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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. IGNACIO AGUILLAR et al., Defendants and Appellants.	E037490 (Super.Ct.No. SWF003129) O P I N I O N

APPEAL from the Superior Court of Riverside County. Bernard Schwartz, Judge. Affirmed in part and reversed in part with directions.

Elizabeth A. Missakian, under appointment by the Court of Appeal, for Defendant and Appellant Ignacio A. Aguillar.

Elisa A. Brandes, under appointment by the Court of Appeal, for Defendant and Appellant Fernando Ramirez.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant Alejandro H. Torres.

Jerry D. Whatley, under appointment by the Court of Appeal, for Defendant and Appellant Ismael Lujan Garcia.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Bradley Weinreb and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Following the discovery of a "cartel-size" methamphetamine laboratory in Mead Valley, defendants, Ignacio Aguillar, Alejandro Torres, Fernando Ramirez, and Ismael Garcia, were charged in the same information and tried before the same jury. All four defendants were found guilty of manufacturing methamphetamine in count 1 (Health & Saf. Code, § 11379.6, subd. (a))[1] and of possessing methamphetamine for sale in count 2 (§ 11378). Aguillar, Ramirez and Torres were also found guilty of conspiring to manufacture methamphetamine in count 3. (Pen. Code, § 182, subd. (a)(1); Health & Saf. Code, § 11379.6, subd. (a).) Garcia was found not guilty of the conspiracy charge in count 3, and all four defendants were acquitted of disposing of hazardous chemicals used in the manufacture of a controlled substance in count 4. (§ 11374.5, subd. (a).)

Drug quantity or weight enhancements were found true as to Aguillar, Ramirez, and Torres in counts 1, 2, and 3.[2] No weight enhancements were found true as to Garcia,

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[1] All further statutory references are to the Health and Safety Code unless otherwise indicated.

[2] In counts 1 and 3, the jury found that the amount of methamphetamine or controlled substance manufactured or conspired to be manufactured exceeded 25 gallons

[footnote continued on next page]

but the jury found that Garcia was personally armed with a firearm in count 1. (Pen. Code, § 12022, subd. (c).)[3] In count 2, Garcia admitted a prior conviction for possessing methamphetamine for sale (§ 11378), within the meaning of section 11370.4, subdivisions (b) and (c).

Aguillar, Torres, and Ramirez were each sentenced to 15 years in prison, consisting of five years on count 1, plus 10 years for the section 11379.8 weight enhancement on count 1.[4] Garcia was sentenced to 14 years in prison, consisting of the upper term of seven years on count 1, plus four years for the armed enhancement on count 1 and three years for the prior drug conviction.[5] Defendants appeal.

SUMMARY OF CONTENTIONS AND CONCLUSIONS

Only Torres joins the other defendants' contentions; however, we consider each defendant's contentions and arguments to the extent they benefit the other defendants. First, we address two contentions raised by Garcia.

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of liquid or 10 pounds of solid substances within the meaning of section 11379.8, subdivision (a)(3). In count 2, the jury found that the amount of methamphetamine possessed exceeded 100 liters of liquid or four kilograms of solid substance within the meaning of section 11370.4, subdivision (b)(2).

[3] The jury found not true additional allegations that Aguillar, Torres, and Ramirez participated in the crimes charged in counts 1, 2, and 3, knowing that Garcia was armed with a firearm. (Pen. Code, § 12022, subd. (d).)

[4] As explained below, it clearly appears that the trial court intended to impose stayed sentences on Aguillar, Ramirez, and Torres in counts 2 and 3, and not concurrent or consecutive terms.

[5] Garcia received a concurrent sentence on count 2.

Garcia first requests that this court review the trial court's conduct of an in camera hearing on a sealed search warrant affidavit, and determine whether the hearing was conducted in accordance with the requirements of *People v. Hobbs* (1994) 7 Cal.4th 948 (*Hobbs*), and whether the affidavit showed probable cause to issue the warrant. We conclude the hearing was properly conducted in accordance with *Hobbs*, and the affidavit showed probable cause to issue the warrant.

Garcia next contends that the upper term sentence of seven years on count 1 violated his right to a jury trial. This claim does not affect the other defendants, because none of them received upper term or consecutive sentences. For the reasons set forth below, we remand the matter to the trial court with directions to resentence Garcia.

Aguillar, Ramirez, and Torres claim that their 10-year section 11379.8 weight enhancements on count 3 must be reversed due to prejudicial instructional error. We agree. Regarding the weight enhancements on count 3, the jury was instructed on alternative theories, one legally valid and one legally invalid, and the record affirmatively demonstrates a reasonable probability that the jury based its true findings solely on the invalid theory. We further conclude that double jeopardy principles bar retrial of the enhancements because there is insufficient evidence to support the enhancements based on the only legally valid theory. That is, there is insufficient evidence that Aguillar, Ramirez, or Torres were substantially involved in the "direction or supervision of, or in a significant portion of the financing of, the underlying" conspiracy. (§ 11379.8, subd. (e).)

Aguillar, Ramirez, and Torres further claim the trial court erroneously instructed the jury on the mens rea or knowledge element of the weight enhancements in counts 1, 2, and 3. Because we reverse the weight enhancements in count 3, we consider this claim only in relation to the weight enhancements on counts 1 and 2. We conclude that the jury was properly instructed on the mens reas or knowledge element of the weight enhancements in counts 1 and 2.

Aguillar next contends the trial court erroneously imposed concurrent rather than stayed sentences on the underlying offenses in counts 2 and 3. As we explain, the error here is clerical, not substantive. The trial court clearly intended to stay Aguillar's, Ramirez's, and Torres's sentences on counts 2 and 3, and their abstracts of judgment properly reflect that their sentences were stayed. There is, however, an error in the trial court's sentencing minute orders. Each order erroneously reflects that Aguillar, Ramirez, and Torres received *consecutive* sentences on counts 2 and 3. We therefore remand the matter to the trial court with directions to correct this error in its sentencing minute orders. We also remand the matter with directions to correct another clerical error: Aguillar's abstract of judgment does not reflect that he received any presentence custody credits, when he in fact received a total of 1,053 days' presentence custody credits. Finally, we reject Torres's contention that his $10,000 restitution fine was unconstitutionally excessive.

In all other respects, we affirm the judgments.

FACTS AND PROCEDURAL HISTORY

A. *Prosecution Evidence*

1. Background

In March 2003, the Riverside County and San Bernardino County Sheriffs' Departments were investigating a possible clandestine methamphetamine laboratory on a remote, isolated property in Mead Valley. The five-acre property included a single-story house, a large, two-story barn-like garage, several other outbuildings, and a tree house. At 6:00 a.m. on March 5, and after watching the property for over one day, approximately 13 officers entered the property to conduct a "knock and talk" with the occupants.

