IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

SILVERIO RENGULBAI,
Appellant,
v.
REPUBLIC OF PALAU,
Appellee.

Cite as: 2022 Palau 14
Criminal Appeal No. 21-002
Appeal from Criminal Action No. 20-092

Decided: July 14, 2022

Counsel for Appellant ..... Johnson Toribiong
Counsel for Appellee ..... Rebecca Sullivan

BEFORE: OLDIAIS NGIRAIKELAU, Chief Justice
DANIEL R. FOLEY, Associate Justice
KEVIN BENNARDO, Associate Justice

Appeal from the Trial Division, the Honorable Kathleen M. Salii, Presiding Justice, presiding.

OPINION

PER CURIAM:

[¶ 1] A jury convicted Appellant Silverio Rengulbai of both possessing and trafficking methamphetamine based on two different occasions when he sold methamphetamine to a confidential informant. On appeal, Rengulbai raises a number of challenges to his convictions and sentence. While we reject most of Rengulbai's arguments, we hold that the double jeopardy clause prohibited him from being convicted for both possession and trafficking with respect to a single sale of methamphetamine. Thus, we **AFFIRM** the convictions for trafficking and the sentence imposed by the Trial Division and **VACATE** the convictions for possession.

BACKGROUND

[¶ 2] The charges in this case largely arise from two controlled buys of methamphetamine from Rengulbai by confidential informants. The first controlled buy occurred on September 20, 2017. A confidential informant that Narcotics Enforcement Agency ("NEA") officers had used before called Rengulbai and said he wanted to buy methamphetamine. Rengulbai agreed, and the two made plans to meet at the informant's workplace. Before the informant and Rengulbai met, officers searched the informant for money and drugs and gave him $100 to buy methamphetamine. While officers watched nearby, the confidential informant approached Rengulbai's vehicle and the officers witnessed an exchange on the driver's side of the vehicle. The informant confirmed that he purchased what he believed was methamphetamine from Rengulbai in exchange for $100. A presumptive field test showed that the substance the informant purchased was indeed methamphetamine, and subsequent laboratory testing in Guam confirmed the result.

[¶ 3] A third controlled buy took place on March 3, 2020.[1] Law enforcement had instructed a different confidential informant to let them know if anybody was offering to sell methamphetamine. The informant told them that Rengulbai was selling. After officers searched the informant and gave him $300 to purchase methamphetamine, the informant went to Rengulbai's home (with officers following him and surveilling the interaction), and the informant testified that he purchased methamphetamine from Rengulbai. Again, a field test was presumptive for methamphetamine, a conclusion confirmed by further testing in Guam.

[¶ 4] Shortly after the third controlled buy, officers executed a search warrant on Rengulbai's home. Among other items, officer seized cash from the home. Following the search, Rengulbai went to the NEA office and made a statement.

[¶ 5] The Republic charged Rengulbai with trafficking and possessing methamphetamine in connection with the first controlled buy (Counts 1 and 4,

[1] A second controlled by took place on November 1, 2018. Because the jury acquitted Rengulbai of the charges related to that controlled buy, we do not discuss it here.

respectively); trafficking and possessing methamphetamine in connection with the second controlled buy (Counts 2 and 5, respectively); and trafficking and possessing methamphetamine in connection with the third controlled buy (Counts 3 and 6, respectively). After a seven-day trial, the jury convicted Rengulbai on the four counts related to the first and third controlled buys, and acquitted Rengulbai on the two counts related to the second controlled buy. The Trial Division sentenced Rengulbai to 25 years imprisonment and imposed a $50,000 fine. Rengulbai now appeals.

STANDARD OF REVIEW

[¶ 6] "We review the Trial Division's findings of fact for clear error and its conclusions of law de novo." *Ngirakesiil v. ROP*, 2021 Palau 23 ¶ 12. "We review the sufficiency of the evidence underlying a criminal conviction for clear error, asking whether the evidence presented was sufficient for a rational fact-finder to conclude that the appellant was guilty beyond a reasonable doubt as to every element of the crime." *Xiao v. ROP*, 2020 Palau 4 ¶ 8 (cleaned up).

