 issue. The ultimate issue is do you believe
9 that Ray Hatchie is guilty of this crime, as
10 you understand the crime to be defined and as
11 you understand particularly his role as an
12 accomplice? That's what the issue is. Are you
13 confident of that? Do you believe that? The
14 law commands that if some of you have great and
15 serious doubts about that, that you should
16 acquit.

17 MR. SCHWARTZ: Objection, Your Honor, he
18 is mistaking the law.

19 MR. HAMMOND: This is argument.

20 THE COURT: Well, you should be advised
21 that the law is controlled by the instructions
22 as I've read them to you and not by argument of
23 counsel, all right.

24 MR. HAMMOND: And that's absolutely
25 correct, anything that either Mr. Schwartz or I

1 say about the law, that's not the law. The law
2 is in your hands right now. It's the
3 instruction that you have. So if anything I
4 say seems to conflict with the instructions,
5 certainly the instruction is controlling. I am
6 just making my argument here, folks, but the
7 idea behind the concept behind proof beyond a
8 reasonable doubt and the presumption of
9 innocence is that if you have doubt, if you
10 have doubt, reasonable doubt about whether or
11 not someone is guilty of a crime, they get the
12 benefit of that doubt.

13 But there is a flip side to that, if you
14 are walking out of this room confident that
15 someone is guilty of a crime, then you are --
16 you were at that point you are convinced you
17 shouldn't feel like you are compelled to vote
18 to acquit someone just because you have been
19 instructed that there is a thing called
20 reasonable doubt. You are not required to
21 believe it beyond a shadow of a doubt. You are
22 simply required to be confident of an abiding
23 belief in the truth of the charge, okay, that's
24 that proof beyond a reasonable doubt.

25 So the question becomes does any one ever

1 walk out of a jury deliberation room saying
2 something like, well, we knew he did it, but
3 there just wasn't enough evidence. ?

4 Well, you all came into these cases
5 hopefully not knowing a thing about the crime
6 or the party involved or what the evidence
7 would be. So how could a person walk out when
8 they knew nothing about the case to begin with
9 but they walk out of the case saying, well, we
10 knew he did it, and say but there wasn't enough
11 evidence? How do you know he did it then you
12 know he did it because of the evidence that's
13 presented and that's another concept that's
14 behind this concept of proof beyond a
15 reasonable doubt. If you believe someone is
16 guilty, you reach a guilty verdict.

17 We would submit to you that the evidence
18 in this case is overwhelming. Mr. Hatchie
19 maintained a residence that was used to promote
20 and facilitate the manufacturing of
21 methamphetamine. There were multiple
22 components in the residence in every single
23 room of the residence to promote and facilitate
24 the manufacture of methamphetamine and there
25 were all three phases found at this particular