

NO. 40695-1-II

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

STATE OF WASHINGTON, RESPONDENT

v.

NATASHA PENLAND, APPELLANT  
REED STONE, APPELLANT  
(Consolidated)

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Appeal from the Superior Court of Pierce County  
The Honorable Judge Linda Lee

No. 09-1-02011-8 (Penland)  
No. 09-1-02012-6 (Stone)

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**Brief of Respondent**

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**Table of Contents**

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

    1. Whether sufficient evidence supported the conviction for unlawful possession of pseudoephedrine with intent to manufacture methamphetamine where the defendant's possessed pseudoephedrine along with numerous other times related to the manufacture of methamphetamine, including the end product?..... 1

    2. Whether the court unlawfully imposed the school bus route stop enhancement on the pseudoephedrine count consecutive to all other time where trial counsel was ineffective for failing to challenge the enhancement because it was unlawful, and where case law also establishes that it cannot be imposed consecutive to other enhancements?..... 1

B. STATEMENT OF THE CASE..... 1

    1. Procedure ..... 1

    2. Facts..... 4

C. ARGUMENT..... 11

    1. SUFFICIENT EVIDENCE SUPPORTED THE CONVICTIONS FOR POSSESSION OF PSEUDOEPHEDRINE WITH INTENT TO MANUFACTURE METHAMPHETAMINE ..... 11

    2. THE TRIAL COURT IMPROPERLY IMPOSED THE TWO SENTENCE ENHANCEMENTS CONSECUTIVE TO EACH OTHER..... 23

D. CONCLUSION..... 28

## Table of Authorities

### State Cases

<i>Seattle v. Gellein</i> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989).....	11
<i>State v. Barrington</i> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988).....	11
<i>State v. Bonisisio</i> , 92 Wn. App. 783, 964 P.2d 1222 (1998).....	25
<i>State v. Brockob</i> , 159 Wn.2d 311, 331, 150 P.3d 59 (2006).....	13, 15
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	12
<i>State v. Campos</i> , 100 Wn. App. 218, 215, 998 P.2d 893 (2000).....	21
<i>State v. Casbeer</i> , 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987).....	12
<i>State v. Cord</i> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985).....	12
<i>State v. Davis</i> , 117 Wn. App. 702, 708, 72 P.3d 1134 (2003).....	13, 21
<i>State v. Delmarter</i> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....	12
<i>State v. Holbrook</i> , 66 Wn.2d 278, 401 P.2d 971 (1965).....	11
<i>State v. Jacobs</i> , 154 Wn.2d 596, 601-602, 115 P.3d 281 (2005).....	27
<i>State v. Joy</i> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993).....	11
<i>State v. Mabry</i> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988).....	11
<i>State v. McCullum</i> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).....	11
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	25
<i>State v. McPherson</i> , 111 Wn. App. 747, 759, 46 P.3d 284 (2002).....	14

<i>State v. Missieur</i> , 140 Wn. App. 181, 165 P.3d 381 (2007) .....	13, 14, 15
<i>State v. Moles</i> , 130 Wn. App. 461, 465, 123 P.3d 132 (2005).....	13, 14, 16
<i>State v. Poling</i> , 128 Wn. App. 659, 668, 116 P.3d 1054 (2005).....	21
<i>State v. Riley</i> , 121 Wn.2d 22, 846 P.2d 1365 (1993) .....	25
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	12
<i>State v. Turner</i> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981) .....	11
<i>State v. Whalen</i> , 131 Wn. App. 58, 126 P.3d 55 (2005) .....	13, 15
<i>State v. Zunker</i> , 112 Wn. App. 130, 139, 48 P.3d 344 (2002).....	14, 15

**Statutes**

RCW 69.50.101 .....	13, 21
RCW 69.50.204 .....	24
RCW 69.50.401 .....	24
RCW 69.50.410 .....	24
RCW 69.50.435(1)(c) .....	24
RCW 69.50.440 .....	13
RCW 69.50.440(1).....	24
RCW 9.94A.605.....	27

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

1. Whether sufficient evidence supported the conviction for unlawful possession of pseudoephedrine with intent to manufacture methamphetamine where the defendant's possessed pseudoephedrine along with numerous other items related to the manufacture of methamphetamine, including the end product?
2. Whether the court unlawfully imposed the school bus route stop enhancement on the pseudoephedrine count consecutive to all other time where trial counsel was ineffective for failing to challenge the enhancement because it was unlawful, and where case law also establishes that it cannot be imposed consecutive to other enhancements?

B. STATEMENT OF THE CASE.

1. Procedure

On April 15, 2009, based on an incident that occurred the day before, the State filed an information that charged Natasha Penland in Count I, with Unlawful Manufacturing of a Controlled Substance, Methamphetamine; Count II, Endangerment with a Controlled Substance; Count III, Unlawful Possession of a Controlled Substance with Intent to

Deliver. CP 79-80.<sup>1</sup> That same day the State also filed an information that charged co-Defendant Reed Stone in Count IV, with Unlawful Manufacturing of a Controlled Substance; and Count V, Unlawful Possession of a Controlled Substance with Intent to Deliver. CP 1-2.