DISCUSSION

[¶ 7] Rengulbai raises several arguments on appeal, many of which are not well-developed and are difficult to follow. This difficulty is not helped by the fact that the Republic failed to file a timely brief, although such a failure "does not constitute a concession that [Rengulbai] is correct in his assertions." *Rechelluul v. ROP*, 2021 Palau 29 ¶ 8. Rengulbai, as a party seeking relief from a duly entered judgment, "always carries the burden to show that the judgment below was erroneous," *id.*, and we consider each of Rengulbai's arguments in turn.

I.

[¶ 8] Rengulbai makes several arguments related to the first and third controlled buys. Specifically, Rengulbai argues (1) that there is insufficient evidence to support his convictions for possession and trafficking based on the controlled buys; (2) that the controlled buys amounted to entrapment; (3) that he could not be convicted of trafficking for the first controlled buy because he did not deliver a "saleable quantity"; and (4) that the evidence obtained during

the controlled buys was inadmissible because of gaps in the chain of custody. We reject each contention.

A.

[¶ 9] Rengulbai argues that the Republic did not introduce sufficient evidence to convict him of possession and trafficking in connection with the controlled buys. This argument fails. In connection to both controlled buys, officers testified about the details of the controlled buys and the confidential informants testified that they purchased methamphetamine from Rengulbai. Moreover, on both occasions, the substance that Rengulbai gave to the confidential informants tested positive as methamphetamine. This evidence is more than sufficient for the jury to convict Rengulbai. In fact, we have upheld a conviction based on a controlled buy even when only the officers—and not the informant—testified at trial. *Silmai v. ROP*, 10 ROP 139 (2003) (finding sufficient evidence for trafficking based on officers searching informant prior to buy, following informant, witnessing the informant's interaction with defendant, and finding methamphetamine on the informant following the buy).

[¶ 10] Rengulbai points to minor inconsistencies in the testimony and claims that the informants were drug users who may have received incentives for participating in the controlled buys. But "judgments on the credibility of witnesses are the province of the trier of fact rather than the appellate tribunal that did not observe the witnesses' testimony or demeanor in reaction to questioning by counsel, and instead has access only to the cold record." *Xiao*, 2020 Palau 4 ¶ 12. The evidence presented at trial related to the controlled buys was sufficient for the jury to conclude that Rengulbai was guilty beyond a reasonable doubt of possession and trafficking.

B.

[¶ 11] Rengulbai next argues that the controlled buys amounted to entrapment. But Rengulbai never raised the affirmative defense of entrapment in the Trial Division, so he cannot raise it on appeal. *Orrukem v. ROP*, 11 ROP 177, 177 (2004).

C.

[¶ 12] Rengulbai also argues that he cannot be convicted of trafficking in connection with the first controlled buy because he did not deliver a "saleable quantity" of methamphetamine to the confidential informant. Rengulbai bases his argument on our decision in *Ueki v. ROP*, 10 ROP 153 (2003). In *Ueki*, the defendant was charged with trafficking after police found 0.001 grams of methamphetamine on the defendant during a pat-down search. We reversed the trafficking conviction, noting that testimony in other cases showed that the smallest salable dose of methamphetamine is 0.1 grams and no evidence was presented in *Ueki* showing that 0.001 grams was a saleable quantity. *Id.* at 158. Rengulbai argues that because officers seized only 0.07 of methamphetamine in the first controlled buy, his conviction on Count 1 for trafficking should be reversed as well.