The officers divided into two groups. One group approached the garage, while the other group went to the main residence. Investigator John Howell and Sergeant David Stroh were with the group that approached the garage. They noticed a strong odor, which they recognized as a methamphetamine laboratory, emanating from the garage. The officers knocked on the garage door and announced their presence in English and Spanish. After no one responded, the officers entered the garage. Through a fog of chemicals, the officers found Aguillar and Ramirez asleep inside a white Jeep Cherokee in the middle of the garage. Torres was on a cot in front of the Jeep. Aguillar, Ramirez, and Torres were taken outside.

After donning protective air purification respirators, the officers went back inside the garage. They found a methamphetamine laboratory, consisting of two 22-liter flasks sitting on heating mantles controlled by rheostats. The flasks were about half-full and

bubbling. The officers unplugged the heating mantles, left the garage, and secured the scene for the purpose of obtaining a search warrant. Before leaving the property to obtain a search warrant, Howell told the officers who had gone to the house that there was a "major meth lab" in the garage.

Meanwhile, several officers approached the main house, knocked on the door, and announced their presence in English and Spanish. When no one responded, the officers entered the house through the unlocked front door. In the bathroom, they found Garcia hiding in the bathtub behind a closed shower curtain, leaning against a back wall and fully clothed. Garcia was handcuffed and taken outside.

After Garcia was taken outside, he told one of the officers he was originally from Compton, and had been living in the house and taking care of the property for about eight months. He said he knew what was going on in the garage, and that there was a rifle in the bedroom. There was "Compton" gang graffiti inside the house, garage, and elsewhere on the property; however, the officers had no documentation that Garcia was a gang member.

The officers found a large metal cooking pot in the bathtub where Garcia was hiding. The pot was of the type used to extract pseudoephedrine for purposes of manufacturing methamphetamine, was charred on the outside, and had a white residue on the inside. A two-liter soft drink bottle was on the bathroom sink; it contained an alkaline pasty sludge, later identified as part of the biphasic liquid created in manufacturing methamphetamine.

After a search warrant was obtained, Investigator Richard Holder searched the house. The house was messy, which Holder said was typical of clandestine methamphetamine laboratory sites.

In one bedroom, Holder found a loaded, sawed-off .22-caliber rifle between two mattresses. The rifle appeared to be in working condition, and the bed appeared to have been recently used. In the same bedroom's closet, Holder found two pounds of a white powdery substance, which was later identified as containing either ephedrine or pseudoephedrine, substances used in the manufacture of methamphetamine. About four ounces of brown methamphetamine powder was also found in the closet.

A white box containing items of "dominion and control" and a notebook, were also found in the closet. The name Arturo Castaneda, a name Garcia used, was on one of the pieces of paper in the box. Holder did not find any cell phones, scales, sales ledgers (i.e., "pay/owe" sheets), or other materials associated with packaging methamphetamine for sale.

2. Investigator Marc Bender's Testimony

Investigator Marc Bender had training, experience, and education concerning the manufacture of methamphetamine. He was assigned to the drug enforcement arm of the Riverside County Sheriff's Department's Special Investigations Bureau, which primarily investigated clandestine methamphetamine manufacturing operations.

According to Bender, the primary method of manufacturing methamphetamine, at least in the southern United States, is the "ephedrine red . . . phosphorus method." It involves placing cold pills containing pseudoephedrine into a container, such as a trash

can, with a liquid solvent such as methylol or denatured alcohol. This causes the pseudoephedrine to become suspended in the liquid and the heavier, pill-binding materials to sink to the bottom. The solvent is then heated to evaporate the liquid, leaving crystalline pseudoephedrine.

The pseudoephedrine crystals are then converted to methamphetamine by mixing them with iodine crystals, red phosphorus, and water in a "reaction vessel," which may be glass or Corning wear, but not metal. Large laboratories commonly use 22-liter round-bottomed, glass reaction vessels. The resulting mixture is hydriatic acid, a corrosive chemical containing the methamphetamine, and a "reaction mass" of red phosphorous which can be reused. Sodium hydroxide or lye is then slowly added to the hydriatic acid. The mixture becomes a biphasic liquid, where the top layer is an organic petroleum distillate into which the methamphetamine travels. Finally, muriatic acid is added to create a hydrogen chloride gas which bubbles and creates a "snow" of methamphetamine crystals. The remaining mixture is poured through a filter to extract all of the methamphetamine. The methamphetamine is then washed with acetone and allowed to dry.

Bender was placed in charge of processing and dismantling the laboratory. Inside the garage, Bender found numerous items associated with the manufacture of methamphetamine.[6] Additional evidence of methamphetamine production was found in

[6] The items found in the garage included cut-out plastic milk cartons coated with white residue, commonly used for scooping liquid pseudoephedrine; sheets, commonly spread over trash cans containing liquid pseudoephedrine and used as filters to separate

[footnote continued on next page]

a shed, the tree house, and elsewhere on the property.[7] In Bender's opinion, all phases of methamphetamine production were performed on the property. Various toxic materials had been emitted into the air, soil, and watershed. The waste and acid-contaminated soil on the property filled 122 hauling trucks, each containing 10 to 12 cubic yards of soil.

In Bender's opinion, 120 pounds of methamphetamine was being processed in the laboratory or garage on March 5. Approximately 35 to 40 gallons of liquids containing methamphetamine were found throughout the property. In Bender's estimation, 40 gallons of liquid methamphetamine produce 120 pounds of dry methamphetamine, with a "wholesale" value of $600,000. All of the liquids and solids seized on the property were found to contain methamphetamine in a processing state.

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the binder material; two unused 22-liter reaction vessels; multiple five-gallon containers of acetone, one pound of red phosphorus, camp fuel, sulfuric acid, and rock salt; a digital scale for weighing chemicals; baggies; an exhaust fan with iodine corrosion; a spatula with red phosphorus stains; numerous large metal pots for boiling off denatured alcohol; an electric rheostat control attached to an asbestos-lined heating mantel; cat litter, used to trap and dissipate the cooking vapors; and duct tape to tape ventilation hoses. An unloaded semiautomatic handgun was also found on a bench in the garage.

[7] A shed near the garage contained denatured alcohol and several large trash bags. The trash bags contained paste left over from the process of extracting liquid pseudoephedrine from cold pills. A crusty, white residue, consistent with the extracted bottom layer of a biphasic liquid, was found on the ground inside and outside the shed. Eighteen hydrogen chloride cylinders were also found on the property, some of which were buried. Also buried on the property were a few thousand pounds of pill binder, resulting from the pseudoephedrine extraction phase. Hundreds of empty 1,000-count pseudoephedrine pill bottles were found. Every nine bottles had a potential yield of one pound of methamphetamine.