On October 29, 2009, the State filed Amended Informations. The Amended Information for Penland added Count IV, Unlawful Delivery of a Controlled Substance; Count V, Unlawful Possession of Pseudoephedrine and/or Ephedrine with Intent to Manufacture Methamphetamine, and Counts I, III, IV, V also had school bus route stop enhancements. CP 89-91.

The Amended Information for Stone added Count VI, Unlawful Delivery of a Controlled Substance; and Count VII, Unlawful Possession of Pseudoephedrine and/or Ephedrine With Intent to Manufacture Methamphetamine, and counts IV, V, VI and VII also had school bus route stop enhancements. CP 3-5.

The case was assigned to the honorable Judge Linda Lee on February 24, 2010, and proceeded to jury trial on March 2, 2010. CP 385, 400; CP 386, 387-92, 401, 402-07.

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<sup>1</sup> The clerk's office numbered the Clerk's Papers consecutively between the two cases with one set of numbers.

On March 10, 2010, the State filed a Second Amended Information as to Penland that expanded the charging period on Count II by a day. CP 218-220.

On March 12, 2010, the jury found Penland guilty of Unlawful Manufacturing of a Controlled Substance (Count I); Endangerment with a Controlled Substance (Count II); Unlawful Possession of a Controlled Substance with Intent to Deliver (Count III); and Unlawful Possession of Pseudoephedrine and/or Ephedrine With Intent to Manufacture Methamphetamine (Count V). CP 326-330. The jury found that Penland was within 1000 feet of a school bus route stop when she manufactured methamphetamine, and when she possessed pseudoephedrine with intent to manufacture methamphetamine, but not when she possessed a controlled substance with intent to deliver.<sup>2</sup> CP 331-333.

The jury found Stone guilty of Unlawful Manufacture of a Controlled Substance (Count IV); Unlawful Possession of a Controlled Substance [lesser included] (Count V); Unlawful Manufacture of a Controlled Substance, Methamphetamine (Count VII). CP 393-96. The jury found that Stone was within 1000 feet of a school bus route stop when he manufactured methamphetamine, and when he possessed

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<sup>2</sup> Although the Second Amended Information includes a Count IV, Unlawful Delivery of a Controlled Substance with a School Bus Route Stop enhancement, instructions for that count were apparently omitted from the jury instructions. *See* RP 03-10-10, p. 40, ln. 10 to p. 741, ln; CP 218-230, 326-333.

pseudoephedrine with intent to manufacture methamphetamine, but not when he possessed a controlled substance with intent to deliver. CP 397-99.

On May 7, 2010, the court sentenced Penland and Stone each to a total of 116 months in custody. CP 58-71; 355-69. Those sentences consisted of a base sentence of 68 months, with all counts run concurrently, and with two 24 month firearm sentence enhancements imposed consecutive to the base sentence and to each other. CP 57; 361.

Penland timely filed a Notice of Appeal on May 10, 2010. CP 370. Stone timely filed a Notice of Appeal on May 12, 2010. CP 72-73.

## 2. Facts

Because both defendants were tried together in a single trial and only one jury was empaneled, for the sake of economy the citations to the record are to the Report of Proceedings designated by Penland. The sole exception is to the sentencing hearings on May 7, 2010, because there is a separate transcript for each defendant.

On April 14, 2009, Pierce County Sheriff's Deputies were serving a search warrant in the Bonney Lake area at 25206 96<sup>th</sup> ST E in Pierce County. RP 03-02-10, p. 303, ln. 4 to p. 304, ln. 6. When they served the warrant, the deputies found Reed Stone and Natasha Penland inside the residence in bed in the northeast master bedroom. RP 03-02-10, p. 306, ln. 2-8. Officers observed evidence related to the manufacture of

methamphetamine, so they contacted the case officer and obtained an addendum to the warrant. RP 03-02-10, p. 309, ln. 10 to p. 310, ln. 15.

In the master bedroom deputies found lithium batteries [Ex. 12, 37]; two Walmart receipts for the purchase of pseudoephedrine [Ex. 13, 40]; cell phones [Ex. 6, 7, 8, 36, 42]; sandwich baggies with white powder residue [Ex. 1-D, 41]; drug paraphernalia consisting of a meth pipe [Ex. 43]; documents in the name of Natasha Penland [Ex. 5b 44]; a wallet with Reed Stone's ID [Ex. 4, 45]; a Pyrex dish with white powder [Ex. 2, 47]; a small bottle of white powder labeled "caffeine" [Ex. 1-E 48]; and \$240 in cash [Ex. 15, 46]. RP 03-02-10, p. 360, ln. 19 to p. 377, ln. 22; p. 369, ln. 16 to p. 370, ln. 7; p. 373, ln. 5-8.]