[¶ 13] Rengulbai's reliance on *Ueki* is misplaced. The offense of trafficking can be committed in several ways, including: (1) knowingly or intentionally "deliver[ing] … a controlled substance," and (2) knowingly or intentionally "possess[ing] with intent to … deliver … a controlled substance." 34 PNC § 3301(a)(1). Because the drugs in *Ueki* were found on the defendant's person, he was charged with trafficking by possession with intent to distribute. *Ueki*, 10 ROP at 158. For that offense, we held that "the government must … demonstrate that the defendant possessed enough illegal drug to actually distribute." *Id.* at 159. Rengulbai, by contrast, was charged with trafficking by delivering a controlled substance to a confidential informant. For that offense, the amount of methamphetamine he actually delivered is irrelevant because "[t]he delivery of any controlled substance, assuming a culpable mental state, is sufficient to constitute the offense of trafficking." *Sungino v. ROP*, 6 ROP Intrm. 70, 72 (1997). That fact that Rengulbai delivered any amount of methamphetamine to the confidential informant during the first controlled buy is sufficient to support his conviction on Count 1.[2]

[2] A year after *Ueki*, we addressed "saleable quantity" in the context of a trafficking conviction based on delivery of methamphetamine. *Ngirailild v. ROP*, 11 ROP 173 (2004). We correctly noted that *Ueki* did not establish a "legal minimum" amount of methamphetamine to support a conviction for trafficking. *Id.* at 176. Our remaining discussion, however, left it unclear whether the amount of methamphetamine is relevant to a conviction for trafficking by delivery

D.

[¶ 14] Rengulbai raises two cursory arguments about the chain of custody regarding the methamphetamine obtained from the controlled buys. The chain of custody plays two critical roles in a criminal case—"the chain of custody goes first to admissibility and then to weight." *Gibbons v. ROP*, 2022 Palau 5 ¶ 8. It is not entirely clear from his brief whether Rengulbai is challenging the admissibility of the seized methamphetamine or the weight the jury gave the evidence. But because Rengulbai raised his chain of custody argument in his motion to suppress—and because we will not reconsider the weight the jury gave the evidence based on gaps in the chain of custody, *Gibbons*, 2022 Palau at ¶ 10—we construe his brief as challenging the admission of the methamphetamine.

[¶ 15] First, Rengulbai argues that the third controlled buy took 20 minutes, and this gap creates a fatal break in the chain of custody. But testimony showed that law enforcement officers followed the confidential informant from the location of the third buy—Rengulbai's residence—to the location where the confidential informant handed over the methamphetamine and was searched. This alleged "gap" does not constitute a "risk of alteration, contamination, or adulteration," *see Gibbons*, 2022 Palau at ¶ 8, and does not render the evidence inadmissible.

[¶ 16] Second, Rengulbai argues that the fact that the evidence from the controlled buys was mailed to Guam for testing creates a gap in the chain of custody. But we have noted that even when evidence is mailed, "courts routinely hold that a chain of custody can be established by showing that a package was put into the mail and was received in a sealed condition by the laboratory." *Gibbons*, 2022 Palau at ¶ 9 n.1; *see e.g.*, *United States v. Cannon*, 88 F.3d 1495, 1503 (8th Cir. 1996) (rejecting argument that government failed to establish a chain of custody because it did not "show what happened to the cocaine base between the time it was mailed to a DEA laboratory for testing and the time when a DEA forensic chemist at the laboratory tested it"); *Gilliam v. State*, 383 N.E.2d 297, 300 (Ind. 1978); *State v. Sealey*, 254 S.E.2d 238, 240–

(as opposed to trafficking by possession with intent to distribute). To the extent this discussion in *Ngirailild* caused confusion, we reaffirm our decision in *Sungino* and clarify that the quantity of controlled substance is irrelevant to a charge for trafficking based on delivery.

41 (N.C. Ct. App. 1979). So too here. Nothing in the record shows any indication of tampering when the evidence was mailed from Palau to Guam, so the evidence was properly admitted.

II.

