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COURT OF APPEALS  
DIVISION II

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No. 32402-4-II

STATE OF WASHINGTON

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON,  
DEPUTY  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

ROY L. NEFF,

Appellant.

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OPENING BRIEF OF APPELLANT

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On appeal from the Superior Court of Pierce County, the  
Honorable Ronald E. Culpepper, Judge

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to support the firearm enhancement. Appellant assigns error to the following portion of Finding of Fact XIX in the Stipulated Bench Trial Findings of Fact and Conclusions of Law:

At the time defendant was manufacturing methamphetamine, he was armed because the guns found in the garage where [sp] readily available and easily accessible for offensive or defensive purposes.

CP 164.

2. There was no waiver of the state right to appeal or the state and federal due process rights to be free from conviction and punishment based upon anything less than legally sufficient evidence and any implied waiver would be invalid under the state and federal constitutions.

3. Appellant's constitutional rights to effective assistance of appointed counsel under the Sixth Amendment and Article I, section 22 of the Washington constitution were violated.

4. The trial court failed to conduct the proper inquiry and erred in refusing to suppress evidence which was the fruit of an unlawful warrantless search, in violation of the Fourth Amendment and Article I, section 7 of the Washington constitution.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Neff was convicted of manufacturing methamphetamine after officers found a lab in a locked garage on his property on November 20, 2002. A subsequent search of the garage turned up two guns in a locked safe in the floor under a desk and a gun in a tool belt in the "rafters" an unspecified height above the garage floor.

To prove someone was “armed” during a crime for the purposes of imposing a firearm enhancement, the prosecution is required to show that the gun was readily available and easily accessible for use in the crime, and that there is a link not only between the gun and the defendant but also the gun and the crime. Was the evidence insufficient to support a firearm enhancement when the only evidence was that Mr. Neff had constructive possession of the guns, the manufacturing also occurred in the garage, the guns were locked away or not proven to have been accessible, and Mr. Neff was nowhere near the guns on the day the manufacturing was alleged to have occurred?

2. In finding the evidence sufficient to support the firearm enhancement, the trial court admitted it did not have a grasp of the nuances of the law on issue and invited counsel to reargue. Despite clear, controlling precedent establishing that Mr. Neff was not “armed” as a matter of law, and that the analysis the trial court had used was flawed, counsel apparently made no effort to present the court with any of that precedent, nor did counsel attempt to argue the issue again. Was this failure to pursue appropriate investigation of the law and present the results of that information to the court ineffective assistance of counsel when further argument could not possibly have hurt his client and would have likely resulted in a dismissal of the enhancement?

3. The agreement for submission of the case as a stipulated facts trial contained many confusing clauses, including some which contradicted each other and one which could possibly be construed as a waiver of the right to challenge the insufficiency of the evidence on

appeal. Nothing in the agreement advised Mr. Neff that he might be giving up his due process rights to be free from punishment for an enhancement when the prosecution had not proven that enhancement beyond a reasonable doubt. In accepting the agreement, the court never advised Mr. Neff he was giving up such rights, or make any inquiries of Mr. Neff to determine whether any purported waiver of those rights or the right to appeal were being made knowingly, voluntarily and intelligently.

Is any waiver made under these circumstances invalid? Further, is antithetical to both the state and federal constitutions to permit an “implied” waiver of vital rights such as the right to be free from conviction and punishment on anything less than constitutionally sufficient evidence?

4. Was counsel grossly, prejudicially ineffective for advising his client to sign an agreement which was unclear about the rights the client was agreeing to give up, without clarifying what exactly the agreement meant? Further, was counsel ineffective in failing to ensure that his client was aware of the possibility that the agreement might amount to a waiver or, if he intended for his client to waive vital rights, ensuring that his client knowingly, voluntarily and intelligently waived those rights?

5. The trial court found that the officers’ warrantless search of a locked garage was unlawful because it was not authorized by any exception to the warrant requirement. Where a warrant is sought after an unlawful search, the prosecution must show that search did not in any way contribute to the issuance of the warrant by showing the magistrate would have issued the warrant absent the evidence gathered in the search and the

officers would have sought the warrant even if they had not conducted the search.

Did the trial court err in refusing to suppress evidence seized as a result of warrant sought after the unlawful search without considering whether the officers would have sought the warrant without the illegal search? Further, where the issue was specifically raised below and the evidence is insufficient to support a finding that the officers would have sought the warrant, is the prosecution precluded on double jeopardy grounds from having a second opportunity to marshal its evidence on remand?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Roy L. Neff was charged by second amended information filed in Pierce County with manufacturing methamphetamine and committing that crime while armed with a firearm. CP 105; RCW 69.50.401(a)(1)(ii); RCW 9.41.010, RCW 9.94A.310, RCW 9.94A.370, RCW 9.94A.510, RCW 9.94A.530.

Mr. Neff had originally been charged with a number of counts and enhancements. See CP 2, 34-37. After a series of continuances before the Honorables D. Gary Steiner, Kathryn J. Nelson and Stephanie A. Arend, a suppression hearing was held before the Honorable Ronald E. Culpepper on November 20 and 24, 2003. See 1RP 1, 2RP 1, 3RP 1, 4RP 1, 5RP 1,

6RP 1, 7RP 1, 7RP 143.<sup>1</sup>

After Judge Culpepper denied the motion to suppress and juror selection had begun, the parties agreed to go forward by way of a stipulated facts trial to the bench on the second amended information with its single charge of manufacturing and the firearm enhancement. 7RP 213-14, 220, 8RP 120; CP 99-104. The judge found Mr. Neff guilty as charged. 7RP 236-37.

On October 20, 2004, Judge Culpepper ordered a standard range sentence, adding 36 months of “flat time” to which no credit for time served could be applied, for the firearm enhancement. SRP 12; CP 118-129.

Mr. Neff timely appealed, and this pleading follows. See CP 136-39.

## 2. Testimony at the suppression hearing<sup>2</sup>

On November 20, 2002, at about 4:49 in the afternoon, Pierce County Sheriff’s Department (PCSD) Deputy James Jones was responding

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<sup>1</sup>The verbatim report of proceedings in this case consists of 12 volumes, which will be referred to as follows:

the proceedings of February 26, 2003, as “1RP;”  
May 1, 2003, as “2RP;”  
August 17, 2003, as “3RP;”  
September 3, 2003, as “4RP;”  
November 12, 2003, as “5RP;”  
November 19, 2003, as “6RP;”  
the three chronologically paginated proceedings of November 20, 24 and 25, 2003, as “7RP;”  
the separate volume entitled “reporter’s supplemental transcript of proceedings,” of November 24 and 25, 2003, as “8RP;”  
sentencing on October 1, 2004, as “SRP;” and  
March 7, 2005, as “9RP.”