Exhibit 1-D was two plastic sandwich baggies that had powder residue and the residue contained methamphetamine and caffeine. RP 03-10-10, p. 794, ln. 4-20; p. 808, ln. 4-16. Exhibit 1-E, the small bottle, had powder that contained caffeine and weighed 10.2 grams. RP 03-10-10, p. 796, ln. 2-25.

Items related to the manufacture of methamphetamine were found in the kitchen as well. RP 03-02-10, p. 377, ln. 23 to p. 378, ln. 9. Inside the cabinet in the kitchen island was a container with pink sludge and coffee filters inside [Ex. 51]; a mason jar with amber colored liquid with a pink residue at the top of the jar [Ex. 52]; a mason jar with white powder residue [Ex. 53]; a small plastic funnel with pink powder residue [Ex. 77]; a Pyrex baking dish with pink and white powder and containing coffee

filters [Ex. 2-A, 54, 55, 56, 57]. RP 03-02-10, p. 378, ln. 11 to p. 385, ln. 21. Exhibit 2-A is a paper filter with residue on it from the Pyrex dish that contained pseudoephedrine. RP 03-10-10, p. 799, ln. 24 to p. 800, ln. 20.

On the countertop of the island, officers found a Zip-lock sandwich baggie with a large amount of pinkish-white powder [Ex 2-C , 61]; another sandwich baggie with a white crystal substance [Ex. 2-D, 62]; a digital gram scale with a white powder residue [Ex. 10, 63]; a heart-shaped tin with white powder residue [Ex. 1, 64]; sandwich baggies with white powder residue [Ex. 1-C, 65]; a brown pouch with three red pills [Ex. 2-F, 66]; a glass smoking pipe with vinyl tubing attached and white residue near the glass pipe [Ex. 3, 67]; a coffee grinder with white powder residue [Ex 1-G, 68]; RP 03-02-10, p. 387, ln. 4 to p. 394, ln. 10.

Exhibit 1-F, a tin with powdered residue, tested positive for methamphetamine and a reaction by-product specific to the ammonia lithium method for manufacturing methamphetamine. RP 03-10-10, p. 797, ln. 2-25. Exhibit 1-C, three bags that had powder residue that contained pseudoephedrine. RP 03-10-10, p. 794, ln. 2-23. Exhibit 1-G, a coffee grinder, contained powdered residue inside the cap and grinding mechanism, and the powder tested positive for pseudoephedrine. RP 03-10-10, p. 798, ln. 8 to p. 799, ln. 3. Exhibit 2-C was a plastic bag with pink powder weighing 26.3 grams that tested positive as mostly pure pseudoephedrine, and appeared to be pseudoephedrine extracted out of the tablets because it didn't contain any starches or sugars. RP 03-10-10, p.

802, ln. 4 to p. 803, ln. 17. Exhibit 2-D was a plastic bag containing 0.7 grams of a crystalline powder that contained methamphetamine. RP 03-10-10, p. 803, ln. 19 to p. 804, ln. 14. Exhibit 2-F was a leather pouch with three small red tablets, one of which was tested and contained pseudoephedrine. RP 03-10-10, p. 806, ln. 8 to p. 807, ln. 21.

Deputies found a can of acetone on the kitchen floor next to the island [Ex.59]. RP 03-02-10, p. 385, ln. 22-25; p. 386, ln. 8-16. Next to the acetone was a can labeled lacquer thinner [Ex. 60]. RP 03-02-10, p. 386, ln. 17-20.

In the laundry room, deputies found a respirator used to protect one's lungs from chemical fumes [Ex. 69]. RP 03-02-10, p. 395, ln. 1-7. They also found a five-gallon bucket labeled "methanol." RP 03-02-10, p. 397, ln. 7-20.

In the garage deputies found a can of starter fluid (ether) that had a hole punched in the bottom [Ex. 70]; a can of brake cleaner [Ex 72]. RP 03-02-10, p. 395, ln. 8 to p. 397, ln. 3-6.

Deputies also found a can labeled "Drano Kitchen Crystals," which are sodium hydroxide or lye [Ex. 79]; RP 03-02-10, p. 394, ln. 11-25.

A more comprehensive description of the manufacturing process occurs at RP 03-10-10 p. 765, ln. 25 to p. 771, ln. 15. For the sake of brevity it is not repeated here. However, the relevance of the specific items listed above is described in what follows.

Pseudoephedrine is the main precursor for the manufacture of methamphetamine. RP 03-02-10, p. 365, ln. 16 to p. 366, ln. 13. The receipts for Walgreens were both for pseudoephedrine, and showed that the two purchases were made within two minutes of each other. RP 03-02-10, p. 365, ln. 18 to p. 366, ln. 1. Those receipts were significant because they were consistent with “smurfing,” an attempt to circumvent restrictions on the purchase of pseudoephedrine by making multiple purchases below the limit. RP 03-02-10, p. 366, ln. 4-13.