[¶ 17] Rengulbai next challenges the admissibility of evidence obtained during the search of his house. Before addressing the issues related to the search, however, we note that Rengulbai's brief does not make it clear exactly what evidence he is trying to suppress. For instance, he claims that officers seized certain items—including fish, lobsters, and coolers—but never asserts that those items were introduced as evidence at trial. *See* ROP R. App. P. 28(e) ("A party referring to evidence whose admissibility is in controversy must specifically identify the point at which the evidence was identified, offered, and received or rejected."). Similarly, he argues that officers searched certain areas—such as his car—that were outside the scope of the warrant, but does not discuss whether any evidence from these areas was introduced at trial.

[¶ 18] Even though it is not our duty "to scour the record for any facts to which the argument might apply," *Idid Clan v. Demei*, 17 ROP 221, 229 n.4 (2010), it appears that the only evidence from the search of Rengulbai's home that the Republic introduced at trial was cash. This evidence was certainly not central to the Republic's case—especially given the testimony of the officers and informants related to the controlled buys—so it may be that any error in admitting the cash was harmless. Nonetheless, we consider Rengulbai's arguments regarding the search and reject each in turn.

A.

[¶ 19] Rengulbai argues that the search warrant was overbroad. "[A] search warrant must be sufficiently particular and not overbroad." *U.S. v. McGrew*, 122 F 3d. 847, 849 (9th Cir. 1997) (citing *Andresen v. Maryland*, 427 U.S. 463, 480 (1976)). While it is clear that authorization to search for "evidence of *a* crime" is overbroad, a search warrant can satisfy the particularity requirement when it is, by its terms, limited to the evidence of a specific crime. *ROP v. Shao Wen Wen*, 9 ROP 279, 283–84 (Tr. Div. 2002) (collecting cases). Here, the search warrant was limited to "evidence related to drug possession and trafficking." This limitation to evidence of specific

crimes satisfies the particularity requirement.[3] *See United States v. Ladd*, 704 F.2d 134, 136 (4th Cir. 1983) ("The instant warrant fully satisfies the particularity requirement. The items to be seized were limited to those relating to 'the smuggling, packing, distribution and use of controlled substances.' More specificity is not required by the Constitution.").

B.

[¶ 20] Rengulbai also argues that the officers executing the search warrant violated the knock and announce rule. The knock and announce rule requires law enforcement officers executing a search warrant to "announce their presence and provide residents an opportunity to open the door." *Hudson v. Michigan*, 547 U.S. 586, 589 (2006). After holding a hearing on the motion to suppress that included testimony from several witnesses, including Rengulbai's wife and the officers executing the search, the Trial Division concluded that the "law enforcement officers announced their presence and the reason why they were at the house prior to any search." Order Denying Mot. to Suppress at 3. This factual determination is subject to clear error review, *United States v. Harvick*, 187 F. App'x 372 (5th Cir. 2006), and we find no clear error in the Trial Division's findings.

C.

[¶ 21] In his last challenge to the search of his home, Rengulbai points to a laundry list of internal regulations that he claims law enforcement violated in the course of the search and argues that these violations require exclusion of any evidence seized from his home. The United States Supreme Court, however, has rejected this argument, holding that an agency's violation of its own internal policies in the course of a criminal investigation does not require the exclusion of evidence unless the person's constitutional rights were otherwise violated. *See*, *e.g.*, *United States v. Caceres*, 440 U.S. 741, 754–55 (1979) (reversing suppression of evidence obtained in violation of IRS regulations). We agree. Rengulbai makes no independent argument why any of the alleged regulatory violations violated his constitutional rights, so even

[3] Besides claiming that the warrant is overbroad, Rengulbai argues that the warrant was not supported by probable cause. But Rengulbai never mentions the probable cause affidavit, does not cite any relevant case law, and fails to explain why probably cause was lacking. Thus, we deem this argument waived. *See Eller v. ROP*, 10 ROP 122, 131 n.10 (2003).

assuming officers violated the regulations, it would not require the suppression of evidence seized during the search of his home.