<sup>2</sup>The case was tried to the bench in a stipulated facts trial after the suppression hearing. The documentary evidence presented at the stipulated facts hearing was attached to the bench trial findings and is contained in the record with those findings at CP 158-320.

to a suspicious vehicle call and driving with his defroster on in an area of unincorporated Pierce County when he smelled what he thought was “like an extremely powerful amount of ammonia,” so he stopped his car in the middle of the road and got out. 7RP 84-87. He could still smell the odor, as could a man who complained to Jones about it from a nearby backyard and pointed to a house as being “the possible location” of the source of the smell. 7RP 88.

Deputy Jones could not tell where the odor was coming from but went to the house the man had gestured to anyway, driving past a gate he said was open and up a long driveway. 7RP 88-90, 116. Jones got out and was looking for house numbers when he saw through a window of the house that there was a woman and small child inside. 7RP 90. He knocked on the door, explained about the smell, and asked the woman who answered the door, later identified as Andrea Neff, if he could look around. 7RP 90.

Mrs. Neff said, “[s]ure, go ahead, look around,” so Jones left the porch of the house and started to walk towards the back of the yard on an old driveway, when he encountered Mr. Neff. The deputy explained what was happening and learned that previous residents of the property had had a methamphetamine lab there and Mr. Neff had found several cylinders on the property at some point. 7RP 93, 94, 116-17. Jones then told Mr. Neff there was “very possibly still one leaking off in the” tall sticker bushes on the property, and Mr. Neff seemed willing to help the officer look for any such tank. They walked around the property a little together and onto the road off the property to try to determine the direction of the smell. 7RP

94.

As they were standing on the road, a man later identified as Mr. Rowlands came over and asked what was going on, and, once he was told, said he could not smell anything because of a cold. 7RP 95. Jones testified that the odor seemed to “dissipate” on the roadway, so the men started trying to track along the property. 7RP 120-21. They then went around the back side of the residence, looked in the “sticker bushes” and behind various cars, but found nothing. 7RP 96.

The officer thought Mr. Neff and Mr. Rowlands were “getting kind of nervous at that point,” because they started to walk away from him and walked around to the north side of the garage. 7RP 96. Jones said it was only then he was starting to get “a little bit nervous” for his safety, because Rowlands had a knife, Jones was there by himself, and the men were saying things like “I don’t smell it over here.” 7RP 97. Jones conceded that Rowlands never made any furtive movements, reached for his knife, or threatened Jones in any way, and Jones never felt any concern for his safety. 7RP 120-21. Nevertheless, the nervousness he saw in the men made him think there might possibly be a “meth lab or something occurring at the property,” so he called for other officers. 7RP 97.

When Mr. Neff and Mr. Rowlands went around the side of the shed, the deputy tried to call them back. 7RP 97. Meanwhile, Mrs. Neff had come outside with her children, complaining about the odor and wanting to leave. 7RP 97-98. The deputy refused to allow it because his “suspicions were that this was more likely going to wind up being a crime scene along with the release of the anhydrous ammonia gas.” 7RP 98-99.

Mr. Neff and Mr. Rowlands came back to where Deputy Jones was, and Jones then noticed a garden sprayer in a "heavily bushy area" set down alongside a stump. 7RP 98. Jones said there was a "mist" coming off the top of the sprayer and it had a hose coming off of it. 7RP 99. He opined that it was "off-gassing," i.e., that there was too much pressure inside the tank and that was causing a mist to go into the air. 7RP 99.

The deputy looked down into the top of the garden sprayer and saw several inches of "yellow and bluish liquid, [and] what appeared to be rock salt." 7RP 99. He decided the unit was an "HCL gas generator," which is used in the "off-gassing process of making methamphetamine." 7RP 100. Deputy Jones also then saw about six or eight "blister packs" of the type which contain pseudoephedrine pills in the "burn pile." 7RP 100-101. At that point, Mr. Neff and Mr. Rowlands and the others became suspects, and the deputy had an arriving deputy detain Mr. Neff, who had started heading down the driveway. 7RP 103, 130-31.

A "lab team responder" officer, Deputy Mark Fry, responded to the scene and, with keys Mr. Neff had thrown under the police car as he was being placed inside, they opened up the locked garage and went inside to search it. 7RP 104-106. In a concealed room off the garage, the officers found what they described as a "marijuana grow operation," and, in the garage among the other items were suspected drugs, smoking devices, stripped lithium batteries, and numerous other items indicating various stages of manufacture of methamphetamine. 7RP 106. The anhydrous ammonia smell was coming from a plastic pitcher hidden inside an unlit wood burning stove. 7RP 106.

Although the deputies indicated that there could have been someone inside the locked garage “possibly harming themselves and destroying evidence,” they admitted they never heard or saw anything indicating there was anyone in the locked garage or ever had been that day. 7RP 70-73, 76-77, 105, 118-19.

Child Protective Services was called to take the children away, and sometime after she was told she would be losing her children, Mrs. Neff was asked to give a statement, in which she incriminated her husband in allegedly manufacturing methamphetamine and growing marijuana in the garage. 7RP 106-117.

After the entry into the garage, the officers sought a warrant to reenter the garage and search it, the house and all the other buildings and vehicles on the property. See CP 345. A significant portion of the affidavit for the warrant was the evidence found in the garage. CP 345.

In his oral ruling, the judge first stated that the officer had “every right and duty and expectation of the public” to check out the smell originally. 7RP 174. The court held that the officer was legitimately on the premises when he saw the burn pile and the sprayer, after which he had “a pretty good idea he’s got a meth lab on his hands” and then had sufficient evidence to get a warrant. 7RP 174-76.

However, the court did not find the facts supported a finding of “exigent circumstances,” instead declaring:

[The prosecutor] made the point that by this point the officers thought that every judge presented would have signed the warrant, but it seems to me that doesn’t necessarily mean the warrant is just a mere piece of paper, a mere formality.

Warrants, the requirement of a warrant, has some important purposes. In this particular case they would have gotten a warrant. I don't think there's any question about it, but they're supposed to apply for a warrant unless the exceptions apply, and the case law always talks about warrants are preferred and warrant[less searches] are not allowed except under jealously guarded exceptions, and if this is exigent circumstances, then my concern is, as I indicated, the exception is swallowing the rule.