Lithium batteries are one of the main ingredients in the reaction for the manufacture of methamphetamine. RP 03-02-10, p. 363, ln. 23-25. Caffeine is typically used as a cutting agent with methamphetamine in order to increase the volume of material and thereby profits as well. RP 03-02-10, p. 376, ln. 1-21. Funnels are used in all three phases of the manufacturing process. RP 03-02-10, p. 380, ln. 20-23.

Lye is used to manufacture home-made anhydrous ammonia by combining it with ammonium sulfate or ammonium nitrate, putting them in a jug and adding water, which then reacts and produces ammonia gas. RP 03-02-10, p. 394, ln. 17-22. The ammonia gas can be run through tubing to a dry ice bath which can then actually capture anhydrous ammonia in a liquid form to be used in the reaction. RP 03-02-10, p. 394, ln. 22-25.

Starter fluid is used in the extraction phase. All the pressure is released from the can which then has a hole punched in it and the remaining ether is poured off. Pseudoephedrine is then dissolved into the ether, poured through a filter, and the ether rapidly evaporates off leaving purified pseudoephedrine powder. RP 03-02-10, p. 395, ln. 12 to p. 396, ln. 12.

Methanol is an alcohol and is often used instead of ether for the extraction phase. RP 03-02-10, p. 397, ln. 12-17.

Brake cleaner contains xylene, which is used in the reaction phase to create meth oil or meth base. RP 03-02-10, p. 396, ln. 17-25.

Acetone is used at the end of the manufacturing process to wash the methamphetamine to make it clearer and more white, and can also be used to dissolve the methamphetamine into the acetone and let the acetone slowly evaporate to grow very large crystals. RP 03-02-10, p. 386, ln. 2-7. Lacquer thinner can also be used in the same way as acetone. RP 03-02-10, p. 387, ln. 2-3.

Digital scales with white powder residue are typically used for the weighing of narcotics for individual sale. RP 03-02-10, p. 388, ln. 25 to p. 389, ln. 3.

Coffee grinders are probably the most common item used to grind up pseudoephedrine pills into a powder, allowing for easier extraction of the pseudoephedrine from the pills. RP 03-02-10, p. 392, n. 11-16.

Coffee filters are used in all three phases of methamphetamine manufacturing to help separate one substance from another. RP 03-02-10, p. 381, ln. 12-17. In the extraction phase, such filters are used to remove binder material from the actual pseudoephedrine. RP 03-02-10, p. 382, ln. 5-7. In the reaction phase, coffee filters are used to separate the reaction waste from the meth oil or meth base. RP RP 03-02-10, p. 382, ln. 7-9. While in the gassing out or salting out phase, the filter is used to separate the methamphetamine from the waste product. RP 03-02-10, p. 382, ln. 9-11. After the use of a filter in any of these stages, the filter will contain powder or have a powder residue. RP 03-02-10, p. 382, ln. 13-20.

Sample 22 was a pink powder that contained pseudoephedrine and appeared to be primarily sugar starch that was binder left over after most of the pseudoephedrine had been extracted. RP 03-10-10, p. 779, ln. 6 to p. 781, ln. 8; p. 792, ln. 18-24.

Sample 23 contained pseudoephedrine dissolved in acetone. RP 03-10-10, p. 779, ln. 2-10. Pseudoephedrine dissolved in acetone can be used in stage one, the extraction phase, of the manufacturing process. RP 03-10-10, p. 789, ln. 18-25.

Exhibit 2-B was paper filters with a pink powder residue that contained pseudoephedrine. RP 03-10-10, p. 801, ln. 14-21.

Exhibit 2-E was a plastic Ziploc bag containing powder residue that contained methamphetamine and a reaction by-product specific to the

ammonia lithium method of manufacture. RP 03-10-10, p. 805, ln. 23.

Exhibit 2-E also contained caffeine. RP 03-10-10, p. 19-24.

C. ARGUMENT.

1. SUFFICIENT EVIDENCE SUPPORTED THE  
CONVICTIONS FOR POSSESSION OF  
PSEDUOEPHEDRINE WITH INTENT TO  
MANUFACTURE METHAMPHETAMINE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly

against the appellant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[...]great deference [...] is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

*State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted).

To establish that a defendant possessed pseudoephedrine with intent to manufacture methamphetamine, the State had to prove that the defendant: 1) possessed pseudoephedrine; and 2) intended to use the

pseudoephedrine to manufacture methamphetamine. *State v. Moles*, 130 Wn. App. 461, 465, 123 P.3d 132 (2005) (citing RCW 69.50.440). Manufacture is defined as, “the production, preparation, propagation, compounding, conversion, or processing of a controlled substance either directly or indirectly...and includes any packaging or repackaging of the substance, or labeling or relabeling of its container.” RCW 69.50.101(p). See also *Moles*, 130 Wn. App. at 465-66; *State v. Davis*, 117 Wn. App. 702, 708, 72 P.3d 1134 (2005) (holding that a defendant need not possess a controlled substance in order to manufacture it).