III.

[¶ 22] Rengulbai argues that the Republic provided certain evidence to him too late, requiring that evidence to be suppressed. ROP Rule of Criminal Procedure 12(d) requires the Republic to "give notice to the defendant of its intention to use specified evidence at trial" within 21 days of the defendant's first court appearance. While it appears to be undisputed that the Republic did not give this notice within 21 days, Rengulbai concedes that he eventually received all of the required evidence before trial. Rengulbai deems this a "11th hour" production, but he never moved to continue the trial after receiving the evidence and he makes no argument that the late production impaired his preparation for trial. We hold that the government's failure to comply with the deadline imposed by Rule 12(d) is, at most, harmless error.

IV.

[¶ 23] Rengulbai next argues that the statement he signed following the search of his home was inadmissible because it was coerced. While "[c]oerced or forced confessions shall not be admitted into evidence," ROP Const. art. IV, § 7, nothing in the record shows that Rengulbai's statement was "extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence," *Wong v. ROP*, 11 ROP 178, 183–84 (2004). Indeed, Rengulbai concedes that he signed the statement—which he alleges was prepared by NEA officers—without reading it out of "anger and frustration," not coercion. Rengulbai Aff. ¶ 44. We hold that the Trial Division did not err by admitting the statement.

V.

[¶ 24] Rengulbai argues that the mandatory minimum sentence of 25 years imprisonment and the mandatory minimum fine of $50,000 imposed for trafficking in methamphetamine under 34 PNC § 3301(b)(5) violates the Constitution. The Constitution prohibits "[t]orture, cruel, inhumane or degrading treatment or punishment, and excessive fines." ROP Const. art. IV, § 10. We have held that the 25-year minimum sentence for trafficking methamphetamine is not an unconstitutionally cruel or degrading punishment.

Silmai, 10 ROP at 141; *see also Eller v. ROP*, 10 ROP 122, 131 (2003) (holding that 25-year minimum sentence for importing methamphetamine, while "harsh," did not violate Constitution).[4] We have also held that the $50,000 minimum fine is not unconstitutionally excessive given the legislature's determination that trafficking methamphetamine is a "grave offense." *Silmai*, 10 ROP at 142. Rengulbai provides no reason to depart from our precedent here, and we hold that his sentence does not violate the Constitution.

VI.

[¶ 25] Finally, Rengulbai argues that being convicted of both possessing and trafficking methamphetamine with respect to specific sales of methamphetamine violates the double jeopardy clause. The Constitution states that "[n]o personal shall be placed in double jeopardy for the same offense." ROP Const. art. IV, § 6. The double jeopardy clause prohibits (1) a second prosecution for the same offense; and (2) multiple punishments for the same offense at a single trial. *Gideon v. ROP*, 20 ROP 153, 163 (2013). Because Rengulbai was only subjected to a single trial, we must consider whether he was punished more than once for the same offense.

[¶ 26] We first consider whether the Trial Division imposed "punishments" for both possession and trafficking with respect to each controlled buy. At oral argument, the Republic argued that double jeopardy did not apply because Rengulbai was only sentenced for trafficking, not possession. The Trial Division's sentencing order is somewhat unclear—after noting that Rengulbai was convicted of two counts of trafficking and two counts of possession, the court then focused its analysis on the 25-year mandatory minimum sentence for trafficking. The Trial Division's sentence could be interpreted as either a "general sentence"—a single sentence imposed for a defendant convicted of several counts, *see* 3 Wright & Miller, *Federal Practice and Procedure* § 551 (describing general sentences as "permissible" but "unsatisfactory")—or as imposing a sentence only for trafficking and no sentence for possession.