The exigent circumstance here apparently is this odor, and it appears to be a fairly strong odor, but there's been no indication that this has caused any particular problem to the people present. Rowlands apparently isn't becoming ill. Mrs. Neff and the kids aren't becoming ill. It's not making the officer ill. Of course, it's contained in the garage, but the smell in and of itself doesn't strike me as creating an emergency.

7RP 175-76 (emphasis added). The court also rejected the idea that the officers could enter to determine if someone was potentially inside the garage, because there was "no objective evidence that someone was in there," and the officer "had no particular reason" to think they were. 7RP 178. The court also pointedly noted that the same officer who cited the potential of a leaking tank as such a safety and health risk that it justified the intrusion into the garage did not think there was "too great a threat" to the safety of the Neff children, who the officer had made stay on the property when Mrs. Neff tried to take them away. 7RP 178.

After some discussion about the validity of the resulting search warrant, the court first declared the warrant "invalid," stating that "it makes no sense to say you can't search it and then allow all the evidence in." 7RP 184. The prosecutor disagreed, arguing that the court could find the evidence was "inevitably discovered" under the warrant. 7RP 185. The prosecutor also stated there was no "penalty" for the unlawful search if the court determined that it would not have been an abuse of discretion

for a magistrate to issue the warrant, absent the illegally obtained information included in the affidavit. 7RP 186.

Mr. Neff argued that “inevitable discovery” did not apply because the officers “probably wouldn’t have proceeded with the search warrant had they not gone into the garage.” 7RP 192. The court then asked “how do we know that?” 7RP 192. Counsel noted the prosecutor had presented “no information” on that issue, but argued that the court could assume that the officers would not have sought a warrant without the illegal entry, because they never tried to get a warrant during the entire time that passed between Deputy Jones smelling the smell, walking around, calling for backup, waiting for Deputy Fry, detaining Mr. Neff, Mrs. Neff and the children, and all of the other activities they engaged in prior to the search. 7RP 192. He noted that the warrant was not in the process of being obtained independent of the illegally obtained evidence and thus, he argued, the evidence was not sufficiently independent of the illegal search. 7RP 193.

Although stating its concern that the police were being allowed to engage in illegal conduct with impunity, the court held that the evidence seized under the warrant was admissible, because the untainted information in the warrant would have supported its issuance. 7RP 198. The court made no findings, either oral or written, regarding whether the police would have sought a warrant for the garage if they had not first unlawfully entered the garage and seen the contraband inside.

3. The firearm evidence and ineffective assistance

a. The entry of the agreement for a stipulated facts trial

Prior to considering evidence, the trial court first examined the agreement to proceed in a stipulated facts bench trial. 7RP 119-20. The court asked Mr. Neff to explain what the stipulation meant, and Mr. Neff thought it meant he was making a “deal” with the prosecutor. 7RP 221-22. Counsel and the court repeatedly referred to a stipulated facts trial as a proceeding where the court would still decide whether the defendant was guilty or not but would just not hear trial testimony. 7RP 220, 222 (“if there is sufficient evidence in the reading of the police reports, [Mr. Neff,] you could be found guilty”) (emphasis added), 223-24.

In the written agreement drafted by the prosecution, there were clauses reflecting that the court would be deciding sufficiency of the evidence, which Mr. Neff did not stipulate existed. CP 99; 102-104 (crossed out sections which would have entered such a stipulation). At the end of a lengthy paragraph, however, there was language not crossed out which declared, “I stipulate that there is sufficient evidence to support the charged offense and the firearm enhancement as charged in the Second Amended Information.” CP 100.

The agreement also contained a clause which first appeared to confuse the court. That clause provided that Mr. Neff was “waiving the right to challenge the sufficiency of the evidence to support these convictions on appeal,” while reserving the right to challenge the court’s suppression hearing findings and “conclusions of law.” 7RP 224-25, 728-

29; CP 101-102. Ultimately, the court understood it to mean Mr. Neff was giving up his right to appeal anything but the suppression motion, something counsel said was important to Mr. Neff. 7RP 224-25, 728-29.

Neither the court nor either counsel ever asked Mr. Neff if he understood what he was giving up in giving up his right to appeal the insufficiency of the evidence. 7RP 224-29. The court only asked the prosecutor if he was “agreeing that” Mr. Neff could appeal the suppression hearing ruling, and counsel if he had any doubt his client was agreeing to the stipulated facts trial “freely and voluntarily,” without asking if it was “knowing” or establishing that Mr. Neff understood the direct consequences of that agreement. 7RP 225.

Section 1.1©), the section of the Stipulation which explained Mr. Neff’s understanding of the constitutional rights he was giving up explained the relevant rights as the trial by jury, to remain silent, to refuse to testify, and to cross-examine, confront, and present witnesses. CP 100-101. It did not mention due process, nor did it tell Mr. Neff he was waiving his right to be free from punishment or conviction upon anything less than sufficient evidence and relieving the prosecution of a constitutionally mandated burden of proof in so doing. CP 99-104.

b. The evidence at the stipulated facts trial

At the stipulated facts trial, the evidence indicated that no guns were found or seen in the initial search of the garage. See CP 232-33. After the warrant was issued and a more thorough search conducted, however, a safe was found underneath a desk in the garage. CP 222-23. Inside the safe was a .357 with cartridges, a .45 with cartridges, and a

holster. Id. A .380 was found in a holster with a magazine and five cartridges, described as in a “toolbelt pouch hanging in the rafters in the garage.” Id. There was no evidence presented about whether that pouch could have been easily reached or even reached at all without a ladder from any part of floor of the garage. CP 158-320. Officers also found a shotgun in the bedroom of the unattached house, and some magazines in the kitchen. CP 232-33.

c. The sufficiency challenge at the stipulated facts trial

After the court accepted the agreement to proceed on stipulated facts, the parties argued about the sufficiency of that evidence to support the firearm enhancement. 7RP 230-35. Mr. Neff argued that, due to their location, the guns were not “readily available and easily accessible.” 7RP 235. The judge said:

Well, who had the key to the locked safe? Mr. Neff didn't have them on his person, that's clear. At the time the officers- - at least, Officer Jones was there. One in the bedroom, that was a shotgun. That one, I think, was easily accessible.

7RP 235-36. The court went on:

Three of the weapons were in the garage, one in the rafters, I don't know exactly where, but presumably it wouldn't be very hard to reach up and pull it down, and the two in the safe in Mr. Neff's locked garage, who else would have access to the safe but Mr. Neff?