According to Bender, this was a large-scale, "cartel-size" laboratory, and one of the largest he had ever encountered. Cartel-size laboratories usually involve several organizational levels. At the top is a financier who typically puts up the money and receives profits from the sales, but does not go near the manufacturing location. At the next level down are persons called "tenants," who lease the manufacturing location and obtain the necessary equipment. Beneath the tenant is a "site supervisor," who supervises the production site by ensuring that necessary equipment is delivered and installed at the location. Then, there are usually one or two "cooks" who know the "recipe" for the manufacturing process. Finally, there are "worker bees" who stir pills, pour things into pans, turn on and off the burners, and watch the pots.

Bender estimated it would cost $10,000 to $12,000 to set up a laboratory of the size that was in the garage. Because the amount of methamphetamine being produced was indicative of a seller several tiers up the distribution process, Bender said he would not have expected to find evidence consistent with street sales of methamphetamine, including pay/owe sheets and pagers. He also said that the seized firearms were possessed for the purpose of defending the laboratory.

Bender examined the clothing defendants were wearing on the morning of March 5. Aguillar's sweatshirt, jeans, and shoes, and Ramirez's sweatpants had yellowish-orange stains, characteristic of an acidic iodine used in the manufacture of methamphetamine. Torres's and Garcia's clothing contained no such stains.

3. Additional Prosecution Evidence

Sergeant Pete Cacheiro of the Los Angeles County Sheriff's Department testified that, while executing a search warrant of Garcia's home in Norwalk in 1996, he found 109 grams of methamphetamine, packaging material, a triple-beam scale, and a cell phone. Based on the quantity of the drug and the other items found, Cacheiro opined that Garcia possessed the methamphetamine for purposes of sale.

The parties stipulated to the admission of a Physical Evidence Examination Report, dated April 17, 2003, and prepared by criminalist Gina M. Williams. The report concluded that 11 out of 18 items tested contained methamphetamine at some stage in the manufacturing process and that the "total estimated volume of liquids containing methamphetamine exceed[ed] 25 gallons."

B. *Defense Evidence*

Only Garcia testified in his own defense. Garcia was homeless on March 5, 2003, and had only one set of clothes. In late 2002, he was living on the streets and met a man known to him as "Gordo." Gordo and Garcia spoke on about 12 occasions before Gordo offered to let Garcia stay at the Mead Valley residence. Gordo told Garcia to feed the dogs and to "stay away from the back, the garage and . . . anywhere else."

When Garcia first arrived at the residence, there was electrical power and some food in the cabinets, but there was no propane for the stove. There was also running water in the bathrooms and kitchen, but no hot water. Gordo returned to the property about one week after Garcia first arrived. He dropped off some dog food and left. After another week passed, Gordo returned again. He was leaving as Garcia was returning to

the house, and just said, “hi.” He did not leave anything on his second visit. After a third week passed, Gordo returned a third time and left a 50-pound bag of dog food. Gordo never returned to the property again. Less than two weeks after Gordo’s final visit, the power and water were disconnected.

Without utilities, Garcia left the house more often. He made money by repairing bicycles and selling them. He would also ask for “handouts” at stores. In January or February 2003, he told someone about his situation. This person apparently told Pastor Rubin Bajo about Garcia’s situation. Pastor Bajo then came to the residence, surprising Garcia with food.

Although Gordo never returned to the house, Garcia continued to stay there. He never ventured into the garage because he was told not to. He also never went into the closet where the drugs were found because he did not keep anything of his in there. He does not know what ephedrine looks like. He used the bucket in the shower to wash himself. He found the plastic bottle in a cabinet under the sink, and removed it because he was going to clean the house. He first saw the rifle on a rack in the bedroom, removed it, and placed it between the mattresses.

On March 4, 2003, the power and water came back on at the house. During the early hours of March 5, before the officers arrived, Garcia heard noises on the property. He did not investigate the noises because he said he did not go outside at night. He had never spoken to Aguillar, Ramirez, or Torres, and had not seen them before he was arrested on March 5. Other than Gordo, Garcia was unaware of anyone driving a vehicle onto the property.

Garcia was in the bathroom when the officers arrived. Garcia called out to the officers after they knocked on the door a second time. Then he heard the door being broken down and the lock parts hit the floor. He hid in the shower because he was scared. The officers had their guns drawn when they pulled the shower curtain back. Garcia stepped out of the shower and told the officers that a rifle was under his mattress.

1. Pastor Rubin Bajo's Testimony

Pastor Bajo ran a ministry which distributed food to the poverty stricken. In early 2003, Garcia came by a drug treatment center funded by the church. The ministry provided Garcia with food, candles, water, and other necessities. Bajo personally delivered food to the Mead Valley residence on two occasions and visited with Garcia there on a third occasion. Each time Bajo visited, he noticed an "ugly" smell which he believed to be rotting trash. Bajo was not aware of any other persons on the property. The prosecution introduced evidence that Bajo had served several prison sentences for the sale or transportation of controlled substances, and car theft. He also had prior misdemeanors and previously gave false information to the police.

DISCUSSION

A. *It Is Not Reasonably Probable That Garcia or the Other Defendants Could Have Prevailed on a Motion to Quash or Traverse the Sealed Search Warrant Affidavit*

Garcia asks this court to review the sealed warrant and affidavit and independently determine (1) whether there was probable cause to issue the warrant, and (2) whether the trial court's in camera hearing comported with the requirements of *Hobbs*, *supra*, 7

Cal.4th 948. We conclude the in camera hearing was conducted in accordance with the requirements of *Hobbs* and the affidavit showed probable cause to issue the warrant.

1. Background

Howell signed an affidavit and obtained a warrant to search the property for items related to the manufacture of methamphetamine, after the officers discovered the methamphetamine laboratory in the garage. The affidavit was ordered sealed.

The trial court conducted an in camera review of the sealed affidavit, pursuant to a motion by Ramirez to disclose the names of any informants. In the moving papers, counsel stated, "Frankly, counsel is not sure whether this is a discovery motion [pursuant to Penal Code section] 1054.1[, subdivision] (e) or an informant disclosure motion [pursuant to Evidence Code sections] 1040 [and] 1041." The other defendants joined the motion without additional argument.

In the motion, counsel noted: "It is highly likely that an informant was used in this case and an undisclosed informant plus a sealed warrant does not allow the defense to even begin to challenge (traverse) the search warrant or discover if an informant was used and what information he/she could provide." At the hearing on the motion, counsel told the court he was interested in (1) whether there was an informant, and (2) whether disclosure of the informant's identity could lead to the discovery of exonerating evidence that could assist the defense in any way.

Following the in camera hearing, the trial court denied the motion. The in camera hearing was conducted in the presence of the prosecutor and Howell. Without discussing its inquiry or the contents of the affidavit, and without disclosing whether there was an

informant or whether the warrant was based on any information obtained from an informant, the trial court ruled (1) there was good cause for the warrant to remain sealed, (2) there was insufficient evidence to disclose the identity of the informant, if any, and (3) unsealing the warrant or disclosing any informant's identity would not lead to the discovery of any exonerating evidence or assist the defense in any way.