In *State v. Brockob*, the Supreme Court adopted the reasoning of the court in *Moles* that possession of pseudoephedrine alone is not sufficient to support a conviction for intent to manufacture, that there must be at least one additional factor suggestive of intent, at which point the evidence is sufficient. *Brockob*, 159 Wn.2d at 337 (citing *Moles*, 130 Wn. App. 461; *State v. Whalen*, 131 Wn. App. 58, 126 P.3d 55 (2005)).

In *State v. Missieur*, the court held that possession of 30 boxes of pseudoephedrine and 64 lithium batteries was sufficient to support the charge. *State v. Missieur*, 140 Wn. App. 181, 185ff, 165 P.3d 381 (2007). The court in *Missieur* also did a good job of reviewing prior cases on this issue. *Missieur*, 140 Wn. App. at 185ff.

Thus, in *State v. McPherson*, the court found ample evidence to support intent to manufacture even though all necessary ingredients were not present. *Missieur*, 140 Wn. App. at 185 (citing *State v. McPherson*, 111 Wn. App. 747, 759, 46 P.3d 284 (2002)). The evidence in *McPherson* included a scale with residue, numerous meth precursors, notebooks inferably containing records of drug transactions and \$80 cash, and the accomplice possessed about two grams of meth. *McPherson*, 111 Wn. App. at 757.

In *Moles*, the defendant had purchased pseudoephedrine from different stores in a short period of time and had close to 440 tablets removed from their blister packs and found loose in the defendant's vehicle. *Missieur*, 140 Wn. App. at 186 (citing *Moles*, 130 Wn. App. at 466). The court held that these facts alone established sufficient evidence to support the conviction, and that additional evidence related to meth manufacture only added to that sufficiency. *Missieur*, 140 Wn. App. at 186 (citing *Moles* at 466).

In *State v. Zunker*, in a review of the sufficiency of the evidence for a charge of manufacture of methamphetamine where a defendant had pseudoephedrine in the form of ground-up pills (a preparatory step to manufacturing) and just about all else that was needed to process a batch except anhydrous ammonia, the evidence raised a reasonable inference the

defendants were preparing to make a new batch of methamphetamine.

*State v. Zunker*, 112 Wn. App. 130, 139, 48 P.3d 344 (2002).

However, the evidence was not sufficient to support the charge where the defendant merely shoplifted several boxes of pseudoephedrine in excess of the statutory daily limit, but had no other indicia of intent to manufacture methamphetamine. *Missieur*, 140 Wn. App. at 186-87 (citing *State v. Whalen*, 131 Wn. App. at 64).

Similarly, in *State v. Brockob*, the court held that the evidence was insufficient to support the charge where the defendant shoplifted a large quantity of pseudoephedrine and left some packaging in the store, but did not have any other coffee filters or equipment used in the manufacturing process. *Missieur*, 140 Wn. App. at 181 (citing *State v. Brockob*, 159 Wn.2d 311, 331, 150 P.3d 59 (2006)).

In contrast to *Brockob*, in another case, *State v. Gonzales*, that had been consolidated with *Brockob*, the court held that the evidence was sufficient where the defendant had three sealed bottles of ephedrine, there were two sizes of unused coffee filters, and another person had another bottle of ephedrine tablets. *Missieur*, 140 Wn. App. at 187 (citing *Brockob*, 159 Wn.2d at 340).

Here, the defendant not only possessed some 23 grams of pseudoephedrine, it was already ground up and extracted into pure

pseudoephedrine powder. Ex. 2-C; RP 03-02-10 p. 387, ln 12-17; RP 03-10-10, p. 802, ln. 4 to p. 803, ln. 17. The fact that it was ground up and had been extracted is alone an additional indicia of intent to manufacture sufficient to support the conviction that goes beyond the additional indicia in *Moles*. Thus, the 23 grams of extracted pseudoephedrine alone would be sufficient to support the conviction. However, in addition to that there was additional evidence from all three phases of manufacture.

The manufacturing process consists of three basic stages, Phase I, Extraction (of pseudoephedrine); Stage II, Reaction (chemical creation of meth in solution); and Stage III, Gassing/Salting out (causing methamphetamine crystals to precipitate out of solution and purifying the finished product). See RP 03-10-10 p. 765, ln. 25 to p. 771, ln. 15. Each phase includes a number of different items, some of which can be substituted for each other.

Here, there was evidence of each phase of the manufacturing process. The following evidence is organized according to the phase to which it belongs.

#### Phase I, Extraction

A brown leather pouch with three small red tablets, one of which was tested and contained pseudoephedrine. RP 03-02-10, p. 391, ln. 5 to p. 392, ln. 2. RP 03-10-10, p. 806, ln. 8 to p. 807, ln. 21; Ex. 2-F, 66.

[Kitchen island counter top.]