7RP 236. Counsel disputed that “presumption,” noting that there was no evidence as to how high the rafters were to indicate whether they could be reached from a standing position in the garage. 7RP 236.

In finding Mr. Neff guilty of committing the crime while armed with a firearm, the court ruled:

With respect to the firearm enhancement, I think there is evidence that was readily accessible to him. Three of the guns were located in his lab. Two of them were in the safe, that's true, when the officers checked. Mr. Neff didn't run into Jones as early as his wife did, so it's very possible that he put them in there when he saw the officer outside, which is certainly better than arming himself, and he's got the key to the garage. His wife in her statement said she never had a key to the garage, so clearly those were in his control, and it isn't very hard to get them, so I think they're readily accessible. So I'm going to enter a finding of guilty to the unlawful manufacturing of a controlled substance, methamphetamine, with the firearm enhancement.

7RP 237. The court indicated that counsel could "reargue" the firearm enhancement issue later, noting the court had not "done any research on that." 7RP 237.

In subsequent proceedings, counsel made no effort to reargue the firearm enhancement issue, or present the court with any relevant law on the issue, even at the entry of the court's findings and conclusions on the stipulated facts trial, in March of 2005. 9RP 1-20. Those findings and conclusions stated only that the .357, .45, and .380 were found in the garage, but made no findings as to the gun in the house. CP 162-63. The court also entered as a "finding" the conclusion that "[a]t the time defendant was manufacturing methamphetamine, he was armed because the guns found in the garage where [sp] readily available for offensive or defensive purposes." CP 163-64.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE FIREARM ENHANCEMENT AS A MATTER OF LAW AND COUNSEL WAS INEFFECTIVE

Both the state and federal constitutions require the prosecution to shoulder the burden of proving every essential element of a firearm

enhancement, beyond a reasonable doubt. State v. Pam, 98 Wn.2d 748, 752, 659 P.2d 454 (1983), overruled in part and on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989); State v. Tongate, 93 Wn.2d 751, 754, 613 P.2d 121 (1980); Fourth Amend.; Wa. Const. Art. 1, sec. 3. In reviewing the sufficiency of the evidence to prove an enhancement, this Court determines whether, viewed in the light most favorable to the state, a rational trier of fact could have found the facts supporting it, beyond a reasonable doubt. See State v. Myers, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997). Enhancements not supported by sufficient evidence must be stricken. See State v. Valdobinos, 122 Wn.2d 270, 282-84, 858 P.2d 199 (1993).

In addition to due process, the accused have the right to effective assistance of counsel. Both the state and federal constitutions guarantee that right. Strickland v. Washington, 366 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Sixth Amend.; Wa. Const. Art. 1, sec. 22 (amend. 10).

In this case, the firearm enhancement was not supported by the evidence or the court's findings, and counsel was seriously, prejudicially deficient in his performance in relation to the enhancement. This Court should therefore strike the enhancement or reverse.

- a. There was insufficient evidence to support the enhancement and the court's findings do not support its conclusions

Under CrR 6.1(d), whenever a judge decides a case after a stipulated facts trial, the judge must enter findings of fact and conclusions of law. State v. Banks, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003). Each

element must be addressed separately by the findings and conclusions, and each conclusion of law “must be supported by a factual basis” in the findings. State v. Heffner, \_\_\_ Wn. App. \_\_\_, 110 P.3d 219, 223 (April 19, 2005). A court’s failure to enter findings on each element is only harmless if the omitted element is uncontested and supported by substantial evidence. See Banks, 149 Wn.2d at 45. As a corollary, remand for entry of missing findings is impermissible and would violate the state and federal prohibitions against double jeopardy if the evidence admitted at the original proceeding was insufficient. State v. Hescocock, 98 Wn. App. 600, 606-607, 989 P.2d 1251 (1999); Fifth Amend.; Wa. Const. Art. 1, sec. 9.

The determination of whether someone was armed is a mixed question of law and fact. State v. Schelin, 147 Wn.2d 562, 566, 55 P.3d 632 (2002); State v. Mills, 80 Wn. App. 231, 233, 907 P.2d 316 (1995). As a result, this Court applies de novo review to the question of whether the facts found by the trial court were “sufficient as a matter of law” to prove the defendant was armed. Schelin, 147 Wn.2d at 566; Mills, 80 Wn. App. at 234-35.

In this case, the judge’s findings were not sufficient to support the conclusion, as a matter of law, because the trial court made insufficient findings linking the guns to the commission of the crime and because the court’s “finding” that the guns were easily accessible and readily available is not supported by the evidence or the law.

Because of the concern of infringing on the constitutional right to bear arms, the legal definition of when someone is “armed” for the

purposes of a imposing firearm sentencing enhancement is very specific. See Schelin, 147 Wn.2d at 575. Under RCW 9.94A.533(3), the prosecution is required to prove 1) a firearm was easily accessible and readily available for use for either offensive or defensive purposes, 2) the availability and accessibility occurred during the crime, and 4) there was a link, or “nexus,” not only between the defendant and the gun but also between the gun and the crime. Valdobinos, 122 Wn.2d at 282; Schelin, 147 Wn.2d at 575; see State v. Willis, 153 Wn.2d 366, 103 P.3d 1213, 1216-17 (2005). In cases where the crime charged is considered “ongoing,” a temporal and proximity nexus must also be proven between the gun, the defendant and the crime, rather than just that the gun was constructively possessed by the defendant over a period of time in which drugs were allegedly made by the defendant nearby. Schelin, 147 Wn.2d at 575-76; As the Supreme Court has declared, “[a] defendant is ‘armed’ when he or she is within proximity of an easily and readily available deadly weapon for offensive or defensive purposes and when a nexus is established between the defendant, the weapon and the crime.” Schelin, 147 Wn.2d at 575-76.

The written findings and conclusions entered by the court after the stipulated facts trial here include only a few findings about the guns. In Finding XV, the court found that the police found “[i]n the defendant’s garage. . .a loaded Smith and Wesson .357 handgun, a Colt .45, a Davis model P .380 firearm.” CP 162-64. The court also stated, as part of Finding XIX, that “[a]t the time defendant was manufacturing methamphetamine, he was armed because the guns found in the garage

where [sp] readily available for offensive or defensive purposes.” CP 163-65.