2. The *Hobbs* Requirements

In *Hobbs*, the state Supreme Court held that, under Evidence Code sections 1041 and 1042, all or part of a search warrant affidavit may be sealed to protect the identity of a confidential informant. (*Hobbs*, *supra*, 7 Cal.4th at p. 971.) The court also recognized that, where all or part of a search warrant affidavit has been sealed, a defendant cannot reasonably be expected to make an informed challenge to the veracity of the affidavit (by moving to traverse the warrant), "or otherwise make an informed determination whether sufficient probable cause existed for the search (in consideration of a motion to quash the warrant) . . . ." (*Id*. at pp. 971-972, citing *People v. Luttenberger* (1990) 50 Cal.3d 1.)

Thus, "the *Hobbs* court approved of an in camera hearing to review the contents of a sealed search warrant affidavit in order to determine whether there was a reasonable probability that the search warrant affiant made material misrepresentations when obtaining the warrant. If not, the inquiry ends. If so, the prosecution is put to the choice of either consenting to disclosure of the documents as a prelude to a further evidentiary hearing, or to an order granting the defendant's motion to traverse the warrant." (*People v. Navarro* (2006) 138 Cal.App.4th 146, 166, citing *Hobbs, supra*, 7 Cal.4th at pp. 971-975.)

Before the court determines whether there is a reasonable probability the search warrant affidavit is based on material misrepresentations, the court must first determine "whether sufficient grounds exist for maintaining the confidentiality of the informant's identity. It should then be determined whether the entirety of the affidavit or any major portion thereof is properly sealed, i.e., whether the extent of the sealing is necessary to avoid revealing the informant's identity." (*Hobbs, supra,* 7 Cal.4th at p. 972.)

"If the affidavit is found to have been properly sealed, and the defendant has moved to traverse the warrant, the court should then proceed to determine whether the defendant's general allegations of material misrepresentations or omissions are supported by the public and sealed portions of the search warrant affidavit, including any testimony offered at the in camera hearing. Generally, in order to prevail on such a challenge, the defendant must demonstrate that (1) the affidavit included a false statement made 'knowingly and intentionally, or with reckless disregard for the truth,' and (2) 'the allegedly false statement is necessary to the finding of probable cause.'" (*Hobbs, supra*, 7 Cal.4th at p. 974, quoting *Franks v. Delaware* (1978) 438 U.S. 154, 155-156 [98 S.Ct. 2674, 57 L.Ed.2d 667].) "If the trial court determines that the materials and testimony before it do not support defendant's charges of material misrepresentation, the court should simply report this conclusion to the defendant and enter an order denying the motion to traverse." (*Hobbs, supra*, at p. 974.)

"Similarly, if the affidavit is found to have been properly sealed and the defendant has moved to quash the search warrant [citation] the court should proceed to determine whether, under the 'totality of the circumstances' presented in the search warrant

affidavit . . . there was 'a fair probability' that contraband or evidence of a crime would be found in the place searched pursuant to the warrant. [Citations.] . . . . [¶] If the court determines . . . that the affidavit and related materials furnished probable cause for issuance of the warrant . . . the court should simply report this conclusion to the defendant and enter an order denying the motion to quash. . . ." (*Hobbs, supra,* 7 Cal.4th at p. 975.) If, however, the court determines there is a reasonable probability the defendant would prevail on his motion to quash the warrant, the prosecution must choose between consenting to the disclosure of the sealed materials as a prelude to a further evidentiary hearing, or consenting to an order granting the defendant's motion to quash the warrant. (*Ibid*.)

3. Analysis

On independent review of the sealed warrant, supporting affidavit, and the trial court's in camera hearing, we conclude (1) there was probable cause to issue the warrant, and (2) the trial court's in camera inquiry was conducted in accordance with *Hobbs*.

Regarding the conduct of the in camera hearing, the court properly determined, as an initial matter, that Howell's affidavit was properly sealed -- that is, the court properly determined (1) there were sufficient grounds for maintaining the confidentiality of any informant's identity, and (2) the extent of the sealing of the affidavit was necessary to avoid revealing the identity of any confidential informant. (*Hobbs, supra,* 7 Cal.4th at p. 972.) Any further discussion of these matters would have risked disclosing the identities of any confidential informants.

Additionally, to the extent any information provided by any informants helped furnish probable cause to issue the warrant, the affidavit showed there was "'a fair probability' that contraband or evidence of a crime would be found in the place searched pursuant to the warrant. [Citations.]" (*Hobbs, supra,* 7 Cal.4th at p. 975.) As the law also requires, the affidavit "set forth sufficient competent evidence supportive of the magistrate's finding of probable cause . . . ." (*Ibid.*, citing *Illinois v. Gates* (1983) 462 U.S. 213, 238 [103 S.Ct. 2317, 76 L.Ed.2d 527].) Nor was there any reason to believe, based on the affidavit, Howell's testimony at the in camera hearing, or any information furnished by any of the defendants, that Howell or any confidential informants made any material misrepresentations in relation to the finding of probable cause. (*Hobbs, supra,* at p. 974.)

Lastly, we observe that shortly before trial and over one year after the trial court conducted the *Hobbs* hearing, Garcia filed a motion to suppress any evidence that was seized *before* the warrant was issued. (§ 1538.5.) The court denied the motion, finding that no evidence was seized until after the warrant was issued. At the hearing on this motion, no information was revealed which would have warranted a further *Hobbs* inquiry.

B. *Garcia Must Be Resentenced*

Garcia contends the imposition of his upper term sentence on count 1 violated his right to a jury trial, because the aggravating factors used to justify the sentence were not found true by a jury beyond a reasonable doubt. (*Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]; *Apprendi v. New Jersey* (2000) 530 U.S. 466

[120 S.Ct. 2348, 147 L.E.2d 435].)[8] In imposing the upper term, the court relied on three factors: Garcia was on probation at the time he committed count 1, his performance on probation was unsatisfactory, and he had a prior conviction for possessing methamphetamine for sale. (Cal. Rules of Court, rule 4.421(b)(2), (4), & (5).)[9]

After the parties had fully briefed this issue and before oral argument, the United States Supreme Court decided *Cunningham v. California* (Jan. 22, 2007, No. 05-6551) 549 U.S. ___ [2007 D.A.R. 1003] (*Cunningham*). In *Cunningham*, the high court held that the imposition of an upper term sentence under California's determinate sentencing law (DSL) based on a judge's findings of fact other than the fact of a prior conviction, violates the defendant's Sixth and Fourteenth Amendment right to a jury trial. The court further held that, under the DSL, the middle term is the maximum sentence a judge may impose based on its own factual findings, other than the fact of a prior conviction.

At oral argument, the People argued that the court's error in imposing the upper term based on aggravating factors the court found true (i.e., that Garcia was on probation and his performance on probation was unsatisfactory) is harmless under the standard of review articulated in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed. 2d 705]. (See *Washington v. Recuenco* (2006) ___ U.S. ___ [126 S.Ct. 2546, 165 L.Ed.2d 466] [court's imposition of aggravated term based on its own factual findings

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[8] Garcia's second contention does not apply to the other defendants, because none of them received upper term or consecutive sentences.