A coffee grinder with white powder residue that contained powdered residue inside the cap and grinding mechanism, and the powder tested positive for pseudoephedrine. RP 03-02-10, p. 393, ln. 5 to p. 394, ln. 10. RP 03-10-10, p. 798, ln. 8 to p. 799, ln. 3; Ex 1-G, 68. [Kitchen island counter top.]

In the garage deputies found a can of starter fluid (ether) that had a hole punched in the bottom in a manner used to remove the ether from the can. RP 03-02-10, p. 395, ln. 8 to p. 396, ln. 12; Ex. 70.

Sample 23 contained pseudoephedrine dissolved in acetone. RP 03-10-10, p. 779, ln. 2-10.

A Pyrex baking dish with pink and white powder and containing coffee filters. RP 03-02-10, p. 381, ln. 2-9; Ex. 2-A , 54, 55, 56, 57.

[Inside kitchen cabinet.] Exhibit 2-A is a paper filter with residue on it that contained pseudoephedrine and was from the Pyrex dish. RP 03-10-10, p. 381, ln. 10 to p. 383, ln. 2; Ex. 2-A, 55]

Exhibit 2-B was paper filters with a pink powder residue that contained pseudoephedrine. RP 03-10-10, p. 801, ln. 14-21.

Sandwich baggies with white powder residue that contained pseudoephedrine. RP 03-02-10, p. 390, ln. 11 to p. 391, ln. 4. RP 03-10-10, p. 794, ln. 2-23; Ex. 1-C, 65. [Kitchen island counter top.]

Sample 22 was a pink powder that contained pseudoephedrine and appeared to be primarily sugar starch that was binder left over after most

of the pseudoephedrine had been extracted. RP 03-10-10, p. 779, ln. 6 to p. 781, ln. 8; p. 792, ln. 18-24.

A Zip-lock sandwich baggie with a large amount of pinkish-white powder. RP 03-02-10, p. 387, ln. 4-20; Ex. 2-C , 61. [Kitchen island counter top.] The powder weighed 26.3 grams that tested positive as mostly pure pseudoephedrine, and appeared to be pseudoephedrine extracted out of the tablets because it didn't contain any starches or sugars. RP 03-10-10, p. 802, ln. 4 to p. 803, ln. 17.

#### Phase II, Reaction

Lithium batteries, where because they were intact and the lithium had not been removed were available for use in a future reaction phase. RP 03-03-02-10, p. 363, ln. 20 to p. 364, ln. 18; p. 400, ln. 17 to p. 401, ln. 14. Ex. 12, 37. [Master bedroom.]

Deputies also found a can labeled "Drano Kitchen Crystals," which are sodium hydroxide or lye. RP 03-02-10, p. 394, ln. 11-25; Ex. 79.

A can of brake cleaner that contained xylene. RP 03-02-10, p. 396, ln. p. 397, ln. 6; Ex 72.

These items related to the reaction phase were unused when found, and thus were not evidence that this phase had occurred, but rather evidence that the defendant's were prepared to engage in it at some time in the future.

Phase III, Gassing/Salting Out

Sandwich baggie with a white crystal substance that weighed 0.7 grams and contained methamphetamine. RP 03-02-10, p. 387, ln. 21 to p. 388, ln. 17. RP 03-10-10, p. 803, ln. 19 to p. 804, ln. 14; Ex. 2-D, 62. [Kitchen island counter top.]

A heart-shaped tin with white powder residue that tested positive for methamphetamine and a reaction by-product specific to the ammonia lithium method for manufacturing methamphetamine. RP 03-02-10, p. 389, ln. 24 to p. 390, ln. 10. RP 03-10-10, p. 797, ln. 2-25. Ex. 1, 1-F, 64. [Kitchen island counter top.]

Deputies found a can of acetone on the kitchen floor next to the island. RP 03-02-10, p. 385, ln. 22-25; p. 386, ln. 8-16; Ex.59. Next to the acetone was a can labeled lacquer thinner. RP 03-02-10, p. 386, ln. 17-20; Ex. 60.

Exhibit 2-E was a plastic Ziploc bag containing powder residue that contained methamphetamine and a reaction by-product specific to the ammonia lithium method of manufacture. RP 03-10-10, p. 805, ln. 23. Exhibit 2-E also contained caffeine. RP 03-10-10, p. 19-24.

A small bottle of white powder labeled “caffeine” that contained caffeine and weighed 10.2 grams. RP 03-02-10, p. 376, ln. 1 to p. 377, ln. 3. RP 03-10-10, p. 796, ln. 2-25; Ex. 1-E. 48. [Master bedroom.]

Sandwich baggies with white powder residue and the residue contained methamphetamine and caffeine. RP 03-02-10, p. 367, ln. 11 to

p. 368, ln. 19. RP 03-10-10, p. 794, ln. 4-20. p. 808, ln. 4-16; Ex. 1-D, 41.  
[Master bedroom.]