Those findings were not sufficient to support the court’s conclusion “[t]hat defendant was armed with a firearm while he was manufacturing methamphetamine,” as a matter of law. CP 164-66. Nor does the Court’s oral opinion fill in the required gaps. Where a court’s written findings are insufficient, a reviewing court may refer to the lower court’s oral opinion to fill in the holes. Hescock, 98 Wn. App. at 606.

In his oral opinion, the judge fleshed out his ruling, finding that the guns in the locked safe were “easily accessible and readily available” to Mr. Neff because he was the person who had the key to the locked garage, and “who else would have access to the safe but Mr. Neff?” 7RP 235-236. For the gun in the rafters, although acknowledging there was nothing in the record indicating where or how that gun was placed, the judge found Mr. Neff armed with that gun because, “presumably it wouldn’t be very hard to reach up and pull it down.” 7RP 235-36.<sup>3</sup> The judge concluded that there was “evidence” the guns were “readily accessible to” Mr. Neff, because they were located where the lab was, the access to that garage was “in his control” because he had the key, and “it isn’t very hard to get them.” 7RP 236.

But the mere fact that Mr. Neff had the key to the locked garage

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<sup>3</sup>The court also found, in its oral ruling, that the gun in the bedroom in the house was “easily accessible” because it was easy to reach. 7RP 235-36. The court did not rely on that gun, however, in finding Mr. Neff was armed with a firearm for the offense. CP 163-64.

and had access to the key to the safe does not support the conclusion that the guns found in that locked garage, in the rafters and in a locked safe, were “readily available and easily accessible” to him as a matter of law for the manufacturing of methamphetamine crime. A gun is not “easily accessible and readily available” for use for offensive or defensive purposes during a crime simply because the gun was in a place where illegal activity was occurring, even when that activity involves production of drugs. Valdobinos, 122 Wn.2d at 282; State v. Johnson, 94 Wn. App. 882, 895-96, 974 P.2d 855 (1999), review denied, 139 Wn.2d 1028 (2000). Nor is it enough that there was a gun found at a house where an ongoing drug manufacturing operation was also found, because “[s]imply constructively possessing a weapon on the premises during the entire period of illegal activity is not enough to establish a nexus between the crime and the weapons.” Johnson, 94 Wn. App. at 895.

Instead, there must be some proof actually linking the gun to the crime of manufacturing, more than just by mere presence and the defendant’s constructive possession. Schelin, 147 Wn.2d at 575. Thus, where the defendant had a marijuana grow operation in his home, he was not “armed” for the purposes of that operation even though three guns were found in the same house. State v. Call, 75 Wn. App. 866, 867-69, 880 P.2d 571 (1994). The guns were not “readily available and easily accessible” for use in the crime, because two of them were in a dresser drawer, unloaded, and one was in a toolbox at the foot of a bed. Call, 75 Wn. App. at 868-69. It was insufficient that the guns were in the same place as the manufacturing, nor was it adequate that the guns could have

*possibly* been possessed to “protect” the drugs, because the prosecution must show “more than potential to use a firearm” during the crime. See Schelin, 147 Wn.2d at 583 (noting that holding of Call).

Indeed, the Supreme Court has specifically noted that imposition of a firearm enhancement clearly requires more than proof that the defendant unlawfully and constructively possessed a firearm while committing another crime. Schelin, 147 Wn.2d at 582 n. 2. Proof of constructive possession of a gun is certainly enough to support a conviction for unlawful possession. Id.; see State v. Staley, 123 Wn.2d 794, 798-99, 872 P.2d 502 (1994). To prove a defendant was armed for the purposes of a firearm enhancement, however, requires more than just proof of unlawful possession of a firearm “at some point during the commission of a crime.” Schelin, 147 Wn.2d at 582 n.2.

Here, there is no doubt Mr. Neff was in constructive possession of the guns in his garage on November 20, the day the methamphetamine operation was found and the date charged in the information. But there was no evidence that on that day - or any other - Mr. Neff in any way used those guns in relation to the manufacture of methamphetamine. Nor was there any evidence of any link between any of the guns and the crime other than mere presence and a separate relationship of each to the defendant.

The findings and the evidence here show only that Mr. Neff constructively possessed the firearms in the garage where the manufacturing was taking place. While there was the *possibility* that the guns *could have* been used in the manufacturing crime, as the Washington Supreme Court has declared, “a defendant’s *potential* to use a firearm in

connection with a criminal enterprise” is not enough to support a firearm enhancement. Schelin, 147 Wn.2d at 586. The mere proximity of the guns to the drugs in the garage and the fact Mr. Neff had access to both proved only the link between Mr. Neff and the guns, and Mr. Neff and the manufacturing. It proved no link between the guns and the manufacturing.

As this Court has noted, a “defendant in constructive possession of a deadly weapon, even if that weapon is next to controlled substances, is not ‘armed’” for the purposes of a firearm enhancement, without proof of some other link between the drugs and the crime. Mills, 80 Wn. App. at 233. The trial court’s findings do not support the conclusion that Mr. Neff was “armed” when he committed the manufacturing. Further where, as here, the evidence was insufficient, it would violate the state and federal prohibitions against double jeopardy to remand for entry of the missing findings, which could not be found on this record, absent additional evidence being presented. State v. Alvarez, 128 Wn.2d 1, 20, 904 P. 2d 754 (1995) (citations omitted). This Court should strike the improperly imposed enhancement.

b. There was no valid “waiver” of the right to challenge the insufficiency of the evidence

In its response, the prosecution may argue that this Court should not reach the insufficiency of the evidence based upon a theory that Mr. Neff somehow “waived” the right to appeal the erroneous conviction for the firearm enhancement. This Court should soundly reject any such argument, because the prosecution cannot show that there was an actual waiver of the right to appeal, or that any implied waiver was or ever could

be valid.

The right to appeal is a fundamental right under the Washington constitution and, as a result, there is no presumption in favor of its waiver. See State v. Kells, 134 Wn.2d 309, 314, 949 P.2d 818 (1998). The prosecution bears the heavy burden of proving that any full or partial waiver of the right to appeal was knowing, voluntary and intelligent. See State v. Tomal, 133 Wn.2d 985, 989, 948 P.2d 833 (1997). An “involuntary forfeiture” of the right to appeal does not amount to a valid waiver, because it must be clear that the defendant knew what he was giving up, meant to do so, and was doing so willingly and unequivocally. See Kells, 134 Wn.2d at 313.