[9] All further references to rules are to the California Rules of Court.

subject to harmless error analysis under federal Constitution].) The People noted it was uncontroverted that Garcia was on probation at the time he committed the current crime and that his performance on probation was unsatisfactory. Thus, the People argued, a jury would have undoubtedly made the same findings. The People also noted that the court's choice of the aggravated term was permissibly based, in part, on Garcia's prior conviction for possessing methamphetamine for sale.

Garcia argued that the error is not harmless because, to the extent the court relied on Garcia's prior conviction in selecting the aggravated term on count 1, it engaged in an impermissible dual use of facts. Indeed, the court relied on Garcia's prior conviction in imposing the three-year, section 11370.2 enhancement on count 1 *and* in selecting the aggravated term on count 1. As Garcia points out, a sentencing court may not rely on the same fact to impose an aggravated term and an enhancement. (Pen. Code, § 1170, subd. (b); rule 4.420(c).) This is an impermissible dual use of facts. (*People v. Bowen* (1992) 11 Cal.App.4th 102, 105.)

Moreover, based on this record we cannot say that the court's error in sentencing Garcia to the upper term based on his probation status and his unsatisfactory performance on probation was harmless beyond a reasonable doubt. The error would be harmless beyond a reasonable doubt if we could say that a jury would have found true beyond a reasonable doubt that Garcia was on probation at the time the crimes were committed or that his performance on probation was unsatisfactory. Either of these factors, standing alone, would be sufficient to support imposing the upper term on count 1. And Garcia's prior conviction, standing alone, is sufficient to support the section 11370.2

enhancement. But these questions were not submitted to the jury, and even though they were uncontroverted at sentencing, the record does not indicate that a jury would have found these factors true beyond a reasonable doubt. The matter must therefore be remanded for resentencing in light of *Cunningham* and the prohibition on dual use of facts.

C. *The Weight Enhancements Imposed on Aguillar, Ramirez, and Torres in Count 3 (the Conspiracy Charge) Must be Reversed Due to Prejudicial Instructional Error*

Aguillar, Ramirez, and Torres contend their 10-year weight enhancements in count 3, for conspiracy to manufacture methamphetamine (§§ 11379.6, 11379.8, subd. (a)(3)) must be reversed due to prejudicial instructional error. Citing *People v. Duran* (2001) 94 Cal.App.4th 923, 937 through 941 (*Duran*), defendants argue that CALJIC No. 17.21 erroneously instructed the jury it could find the enhancements true if it found defendants were "substantially involved" in the "planning" or "execution" of the underlying offense of conspiracy to manufacture methamphetamine. Defendants further contend that the instructional error was prejudicial. We agree on both counts.

1. Background

Where a defendant has been convicted of manufacturing methamphetamine, and the quantity of methamphetamine exceeds 25 gallons of liquid by volume or 10 pounds, a 10-year weight enhancement may be imposed under section 11379.8, subdivision (a)(3). Where, in contrast, a defendant has been convicted of *conspiracy* to manufacture methamphetamine, the 10-year enhancement applies only if "the trier of fact finds that the defendant conspirator was substantially involved in the direction or supervision of, or

in a significant portion of the financing of, the underlying offense" of conspiracy to manufacture methamphetamine. (§ 11379.8, subd. (e).)

Sections 11370.2 and 11370.4 provide for similar weight enhancements on drug-related conspiracy convictions, other than conspiracy to manufacture methamphetamine. Under these statutes, the weight/conspiracy enhancements provisions apply only if "the trier of fact finds that the defendant conspirator was substantially involved in the planning, direction, execution, or financing of the underlying offense" of conspiracy. (§§ 11370.2, subd. (e), 11370.4, subds. (a) & (b).)[10]

Plainly, the language of section 11379.8 and sections 11370.2 and 11370.4 differ in relation to the "level-of-involvement" element of the enhancements. On its face, the section 11379.8 enhancement does not apply if the defendant was substantially involved in the "planning" or "execution" of a conspiracy to manufacture methamphetamine. It applies only if the defendant was substantially involved in the "direction or supervision of, or in a significant portion of the financing of" the conspiracy.

Here, the trial court gave a modified version of CALJIC No. 17.21 on the section 11379.8 weight enhancement allegations. It provided, in pertinent part: "If you find the defendant guilty of the crime of conspiracy to commit manufacturing methamphetamine involving a substance containing methamphetamine which exceeds 10 pounds of solid

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[10] The conspiracy provisions of sections 11370.2, 11370.4, and 11379.8 apply only to convictions for the *substantive* crime of conspiracy. They do not apply to convictions for target offenses (e.g., manufacturing methamphetamine) based on an uncharged conspiracy *theory*. (*Duran, supra,* 94 Cal.App.4th at pp. 941-942; *People v. Salcedo* (1994) 30 Cal.App.4th 209, 215-217.)

substances and 25 gallons of liquid by volume[,] *an essential element of this allegation is that the defendant was substantially involved in the planning, direction, execution, or financing of the conspiracy and its objective, or in the direction or supervision of, or in a significant portion of the financing of, the underlying crime*." (Italics added.)

Thus, the given version of CAJIC No. 17.21 combined the language of section 11379.8 with the language of sections 11370.2 and 11370.4. The instruction also allowed the jury to find the enhancements true if they found defendants were substantially involved in the "planning" or "execution" of the conspiracy to manufacture methamphetamine, terms not included in section 11379.8, subdivision (e).[11]

2. The *Duran* Decision

The court in *Duran* reversed a section 11379.8 enhancement based on a similar error in CALJIC No. 17.21. There, as here, the instruction allowed the enhancement to be found true based on evidence of the defendant's substantial involvement in the "planning" or "execution" of the conspiracy to manufacture methamphetamine. (*Duran, supra,* 94 Cal.App.4th at p. 937.) The court rejected the Attorney General's argument that the given instruction, though it did not track the language of section 11379.8, corrected a legislative error in drafting section 11379.8. After reviewing the legislative history of sections 11370.2, 11370.4, and 11379.8, the court presumed "a different

[11] The form-version of CALJIC No. 17.21 contains bracketed clauses of the language of sections 11370.4 and 11379.8. The Use Note explains that the first bracketed clause applies to the former statute, and the second bracketed clause applies to the latter.

legislative intent, not an oversight, from the fact that words used in sections 11370.2 and 11370.4 are missing from section 11379.8." (*Duran, supra,* at pp. 939-941.)

The *Duran* court next concluded that "[e]vidence of planning or execution alone is not enough" for the section 11379.8 enhancement to apply. (*Duran, supra,* 94 Cal.App.4th at p. 941.) Thus, the court recognized that substantial involvement in the "planning" or "execution" of a conspiracy to manufacture methamphetamine *constitutes a lower level of involvement* or participation in the conspiracy than substantial involvement in the "direction" or "supervision" of the conspiracy, or "in a significant portion of the financing of" the conspiracy. (*Id*. at pp. 941-942.)