A digital gram scale with a white powder residue. RP 03-02-10, p. 388, ln. 18 to p. 389, ln. 15. Ex. 10, 63. [Kitchen island counter top.]  
The caffeine and scale relate to compounding and packaging the final product.

Not only is there sufficient evidence of the defendant's future intent to manufacture methamphetamine, there is overwhelming evidence of such.

Accordingly, the court should affirm the convictions for possession of pseudoephedrine with intent to manufacture methamphetamine.

The defense claims that there was no evidence of manufacturing other than the purified pseudoephedrine, and that could not then be used to also support the charge of possession of pseudoephedrine with intent to manufacture because it had been used to support the charge of manufacture. Br. Penland, p. 20; Br. Stone p. 4ff. Thus, the defense argument is that the same pseudoephedrine cannot be used to support both the manufacturing count and the pseudoephedrine with intent count.

The defense argument is flawed for two reasons. First, there was ample evidence of manufacture independent of the purified pseudoephedrine. Second, the jury could infer an intent to process the

three tablets that had not been crushed and extracted, either by themselves, or in conjunction with the acquisition of more tablets.

Defendant Stone argues “The State is not permitted to turn every possession of a controlled substance into possession with intent to manufacture, and for support cites to *State v. Campos*. Br. Stone, p. 6 (*State v. Campos*, 100 Wn. App. 218, 215, 998 P.2d 893 (2000)).

However, that citation is to the dissent.

It is worth noting that:

[b]ecause manufacturing is often an ongoing process involving many steps a defendant need not possess the final product in order to meet the statutory requirements of RCW 69.50.101(p) [manufacturing a controlled substance]. Thus, “a person who knowingly plays even a limited role in the manufacturing process is guilty, even if someone else completes the process.”

*State v. Poling*, 128 Wn. App. 659, 668, 116 P.3d 1054 (2005) (quoting *State v. Davis*, 117 Wn. App. 702, 708, 72 P.3d 1134 (2003), but omitting other citations). The necessary consequence of this is that a person can be guilty of manufacturing methamphetamine by extracting pseudoephedrine. If they have not completed the manufacturing process and the jury can infer an intent to do so at some time in the future, they can also be guilty of possession of that same pseudoephedrine with the intent to manufacture methamphetamine with it. In short, they can be guilty for what they have

done, as well as for what they intend to do in the future with pseudoephedrine they still possess. By analogy, a defendant who has previously been convicted of a felony and is in possession of a shotgun with a barrel length of less than 16 inches can be guilty of both possession of a short barrel shotgun, and of unlawful possession of a firearm for the act of possessing the one gun.

Of course, under the facts of this case such distinctions are completely unnecessary. Here there was evidence of multiple stages of manufacturing, including the finished product, methamphetamine. There was also pseudoephedrine independent of the 23 grams in the form of the three pills, as well as the filters with residue, etc. Thus, sufficient evidence supported both charges even if the 23 grams of pseudoephedrine were completely excluded from the analysis. Although the quantity of the other pseudoephedrine was small, the jury could infer an intent to combine it (either the tablets or by reprocessing the filter residue or remains dissolved into fluid) with additional later acquired pseudoephedrine and manufacture it together into methamphetamine.

Additionally, there was evidence of manufacture related to every stage through to packaging. Accordingly, the defense argument is without merit and should be denied.

Sufficient evidence supported the charge of unlawful possession of pseudoephedrine with intent to manufacture methamphetamine.

2. THE TRIAL COURT IMPROPERLY IMPOSED THE TWO SENTENCE ENHANCEMENTS CONSECUTIVE TO EACH OTHER

Here, both defendants were convicted of a count of unlawful manufacture of a controlled substance, methamphetamine, and a count of unlawful possession of pseudoephedrine with intent to manufacture methamphetamine. As to each count, the jury also found an enhancement that the crime was committed within 1000 feet of a school bus route stop, thereby adding 24 months to the standard range.

At sentencing, the court imposed the standard range sentences on each count concurrent to the other, but imposed each sentence enhancement consecutive to the underlying count, and to each other.

The defense claims the court's action was unlawful because it was required to run the enhancements concurrent to each other and that the court's error resulted in the imposition of 48 months of total enhancement time rather than 24 such months, resulting in a total sentence of 116 months rather than 92 months. *See* Br. Penland 12ff; Br. Stone 9.

- a. The Court Need Not Reach This Issue Because Trial Counsel Was Ineffective Where It Failed To Object To The Court's Improper Imposition Of The Enhancement On The Charge Of Possession Of Pseudoephedrine With Intent To Manufacture Methamphetamine

School bus route stop enhancements are authorized by RCW 69.50.435(1)(c). It provides:

Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell or deliver a controlled substance listed under RCW 69.50.401 or who violates RCW 69.50.410 by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana to a person:

...