Here, there is conflicting evidence about exactly what Mr. Neff agreed to in signing the agreement for the court to decide the case in a stipulated facts trial, because of the language in the agreement and the discussion of the agreement which occurred before the court accepted it. Taken as a whole, however, in light of the specific procedure used and the rights at issue, it becomes clear that Mr. Neff did not knowingly, intelligently and voluntarily give up his constitutional rights in relation to this case.

At the outset, the level of protections required before a trial court may accept an agreement to proceed as a stipulated facts trial is different than the protections given before acceptance of a guilty plea, because of the very significant differences in the two proceedings. Unlike a plea, an agreement to participate in a stipulated facts trial is not a stipulation by the defendant that he or she is guilty. See State v. Mierz, 127 Wn.2d 460, 469,

901 P.2d 286 (1995). Instead, a stipulated facts trial agreement amounts only to an agreement “that what the State presents is what the witnesses would say.” State v. Johnson, 104 Wn.2d 338, 705 P.2d 773 (1985). In distinguishing the requirements for showing the propriety of a stipulated facts trial agreement and those applicable to acceptance of pleas, the Supreme Court has specifically described the stipulated facts trial as “still” a trial of guilt or innocence, at which the “burden of proof remains upon the State,” and from which the defendant retains “the right to appeal.” Mierz, 127 Wn.2d at 469. As a result, the same protections required for entry of a guilty plea are not provided for those agreeing to a stipulated facts hearing, in part because “in a stipulated facts trial the defendant maintains his right to appeal, which is lost when a guilty plea is entered.” Johnson, 104 Wn.2d at 343.

Thus, by definition, a stipulated facts trial is not intended as a stipulation or agreement that the evidence is sufficient to support guilt. If it were, it would simply be a plea. Any agreement which amounts to a stipulation of guilt is the same as a plea of guilty and waives “all nonjurisdictional defenses.” State v. Wiley, 26 Wn. App. 422, 425-26, 613 P.2d 549, review denied, 94 Wn.2d 1014 (1980). As a result, it is required for the court to engage in the lengthy, detailed colloquy required for waiver of all of the rights given up by the plea. Id. But where, as here, a defendant maintains a factual or legal defense to guilt, the stipulation is deemed to have “preserved legal issues for appeal.” Id. To overcome this principle here, the prosecution would have to show a knowing, voluntary and intelligent waiver of the rights this stipulation is deemed to have

waived.

The prosecution cannot meet that weighty burden. First, the plain language of the agreement does not support the conclusion that Mr. Neff waived the right to challenge the sufficiency of the evidence for the enhancement on appeal. Although Section 1.1(e) of the agreement indicates Mr. Neff was waiving the right to challenge the sufficiency of the evidence to support the “*convictions* on appeal,” it said nothing about waiving a challenge to the sufficiency of the evidence to support the *enhancement*. CP 101-102 (emphasis added).

Further, it is clear from the other areas of the agreement that Mr. Neff was attempting, however inartfully, to preserve his rights in relation to the sufficiency of the evidence.<sup>4</sup> A section stating his agreement that there was sufficient evidence to support a conviction as charged was changed to read there was sufficient evidence to support “a possible” conviction as charged. CP 99. And the agreement as filed specifically deleted two of the instances where it would have provided that Mr. Neff stipulated to the sufficiency of the evidence, in paragraph 1.2 and 1.5. CP 103-104. It seems more than likely that the failure to delete the boilerplate language at the end of paragraph 1.1(a) to the contrary was an oversight, given the clear delineation of the other, similar language elsewhere in the agreement.

In any event, the evidence here would not support a finding that Mr. Neff made a knowing, voluntary and intelligent waiver of the vital

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<sup>4</sup>Counsel’s ineffectiveness in handling the entry of this agreement is discussed, *infra*.

constitutional rights at issue. Here, the rights involved include not only the state constitutional right to an appeal but also the underlying fundamental right to be free from punishment or conviction upon anything less than sufficient evidence. That right is enshrined in both the Washington and federal constitutions as an indispensable mandate of due process. See Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989); State v. Duran-Davila, 77 Wn. App. 701, 703, 892 P.2d 1125 (1995).

Nothing in the record proves that Mr. Neff knew that, by agreeing to a stipulated facts trial, he was waiving the right to be free from punishment or conviction based upon less than sufficient evidence, and the right to appeal any determination on that issue. To the contrary, the agreement did not list due process as one of the rights Mr. Neff was waiving. See CP 99-101. And the discussion at the hearing made it clear that Mr. Neff understood only that he was agreeing to allow the court to decide the case based upon the evidence presented by the prosecution, always retaining the possibility that the court would find insufficient evidence to support the enhancement. 7RP 222-23. In addition, during the very brief mention of the waiver of the “right to challenge sufficiency of the evidence to support the conviction on appeal,” no one addressed Mr. Neff, or asked if he understood that he was waiving that right and was doing so knowingly, voluntarily and intelligently. 7RP 224-25.

Johnson, Mierz and Wiley hold that a court accepting an agreement to proceed on stipulated facts is not required to engage in the same kind of colloquy that is required for acceptance of a guilty plea. Those holdings, however, depend upon the belief that a stipulated facts trial is not a

wholesale waiver of vital rights but rather a procedure which retains much of the safeguards of trial because it is only an agreement “that what the State presents” by documentation at the stipulated facts trial “is what the witnesses would say.” Johnson, 104 Wn.2d at 340-41. And those holdings applied only to the question of whether the defendant properly agreed to have the case decided by stipulated facts, not whether the defendant, in the same agreement, waived other very significant, important constitutional rights. Indeed, where an agreement is seen to waive such rights in relation to guilt, it is tantamount to a guilty plea and must be treated as such. Wiley, 26 Wn. App. at 425-26. If Mr. Neff was deemed to have waived his rights to appeal the sufficiency of the evidence presented at the stipulated facts trial, he was effectively waiving his due process rights to be free from conviction and punishment upon anything other than sufficient evidence. The prosecution simply cannot show that the muddled, confusing and contradictory agreement in this case amounted to a knowing, voluntary and intelligent waiver of the rights to appeal and to due process.