3. Argument and Analysis

The Attorney General submits that *Duran* was wrongly decided. Alternatively, he argues that any instructional error was harmless. We consider these arguments in that order.

(a) *Duran*

The Attorney General argues that an instruction is not faulty merely because it fails to "track" the language of the statute upon which it is based. The proper test, he argues, when reviewing the language of an instruction for error, is to "determine whether there was a 'reasonable likelihood' the jury misunderstood the instruction as claimed by the defendant. (See *People v. Cain* (1995) 10 Cal.4th 1, 36.)" And here, he argues, the instruction's "deviation from the precise language of . . . section 11379.8 . . . was not reasonably likely to have resulted in the jury misapplying the statute." He also notes that the *Duran* court "failed to discuss the materiality of the additional words in CALJIC No.

17.21, summarily concluding the instruction was erroneous simply because it did not mirror the statute."

More specifically, the Attorney General argues that "the words 'planning' and 'execution' were essentially synonyms of the words 'direction' or 'supervision' as used in the statute. Like direction and supervision, planning and execution connote a leadership role in the enterprise. *To plan or execute a particular plan, a person would necessarily be involved in direction or supervision*. Planners and executives are no different from directors and supervisors. These are commonly understood terms with no technical meaning peculiar to the law, and as a result no further definition is required." (Italics added.)

We agree with the Attorney General in one respect: the terms planning, execution direction, and supervision "are commonly understood by those familiar with the English language" and, as such, require no definitional or clarifying instructions. (*People v. Estrada* (1995) 11 Cal.4th 568, 574-575.) We disagree, however, that "planning" and "execution" are essentially synonymous with "direction" and "supervision," as the latter terms are used in section 11379.8 and as these terms may apply to the underlying offense of conspiracy to manufacture methamphetamine. Contrary to the Attorney General's argument, one who is substantially involved in the planning or execution of a conspiracy to manufacture methamphetamine is not *necessarily* involved in the direction or supervision of the conspiracy. The facts of the present case illustrate this point.

A conspiracy is "'an agreement between two or more persons that they will commit an unlawful object (or achieve a lawful object by unlawful means), and in

furtherance of the agreement, have committed one overt act toward the achievement of their objective.' [Citations.]" (*People v. Salcedo, supra,* 30 Cal.App.4th at p. 215.) The evidence here showed that Aguillar, Ramirez, and Torres agreed to commit an unlawful objective -- the manufacture of methamphetamine -- and that each of them committed at least one overt act in furtherance of that agreement. They were each found asleep in the barn-like garage on the Mead Valley property, while two 22-liter flasks of methamphetamine were in the hours-long process of "cooking" on two lit burners.

Additionally, Bender testified that large-scale or "cartel-size" methamphetamine laboratories typically involve several organizational levels. At the bottom level are "worker bees," persons who stir pills, pour things into pans, turn on and off the burners, and watch the pots. Based on their presence in the garage at the time and under the circumstances shown, the jury could have reasonably inferred that Aguillar, Ramirez, and Torres were "worker bees," or persons substantially involved in "executing" or carrying out the conspiracy to manufacture methamphetamine.

But the evidence also showed that these defendants were not necessarily involved in directing or supervising the conspiracy. Based on Bender's further testimony, the jury could have reasonably inferred -- and it is reasonably likely they did infer -- that the direction and supervision functions were reserved to persons higher up in the organizational structure. According to Bender, more senior persons in the organization typically include a "tenant," who leases the manufacturing location and obtains the necessary equipment, and a "site supervisor," who oversees the production site by ensuring the necessary equipment is delivered and installed.

Thus, contrary to the Attorney General's argument, a person who is substantially involved in the planning or execution of a conspiracy to manufacture methamphetamine is not *necessarily* involved in the direction or supervision of the conspiracy. It is also reasonably likely that, here, the jury understood the terms "supervision" and "direction" as referring to the roles of the more senior players in the organizational structure of the methamphetamine manufacturing operation, and understood the term "execution" as referring to the roles of lower-level "worker bees."

(b) *Prejudice*

Where, as here, the jury has been instructed on alternative grounds, one legally valid and the other legally invalid, reversal is required if the entire record affirmatively demonstrates a reasonable probability that the jury found the defendant guilty (or the enhancement true) based solely on the invalid theory. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130.) And here, the record affirmatively demonstrates a reasonable probability that the jury found the count 3 weight enhancements true based solely on the invalid ground that Aguillar, Ramirez, and Torres were substantially involved in the "planning" or "execution" of the conspiracy to manufacture methamphetamine. Indeed, it is reasonably probable that the jurors understood the term "execution" as referring to the roles of lower level "worker bees," and the evidence showed that Aguillar, Ramirez, and Torres acted only as "worker bees" in the conspiracy to manufacture methamphetamine.

D. *Double Jeopardy Principles Bar Retrial of the Count 3 Weight Enhancements*

We next consider whether there is substantial evidence to support the valid theory of the count 3 weight enhancements -- that is, whether there was sufficient evidence that

Aguillar, Ramirez, and Torres were substantially involved in the "direction" or "supervision" of the underlying conspiracy. (§ 11379.8, subd. (e).) We conclude there is not. Accordingly, double jeopardy principles bar retrial of the count 3 weight enhancements. (*People v. Grant* (2003) 113 Cal.App.4th 579, 594.)

In determining whether sufficient evidence supports an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence, that is, reasonable, credible, and solid evidence, from which a rational trier of fact could find the enhancement true beyond a reasonable doubt. (*People v. Ortiz* (1997) 57 Cal.App.4th 480, 484.) The same standard of review applies when the prosecution relies mainly on circumstantial evidence. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

As discussed, where, as here, a section 11379.8 weight enhancement is based on a conviction for *conspiracy* to manufacture methamphetamine, the trier of fact must find "the defendant conspirator was substantially involved in the direction or supervision of, or in a significant portion of the financing of, the underlying [conspiracy] offense." (§ 11379.8, subd. (e); CALJIC No. 17.21.) As further discussed, it is reasonably probable the jury found the weight enhancements true based solely on the invalid theory that defendants were substantially involved in the planning or execution of the conspiracy. (§§ 11370.2, subd. (e), 11370.4, subds. (a) & (b).) Moreover, the evidence was insufficient as a matter of law to support the weight enhancements on the legally valid theory of substantial involvement in the direction or supervision of the conspiracy. (§ 11379.8, subd. (e).)

The evidence showed Aguillar, Ramirez, and Torres were asleep inside the garage when the officers entered it at 6:00 a.m. on March 5. At that time, two 22-liter containers of methamphetamine-related chemicals were "cooking" on lit burners in one area of the garage. Aguillar's and Ramirez's clothing had stains consistent with chemicals used in manufacturing methamphetamine. Torres's clothing did not have stains; however, there were paper towels on Torres's makeshift cot. No one had entered or exited the property since officers began watching it the previous evening.