[4] As we noted in *Eller*, a defendant convicted of trafficking methamphetamine is eligible for parole after serving one-third of the 25-year sentence, 18 PNC § 1209, and the "availability of parole is an appropriate consideration when assessing the severity of a sentence," 10 ROP at 131 n.9.

[¶ 27] Under either interpretation, however, it is clear that the Trial Division did not vacate the convictions for possession. And, as the United States Supreme Court has noted, punishment for double jeopardy purposes "must be the equivalent of a criminal conviction and not simply the imposition of sentence." *Ball v. United States*, 470 U.S. 856, 861 (1985). After all, a conviction itself—regardless of the sentence imposed for that conviction—"has potential adverse collateral consequences." *Id.* at 865. For instance, a conviction may impact a defendant's eligibility for parole. *Id.*; *see* 18 PNC § 1211(a)(2) (noting that parole board should consider defendant's "prior criminal record"). Additionally, a conviction may be "used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction." *Ball*, 470 U.S. at 865. Thus, we hold that even if a conviction results in no greater sentence—like Rengulbai's possession convictions here—a conviction itself is still an "impermissible punishment" for double jeopardy purposes. *Id.*

[¶ 28] Next, we consider whether possession of methamphetamine is the "same offense" as trafficking methamphetamine by delivery. "Offenses are the 'same' where the same act or transaction gives rise to a violation of two distinct statutory provisions, unless each statutory provision requires proof of a fact which the other does not." *Gideon*, 20 ROP at 164 (explaining that we have adopted the test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932)). Courts in the United States have split on the issue of whether possession is a lesser-included offense of distribution (a crime comparable to trafficking by delivery).

[¶ 29] Several courts have held that possession and distribution are the same offense for double jeopardy purposes. In *Anderson v. State*, 867 A.2d 1040 (Md. 2005), Maryland law made it unlawful both "to possess" and "to distribute" (defined as "to deliver") controlled substances. *Id.* at 1045. The Maryland Court of Appeals—the state's highest court—held that "[i]t is not possible, under these statutes, to 'distribute' a controlled dangerous substance … unless the distributor has actual or constructive possession … of the substance." *Id.* As a result, the court held that "possession of the substance distributed is necessarily an element of the distribution" and so "possession and distribution are the 'same' offenses for double jeopardy purposes." *Id*; *see also State v. Johnson*, 627 N.W.2d 753, 760 (Neb. 2001) ("[O]ne cannot

commit the offense of distribution of a controlled substance without simultaneously committing the offense of possession of a controlled substance."); *Austin v. Commonwealth*, 531 S.E.2d 637, 639 (Va. App. 2000) ("[T]he offense of possessing a controlled substance … is a lesser-included offense of distribution of a controlled substance.").

[¶ 30] The result reached by these courts appears to be supported by the United States Supreme Court's discussion in *Ball*. There, the defendant was convicted of "unlawful receipt" and "unlawful possession" of a firearm. *Ball*, 470 U.S. at 859. The court held that a defendant could not be punished for both crimes under the double jeopardy clause because "proof of illegal receipt of a firearm *necessarily* includes proof of illegal possession of that weapon." *Id.* at 862 (emphasis in original). In other words, "when received, a firearm is necessarily possessed." *Id.* (cleaned up). Applying that analysis here, it would seem that delivery is simply the flip side of the same coin—when it is delivered, a controlled substance is necessarily possessed.

[¶ 31] Several courts, however, have reached the opposite conclusion—that possession is not a lesser-included offense of distribution. *See*, *e.g.*, *United States v. Colon*, 268 F.3d 367, 377 (6th Cir. 2001); *United States v. Jackson*, 213 F.3d 1269, 1296–97 (10th Cir.), *vacated on other grounds*, 531 U.S. 1033 (2000). While noting that it would be "unusual for a person to distribute a controlled substance without at least momentarily possessing the controlled substance," *Jackson*, 213 F.3d at 1297, these courts have held that the crime of distribution may include "other acts perpetrated in furtherance of a transfer or sale, such as arranging or supervising the delivery, or negotiating for or receiving the purchase price," that do not require possession, *Colon*, 268 F.3d at 377.