In any event, even if the agreement, with its conflicting provisions, could be deemed a “waiver” of the rights to appeal and due process and even if there had been evidence that Mr. Neff made the waiver “knowingly, voluntarily and intelligently,” that waiver would be invalid as a matter of law. A person may not agree to have a court exceed its statutory authority by entering an unsupported decision. In re Goodwin, 146 Wn.2d 861, 869, 50 P.3d 618 (2002). Where, as here, there is an enhancement which is improperly imposed as a matter of law, it is

immaterial even if the defendant *pled guilty* to the enhancement, because he could not agree to have the court exceed its authority. See In re Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980).<sup>5</sup> The prosecution cannot prove there was a knowing, voluntary and intelligent waiver of the due process rights to be free from conviction upon anything less than sufficient evidence, or to appeal that decision, based upon the record in this case. This Court should not be swayed by any claims to the contrary.

c. Mr. Neff's state and federal constitutional rights to effective assistance of counsel were violated

To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). In this case, Mr. Neff can meet that standard, because counsel was prejudicially ineffective in several ways in relation to the unsupported firearm enhancement.

An attorney's performance is analyzed by applying an objective standard of reasonableness. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999). Performance is deficient if it fell below that standard, "in consideration of all of the circumstances." Id. Further, although there is a strong presumption that appointed counsel is effective, that presumption is overwhelmingly rebutted when counsel fails to "conduct appropriate investigations, either factual or legal, to determine what matters of defense were available." State v. Jury, 19 Wn. App. 256, 264, 576 P.2d 1392, review denied, 90 Wn.2d 1006 (1978).

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<sup>5</sup>Counsel's ineffectiveness in relation to this issue is discussed in detail, *infra*.

Here, counsel did just that, in failing to present the court with the relevant, binding authority on the issue of the insufficiency of the proof for the firearm enhancement. As noted above, there are many, many cases establishing that the evidence here - merely constructive possession in the same place as where the manufacturing occurred - was entirely insufficient to prove that Mr. Neff was "armed" for the manufacturing count as a matter of law. And those same cases would have supported the very arguments counsel had already made about the fact that the guns were found in the safe or not proven to be accessible. Yet counsel first failed to present these cases in his arguments to the court on the stipulated facts trial after knowing in advance what the state's evidence would be. Then he failed to investigate and present these cases when specifically told he could do so after the judge declared that he did not know the relevant law on the issue.

There can be no tactical reason for counsel to have failed to reargue. The court had already ruled against Mr. Neff on this issue. There could have been absolutely no harm to Mr. Neff in counsel taking the court up on its invitation to reargue, after having marshaled the relevant, binding caselaw. Any thin "tactical" claim which could possibly be contrived for this situation simply would not fall within even the "wide range of professionally competent assistance" within which tactical decisions are protected. In re Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (where a "tactical" decision is outside that wide range, it may support a claim of ineffective assistance).

In addition, counsel's was ineffective in allowing his client to sign

the agreement for the stipulated facts trial, drafted by the prosecution. As noted above, the agreement was, at best, confusing and contradictory about what Mr. Neff was actually agreeing to do. At worst, the agreement was possibly an invalid, improper waiver of important constitutional rights. Counsel allowed his client to sign this confusing and contradictory document without fixing it. And counsel did not ensure that there was clarity regarding what his client was actually waiving.

There is a possible tactical reason for advising a client to sign an agreement, even one which waives important rights. Securing the agreement from the prosecutor to proceed on fewer charges, as occurred here, is clearly tactical. But there can be no legitimate tactical reason to fail to ensure that any such agreement is absolutely clear about what your client is giving up and what he retains. And there cannot be a legitimate tactical reason to allow your client to potentially lose the right to appeal the very argument you are going to present to the court, without a clear understanding of the due process implications of such a waiver. If this Court deemed that the agreement someone amounted to a waiver, Mr. Neff would be deprived of rights he had no idea he was waiving. Where a defendant is deprived of an appeal because of ineffective assistance of counsel, he is deprived of not only his right to counsel but of his due process rights, as well. State v. Frampton, 45 Wn. App. 554, 558 n. 3, 726 P.2d 486 (1986).

The document counsel allowed his client to sign was inconsistent on the sufficiency of the evidence at the stipulated facts trial and went far beyond what is ordinarily required for a stipulated trial. Yet counsel did

not ask for clear language explaining whether Mr. Neff was giving up certain rights or not, nor did counsel ask the court to engage in the mandatory colloquy which would have been required for a valid waiver of the substantial rights at issue.

There can be no question that counsel's ineffectiveness prejudiced Mr. Neff. The law on the firearm enhancement is overwhelmingly in favor of Mr. Neff. The court was willing to reconsider. Had counsel done even a cursory investigation of the law and presented even a small portion of it to the court, there is more than a substantial likelihood that the court would not have imposed the unsupported 36 month firearm enhancement of flat time. And had counsel effectively handled the stipulation agreement, either it would have been clear to all, including Mr. Neff, that he was waiving the right to appeal and the right to be free from serving an illegal, unsupported sentencing enhancement as a result, or the agreement would not have contained the confusing, contradictory language which could possibly imply improper waivers.

The result of counsel's ineffectiveness is that Mr. Neff is serving 36 months without the possibility of good time in addition to the standard range sentence. This Court should reverse.

3. MR. NEFF'S FOURTH AMENDMENT AND ARTICLE 1, SECTION 7 RIGHTS TO BE FREE FROM UNREASONABLE GOVERNMENTAL INTRUSION INTO HIS HOME WERE VIOLATED AND THE EVIDENCE SHOULD HAVE BEEN SUPPRESSED

Both the Fourth Amendment and Article I, Section 7 of the Washington constitution protect Washington citizens against unreasonable searches and seizures, especially in their home. Steagald v. United States,

451 U.S. 204, 205, 211, 101 S. Ct. 1642, 68 L. Ed.2d 38 (1981)<sup>6</sup>; Hendrickson, 129 Wn.2d at 70.<sup>7</sup> Warrantless searches are presumptively unreasonable, unless the prosecution can prove that one of the very limited exceptions to the warrant requirement applies. See Arizona v. Hicks, 480 U.S. 321, 327, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987); State v. Mathe, 102 Wn.2d 537, 540-41, 688 P.2d 859 (1984). Where a search does not fall within one of those few exceptions, it violates both the state and federal constitutions and any evidence seized as a result of such a search must be suppressed. See Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); Hendrickson, 129 Wn.2d at 72.

Here, the trial court held that the search of the garage below did not fall under any of the exceptions to the warrant requirement and was unlawful. CP 328. More specifically, the court found that the officers had the time and ability to have sought a search warrant prior to entry and that the circumstances were not “exigent” and did not justify the warrantless intrusion into the locked garage. CP 328. The court then “excised” from the affidavit for the warrant the evidence it said the officers had found in the unlawful search, but concluded that the evidence seized based on that warrant was still admissible, based solely on the court’s decision that the application for the search warrant was still “sufficient” absent the “offending material.” CP 328-29.