Ramirez argues this evidence "sheds no light upon the degree to which, if any," he was involved in directing or supervising the manufacturing activity. He argues the prosecution must show more than a defendant's mere participation in the manufacturing process. Similarly, Aguillar argues that, at most, the evidence showed he was a "worker bee" -- a person who stirs the pills, sets the burners, watches the solvents, makes sure the liquids get low, and turns off the machines. We agree.

Although the evidence was sufficient to show that defendants were substantially involved in the "execution" of the conspiracy, this is not the test. The conspiracy enhancement provision requires a greater showing. Based on the evidence shown here, including Bender's testimony concerning the typical organizational hierarchy of large-scale methamphetamine manufacturing operations, no rational jury could have concluded that defendants were substantially involved in the "direction" or "supervision" of the conspiracy to manufacture methamphetamine. Nor was there any evidence that

defendants were substantially involved in "a significant portion of the financing" of the conspiracy.[12]

E. *The Jury Was Properly Instructed on Defendants' Strict Liability for the Weight Enhancements on Counts 1 and 2*

Aguillar, Ramirez, and Torres contend their weight enhancements on counts 1, 2, *and* 3 must be reversed due to instructional error concerning what they call the mens rea or knowledge element of the weight enhancements. Because we reverse these defendants' section 11379.8 weight enhancements on count 3 due to prejudicial instructional error and insufficient evidence, this contention is moot in relation to the weight enhancements on count 3.

Regarding the weight enhancements on counts 1 and 2, defendants take issue with the trial court's original instructions on the weight enhancements, and its written answers to three jury questions submitted during deliberations. We find no error in any of the instructions. The instructions as a whole correctly stated the mens rea or knowledge elements of the underlying crimes, and properly distinguished these requirements from defendants' strict liability for the quantity or weight of drug manufactured and possessed.

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[12] Aguillar also argues there was insufficient evidence of his "substantial involvement" to support his section 11370.4 subdivision (b)(2) weight enhancement on count 2. This claim is misplaced, because the substantial involvement requirement of section 11370.4, like the similar but distinct substantial involvement requirement of section 11379.8, applies only to conspiracy convictions. On count 2, Aguillar, Ramirez, and Torres were convicted of possession of methamphetamine for sale, not conspiracy to possess methamphetamine for sale. (*Duran, supra,* 94 Cal.App.4th at pp. 941-942.)

1. The Applicable Law

To be guilty of the crimes charged in counts 1 and 2, namely, manufacturing methamphetamine and possessing methamphetamine for sale, respectively, defendants had to know that the substance they were manufacturing and possessing for sale was methamphetamine. (*People v. Coria* (1999) 21 Cal.4th 868, 871, 878-880.) The crime of possessing methamphetamine for sale also requires knowledge of the drug's presence. (*People v. Palaschak* (1995) 9 Cal.4th 1236, 1242.)

In contrast, to be liable for the weight enhancements on these crimes, defendants were not required to know the quantity or weight of methamphetamine they manufactured or possessed for sale. (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1748.) Defendants were "strictly liable" for the quantity or weight of the methamphetamine they manufactured or possessed, provided all of the elements of the underlying, substantive crimes, including the knowledge requirements, were proved. (*Ibid*.)

Strict liability for weight enhancements "is permissible because the enhancements do not criminalize otherwise innocent activity." (*People v. Coria, supra,* 21 Cal.4th at p. 880, citing *People v. Meza, supra*, 38 Cal.App.4th at p. 1748.) Instead, the weight enhancement statutes "incorporate" the underlying crimes, which already contain a mens rea or knowledge requirement. (*People v. Coria*, *supra*, at p. 880.) By committing the underlying crimes, defendants assumed the risk of liability for the enhanced penalties. (*Ibid*.)

2. The Instructions

In accordance with the foregoing principles, the jury was properly instructed on the knowledge elements of the charged offenses. They were instructed that, in order to find defendants guilty of possessing methamphetamine for sale in count 2, they had to find defendants knew of the restricted drug character and presence of the substance possessed. (CALJIC No. 12.01.) Similarly, in order to find defendants guilty of manufacturing methamphetamine in count 1, the jury was properly instructed that defendants had to have knowledge that the substance manufactured was methamphetamine. (CALJIC Nos. 12.09.01 & 6.10.)

And, on the weight enhancements on counts 1 and 2, the jury was properly instructed that, "If you find that a defendant was engaged in the process of manufacturing methamphetamine [count 1], or possessing methamphetamine for the purpose of sales [count 2], they are strictly liable for any weight enhancement *regardless of their knowledge of their quantity*." (Italics added.) During deliberations, the jury submitted three questions regarding the weight enhancements and the trial court provided written answers, as follows.

Question No. 1: "Under the law of possession for sale regarding the weight enhancement [count 2]: Did the defendants have to know the contents of the unmarked containers (later proven to be meth) or is the mere presence of those containers enough to find the weight enhancement to be true?"

Answer No. 1: "A defendant must have knowledge that methamphetamine is present. The definition of knowledge is found in CALJIC [Nos.] 12.01 and 1.21. It is not necessary that a defendant know the exact amount of the weight or volume."

Question No. 2: "Under the law for [c]onspiracy regarding the weight enhancement [count 3]: Did the defendants have to personally agree to manufacture the amount stated in the weight enhancement or is it enough that the larger conspiracy agreed to manufacture more than the specified amount in the weight enhancement charge?"

Answer No. 2: "Please see CALJIC [No.] 17.21. Specifically, the third last paragraph of the instruction.[13] In addition[,] the defendants need not agree as to the exact amount stated in the enhancement."

Question No. 3: "Under the law for [m]anufacturing regarding the weight enhancement [count 1]: Did the defendants personally have to have manufactured the entire volume alleged in the weight enhancement charge? If not, did they have to know it was there and/or available to them?"

Answer No. 3: "A defendant need not personally manufacture the entire volume alleged. A defendant must have knowledge methamphetamine is present. The defendant need not know the exact volume or weight present. Please see CALJIC [Nos.] 12.09.01, 3.00 & 3.01."

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13 The error in CALJIC No. 17.21, discussed above, is not relevant to this contention.

3. Argument and Analysis

Defendants maintain that the trial court's original "strict liability" instruction, in combination with its answers to the jury's three questions, "had the effect of negating rather than incorporating the *mens rea* requirement of the underlying crime[s]" and "lower[ed] the prosecution's burden of proof because it eliminated an essential element of the weight enhancement[s] (i.e., the *mens rea* requirement)." In other words, defendants claim the instructions "allow[ed] the weight enhancement to be imposed based upon a quantity of the drug without proof that the defendant's [*sic*] knew that such [quantity of] methamphetamine was produced."