[¶ 32] One court has taken a third approach. The Second Circuit has held that "generally possession with intent and distribution should not be regarded as the 'same offense,' nor is possession with intent always to be deemed a lesser included offense of distribution." *United States v. Gore*, 154 F.3d 34, 46 (2d Cir. 1998). But the court carved out an exception to that general rule—"where the evidence shows only that the defendant handed over a packet of drugs." *Id.* In that scenario, convictions for possession and distribution fail the *Blockburger* test "because no longer does each offense require proof of a fact

that the other does not." *Id.* In other words, where a defendant is "convicted of separate counts of possession … and distribution based on a single sale of [a controlled substance]," "possession … merges into distribution." *Id.* at 47. This approach conforms with our decision *ROP v. Ngiraboi*, 2 ROP Intrm. 257, 270 (1991), where we held that even though it was conceivable that a defendant could use a firearm without ammunition (and vice versa), the defendant's convictions for use of a firearm and use of ammunition should have merged where the "identical criminal act"—there, firing a loaded gun—"constitutes both offenses." *Id.*

[¶ 33] We need not determine whether possession and distribution are *always* the same offense for double jeopardy purposes. Here, Rengulbai was, based on both the first and third controlled buys, convicted of separate counts of possession and distribution "based on a single sale." *Gore*, 154 F.3d at 47. Because the "identical criminal act" was the basis for both convictions, the possession and trafficking convictions related to the first controlled buy and the possession and trafficking convictions related to the first controlled buy constitute the same offense for double jeopardy purposes under the facts of this case. In other words, for each controlled buy, Rengulbai could only be convicted of either possession *or* trafficking.

[¶ 34] The question of remedy remains. "The proper remedy for convictions on both greater and lesser included offenses is to vacate the conviction and the sentence of the lesser included offense." *United States v. Boyd,* 131 F.3d 951, 954–55 (11th Cir. 1997); *see also Remengesau v. ROP*, 18 ROP 113, 123 n.11 (2011) (vacating convictions); *Scott v. ROP*, 10 ROP 92, 97 (2003) (same). Because the possession convictions in this case are lesser-included offenses of the trafficking offenses, we vacate Rengulbai's possession convictions (Counts 4 and 6). While remanding for resentencing would often be appropriate, *see Boyd*, 131 F.3d at 955, the Trial Division imposed the mandatory minimum sentence for trafficking. Because "the Trial Division's ultimate conclusion and penalty would remain unchanged," *Remengesau*, 18 ROP at 123 n.11, we do not remand for resentencing and instead affirm the sentence imposed by the Trial Division.

CONCLUSION

[¶ 35] While we reject most of Rengulbai's challenges to his convictions, we hold that Rengulbai's convictions for both possessing and trafficking methamphetamine violate the double jeopardy clause. Thus, we **AFFIRM** the convictions for trafficking (Counts 1 and 3) and the sentence imposed by the Trial Division and **VACATE** the convictions for possession (Counts 4 and 6).

BENNARDO, Associate Justice, concurring:

[¶ 1] I join the majority opinion, but briefly write separately to note my reservations about the constitutionality of the 25-year mandatory minimum prison sentence for trafficking in any amount of methamphetamine set forth in 34 PNC § 3301(b)(5). For me, only the availability of parole after serving one-third of sentence pursuant to 18 PNC § 1209(a) salvaged the constitutionality of the mandatory minimum sentence as applied to Rengulbai in this case. Were we presented with a situation in which parole was not statutorily available or with a particularly sympathetic set of facts, the reasoning of *Eller v. ROP*, 10 ROP 122 (App. Div. 2003) would no longer govern and such a harsh penalty could violate Article IV, Section 10 of the Constitution.