(c) Within one thousand feet of a school bus route stop designated by the school district

Unlawful Possession of Pseudoephedrine and/or Ephedrine with Intent to manufacture Methamphetamine is prohibited under RCW 69.50.440(1). Because the enhancement only applies to violations of RCW 69.50.401 and 69.50.410, it does not apply to the charge of Unlawful Possession of Pseudoephedrine and/or Ephedrine with Intent to Manufacture Methamphetamine. Accordingly, the enhancement was improperly imposed on the pseudoephedrine count for each defendant.

A trial attorney is ineffective where: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the appellant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995).

To support a claim of ineffective assistance of counsel for the first time on appeal, the trial record must establish: 1) the facts necessary to adjudicate the claimed error; 2) the trial court would likely have granted the motion if it was made; and 3) the defense counsel had no legitimate tactical basis for not raising the motion in the trial court. *McFarland*, 127 Wn.2d at 333-34; *State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993).

It is also worth noting the court has previously held that it can consider the propriety of sentence enhancements where not raised in the assignments of error where it is necessary to promote justice and facilitate a decision on the merits. *See State v. Bonisio*, 92 Wn. App. 783, 964 P.2d 1222 (1998).

Here, the representation by counsel for both defendants was obviously deficient where at trial counsel failed to raise any challenge to the application of a sentence enhancement that was clearly not authorized

by law. *See* RP [Penland] 05-07-10, p. 5, ln. 19 to p. 8, ln. 13ff; RP [Stone] 05-07-10, p. 5, ln. 21 to p. 7, ln. 22ff; p. 12, ln. 10-13. Nor does the record show that there were any motions for reconsideration filed, nor any motions to modify the judgment and sentence.

Trial counsels' deficiency prejudiced the defendants where counsels' unprofessional errors resulted in the court's imposition of an additional 24 months of incarceration on the sentence. The record does contain the facts necessary to decide the issue. The trial court would likely have granted the motion if it was made since the enhancement was unlawful. Nor could there have been a valid tactical reason for not objecting since the enhancement was clearly unlawful and the defendant gained no advantage tactical or otherwise by the lack of an objection.

The Court should be aware that the State brings this issue to the Court's attention because the error renders the judgment and sentence facially invalid, and trial counsel was ineffective as to this issue, which was a violation of the defendant's constitutional rights. While appellate counsel have raised a closely related issue, the remedy of running the sentences concurrent would not completely solve the problem because it does not completely remove the unlawful enhancement so that the Judgment and Sentence would continue to remain facially invalid.

For all the foregoing reasons, the Court should hold that trial counsel was ineffective, that the sentence enhancement may not be lawfully imposed on the pseudoephedrine count, and remand for resentencing without the enhancement on that count.

- b. Controlling Authority Establishes That Even If Two Enhancements Are Imposed, Under The Rule Of Lenity They Must Be Run Concurrently.

In the event the court were to disagree with the State and conclude that the school bus route stop enhancement did apply to the pseudoephedrine counts, the court still erred because controlling authority establishes that under the rule of lenity the enhancements must run concurrent, not consecutive. *State v. Jacobs*, 154 Wn.2d 596, 601-602, 115 P.3d 281 (2005). It is worth noting that in *Jacobs* the court considered whether the school bus route stop enhancement ran concurrent or consecutive to a completely different statutory enhancement under RCW 9.94A.605 (Manufacturing Methamphetamine With a Child on the Premises). Where the rule of lenity favored running two separate statutory enhancements concurrently, the argument is all the stronger that, as is the case here, multiple enhancements must run concurrently where they are charged under the same statute.

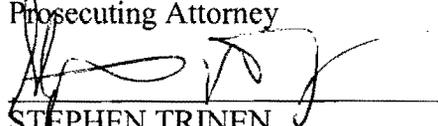
D. CONCLUSION.

Sufficient evidence supported the convictions for unlawful possession of pseudoephedrine with intent to manufacture methamphetamine. The extracted pseudoephedrine could support the conviction for manufacturing, and still support a conviction for the intent to further manufacture methamphetamine with the pseudoephedrine in the future. Moreover, a jury could find that the defendants intended to use the three remaining pseudoephedrine pills at some time in the future, perhaps in conjunction with additional pills to be later acquired.

Trial counsel was ineffective for failing to object to the court's unlawful imposition of the school bus route stop enhancement to the pseudoephedrine count. That enhancement should be reversed. Even if this Court were not to reverse the enhancement, it must still be run concurrent to the enhancement on the manufacturing count. Accordingly, the Court should remand for resentencing with a total of only 24 months of enhancement time.

DATED: September 19, 2011.

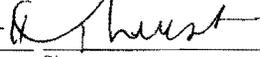
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Certificate of Service:

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

9-20-16   
Date Signature

**PIERCE COUNTY PROSECUTOR**

**September 20, 2011 - 4:47 PM**

**Transmittal Letter**

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Court of Appeals Case Number: 40695-1

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■ Brief: Respondents'

Statement of Additional Authorities

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Objection to Cost Bill

Affidavit

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