More specifically, defendants argue that, on the possession for sale charge on count 2, the jury should have been instructed that defendants had to know the substance *in the containers* was methamphetamine, not just that defendants had to know that some methamphetamine was present on the property. Similarly, on the manufacturing charge on count 1, defendants argue that the jury should have been instructed that defendants had to know the entire extent of the methamphetamine production; not just that they had to know that some methamphetamine was being manufactured.

These arguments improperly conflate the mens rea or knowledge requirements of the underlying crimes with defendants' strict liability for the quantity of drug manufactured or possessed. To be guilty of the underlying crimes, defendants only had to know that they were involved in manufacturing methamphetamine and that methamphetamine was present on the property; they were not required to know *how much* methamphetamine *they* were involved in manufacturing or possessing for sale. By

participating in the underlying crimes, defendants became strictly liable for the weight enhancements, or the actual quantity of methamphetamine they were producing and possessing for sale. (*People v. Coria, supra,* 21 Cal.4th at p. 879-880; *People v. Meza, supra,* 38 Cal.App.4th at p. 1748.) The trial court's instructions clarified these issues for the jury, and properly stated the law.[14]

Torres complains he may have been found liable on the weight enhancements for quantities of methamphetamine he did not possess for sale or was not involved in manufacturing. His concern is misplaced. The enhancement statutes apply to persons convicted of violations of underlying crimes committed "with respect to" methamphetamine and other controlled substances that they possess for sale or are involved in manufacturing. (§§ 11370.4, subd. (b), 11379.8, subd. (a).) The instructions reflected this requirement.

In addition, the evidence showed that Torres, Aguillar, and Ramirez possessed for sale and were involved in manufacturing no less than the quantities of methamphetamine that are reflected in each weight enhancement. (§§ 11370.4, subd. (b)(2), 11379.8, subd. (a)(3).) Bender testified that 35 to 40 gallons of liquids containing methamphetamine were found throughout the property, and all of these liquids were in the process of being manufactured into methamphetamine. In Bender's opinion, 120 pounds of

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[14] For the same reasons, we reject Torres's further contention, based on *Apprendi v. New Jersey, supra,* 530 U.S. 466, that he was deprived of his right to a jury trial and due process because the instructions withdrew an element of the weight enhancements from the jury's consideration.

methamphetamine was being processed in the laboratory or garage on March 5, 2003. (*People v. Hard* (2003) 112 Cal.App.4th 272, 278-280 [weight enhancement properly applied to substances to be used in ongoing methamphetamine manufacturing process].) Although the laboratory itself had been on the property for some time, there was no evidence that any of the methamphetamine seized on March 5 was not in the process of being manufactured on March 5.

F. *Clerical Errors in Sentencing Orders*

Aguillar contends the trial court erred in imposing concurrent sentences on counts 2 and 3. He argues his sentences on these counts should have been stayed under Penal Code section 654. The People agree. So do we.

The problem is clerical, not substantive. In orally pronouncing judgment, the trial court stated that Aguillar's sentences on counts 2 and 3 would run *concurrent* to his sentence on count 1. But the record clearly shows that the trial court *intended* to stay Aguillar's sentences on counts 2 and 3, and to do the same for Ramirez and Torres. Indeed, in sentencing Ramirez, the trial court said his sentences on count 2 would "run concurrent, meaning that is [Penal Code section] 654 to Count 1." And, in sentencing Torres, the trial court said his sentences on count 2 would be imposed consecutively, but "being [Penal Code section] 654, will run concurrent." In addition, all three of these defendants' abstracts of judgment reflect that their sentences on counts 2 and 3 *were stayed*. Thus, it is clear the trial court intended to stay Aguillar's, Ramirez's, and Torres's sentences on counts 2 and 3.

The sentencing minute orders for Aguillar, Ramirez, and Torres reflect that each of them received *consecutive* sentences on counts 2 and 3. To avoid any potential confusion, we remand the matter with directions to the trial court to amend its minute orders to reflect that Aguillar's, Ramirez's, and Torres's sentences on counts 2 and 3 were stayed. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [court has inherent authority to correct clerical errors in court records].) There is no need to correct any of the abstracts of judgment in this regard.

There is, however, a need to correct Aguillar's abstract of judgment to reflect that he received total presentence custody credits of 1,053 days, consisting of 703 actual days served and 350 days of local conduct credit. (Pen. Code, § 4019.) Currently, Aguillar's abstract reflects that he received no presentence custody credits. We therefore remand the matter to correct Aguillar's abstract in this regard. (Ramirez's and Torres's abstracts properly reflect their presentence custody credits.)

G. *The $10,000 Restitution Fines Are Not Constitutionally Excessive*

Finally, Torres claims his $10,000 restitution fine (Pen. Code, § 1202.4, subd. (b)) constitutes a constitutionally excessive fine (Cal. Const., art. I, § 17). Aguillar and Ramirez received identical $10,000 restitution fines. Garcia received a $1,200 restitution fine. None of these fines are constitutionally excessive.

A trial court has broad discretion to determine the amount of restitution fine to impose, within the statutory range. (*People v. Urbano* (2005) 128 Cal.App.4th 396, 406; Pen. Code, § 1202.4, subds. (b)-(d).) The statutory range for restitution fines is $200 to $10,000. (*Id.*, subd. (b)(1).) "'The touchstone of the constitutional inquiry under the

Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish. [Citations.] . . . [A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense. [Citations.]'" (*People v. Urbano, supra,* at p. 406.)

Torres asserts that the trial court imposed the maximum fine "to help the state and Riverside County recover some of their costs of cleaning up the lab site." This, he argues, was unfair or excessive because the evidence showed he was at the site for only one day, and the laboratory had been operating for a long time. He also notes he was found not guilty of unlawfully disposing of hazardous substances on the site, on count 4.

Aside from the excessive costs of the environmental clean-up, the seriousness and gravity of the offenses -- manufacturing and possessing for sale in excess of 25 pounds of methamphetamine -- justified the $10,000 fines imposed on Aguillar, Ramirez, and Torres. Garcia's $1,200 fine was justifiably lower because, for whatever reason, the jury declined to impose any weight enhancements on Garcia's convictions.

DISPOSITION

The section 11379.8, subdivision (a)(3) weight enhancements imposed on Aguillar, Ramirez, and Torres on count 3 for conspiracy to manufacture methamphetamine are reversed. The matter is remanded to the trial court with directions to: (1) resentence Garcia in light of *Cunningham* and the prohibition on dual use of factors in imposing an upper term sentence and an enhancement; (2) correct its sentencing minute orders for Aguillar, Ramirez, and Torres, to properly reflect that each

of their sentences on counts 2 and 3 were stayed; (3) amend Aguillar's abstract of judgment to properly reflect that he received total presentence custody credits of 1,053 days, consisting of 703 actual days served and 350 days of local conduct credit; and (4) forward a corrected copy of Aguillar's abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ King
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Richli
J.