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<sup>6</sup>The Fourth Amendment to the United States Constitution provides: “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause.”

<sup>7</sup>Article I, Section 7 provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

That ruling was in error. Where there is an unlawful search and the police subsequently obtain a warrant based upon what they discover through the unlawful conduct, suppression is required unless the prosecution can meet the very high burden of proving that the illegal search had no effect on the issuance of the warrant. See State v. Hall, 53 Wn. App. 296, 304-305, 766 P.2d 512, review denied, 112 Wn.2d 1016 (1989). The evidence is seen to “derive” from the unlawful search, unless the link between the unlawful search and the evidence is “so attenuated as to dissipate the taint.” Nardone v. United States, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1949).

The state bears the burden of establishing that a subsequent warrant is “untainted” by the unlawful search or seizure. See State v. Le, 103 Wn. App. 354, 361, 12 P. 3d 653 (2000). It can only meet that burden - described by the U.S. Supreme Court as “onerous” - if it can show that the warrant would have been sought by the officers and issued even without the illegal search or seizure. Murray v. United States, 487 U.S. 533, 536-37, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988).

Put another way, the prosecution must show the reviewing court that the officer’s unlawful entry did not contribute to their decision to seek the warrant, or influence the magistrate’s decision to grant it. See State v. Spring, \_\_\_ Wn. App. \_\_\_, 107 P.3d 118 (2005); U.S. v. Hill, 55 F.3d 479, 481 (9<sup>th</sup> Cir. 1995). As the Supreme Court has stated, “[s]o long as a later, lawful seizure is genuinely independent of an earlier, tainted one,” the theory of an “independent source” supporting the later seizure will apply and permit admission of the evidence deemed not “tainted.” Murray, 487

U.S. at 541.

Here, the trial court only addressed one portion of the required analysis when it determined that the warrant was sufficiently supported absent the fruits of the unlawful search. That determination was only a conclusion about whether the warrant would have *issued* absent the illegal conduct; it did not address whether the officers would have *requested* the warrant absent the illegal search. Under Murray, the trial court was required to engage in the “two separate inquiries for determining whether the warrant was tainted by illegally obtained information: the officer’s decision to seek the warrant, and the magistrate’s decision to issue it.” See Spring, 107 P.3d at 120, 122.

The court’s failure to conduct the proper inquiry is somewhat surprising, given that counsel specifically argued that the evidence sought under the warrant was not sufficiently free of the taint of the illegal search because the officers “probably wouldn’t have proceeded with the search warrant had they not gone into the garage.” 7RP 192. In any event, the prosecution presented no evidence to support a finding by the court that the officers would have sought the warrant absent the illegal search. In fact, when counsel made his argument about whether the officers would have sought the warrant, the court asked “how do we know,” and the discussion following that question specifically included comment about the prosecution’s failure to present any evidence to support a finding the officers would have nevertheless sought the warrant. 7RP 192.

In addition, the evidence the prosecution *did* present indicated that the officers’ decision to seek the warrant was based in large part on the

results of the illegal search. Aside from the fact that the affidavit for the warrant was permeated with what the officers saw in the illegal search, it is significant that the officers never tried to get a warrant during the entire time that passed after Deputy Jones smelled the smell, while the deputy contacted and spoke to Mrs. Neff, walked around, spoke to Mr. Neff, walked around the property with him, met Mr. Rowlands, spoke to him, walked around with him, called for backup, waited for backup, detained the Neff family, saw the contraband, waited for Deputy Fry, and ultimately illegally entered the garage. Nor were the officers making any attempt to seek a warrant at the time of the unlawful search. See e.g., State v. Hall, 53 Wn. App. 296, 766 P.2d 512, review denied, 112 Wn.2d 1016 (1989) (where decision to seek a warrant was made prior to arrival and officers were already in the process of seeking one, the evidence seized under the subsequent warrant was admissible despite an illegal search).

Indeed, Deputy Jones specifically testified that he himself did not know how to and would not have sought a telephonic search warrant on his own. 7RP 119-20.

Because the prosecution failed to present sufficient evidence to prove that the officers would have sought the warrant absent the illegal search, the trial court could not have found that fact. Yet that fact is an absolutely crucial part of the analysis mandated under Murray and its progeny.

In its response, the prosecution may ask this Court to remand to allow the prosecution to present further evidence on this issue and allow the trial court to make findings on that evidence. Any such remand,

however, would violate Mr. Neff's state and federal constitutional rights to be free from double jeopardy. Where, as here, the prosecution fails to present sufficient evidence to support a crucial finding by a trial court, it cannot be given another "opportunity to supply evidence which it failed to muster in the first proceeding." Alvarez, 128 Wn.2d at 20. Any remand would be limited to a determination based upon the evidence already heard. Id. Because that evidence was insufficient to support a finding that the officers would have sought the warrant absent the illegal entry, no remand can cure this problem without violating Mr. Neff's state and federal rights to be free from double jeopardy. This Court should reverse.

E. CONCLUSION

Mr. Neff was constitutionally entitled to be free from conviction and punishment for a firearm enhancement which was not supported by the evidence as a matter of law. He was also entitled to counsel who would provide him with meaningful advocacy, ensure his rights were protected, and make reasonable investigation of the relevant law to present to the court at the relevant time. Finally, the trial court improperly ruled the evidence admissible despite the illegal search without any evidence from the prosecution that the officers would have sought the warrant anyway. This Court should strike the firearm enhancement and reverse based upon counsel's ineffectiveness and the erroneous suppression ruling.

DATED this 3rd day of June, 2005.

Respectfully submitted,



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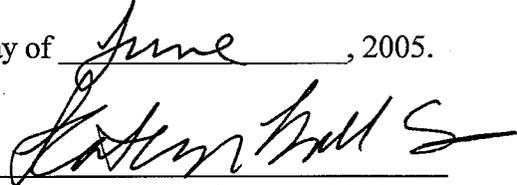
CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached opening brief to opposing counsel and appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

To: Ms. Kathleen Proctor, Esq., Pierce County Prosecuting Attorney's Office, 946 County City Building, 930 Tacoma Avenue S., Tacoma, Washington, 98402;

To: Mr. Roy L. Neff, DOC #780428, P.O. Box 88900. McNeil Island Corr. Ctr., Steilacoom, WA. 98388.

DATED this 3rd day of June, 2005.



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