Supreme Court No. 93275-1
(COA No. 73191-2-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES O'CAIN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

NANCY P. COLLINS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER 1

B. COURT OF APPEALS DECISION 1

C. ISSUES PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 2

E. ARGUMENT 5

1. The multiple convictions for the same offense, as defined by the jury's verdict, constitutes a single unit of prosecution for purposes of double jeopardy 5

2. Mr. O'Cain was prevented from contesting the search warrant used by the State because the State refused to reveal the basis of its investigation 9

F. CONCLUSION 15

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004) 5

State v Jones, 168 Wn.2d 713, 230 P.3d 576 (2010) 14

State v. Adel, 136 Wn.2d 607, 40 P.3d 669 (2002) 5

State v. Casal, 103 Wn.2d 812, 699 P.2d 1234 (1985) 10, 11, 13, 14

State v. Chenoweth, 160 Wn.2d 454, 473, 158 P.3d 595 (2007) 10

State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002) 13

State v. France, 180 Wn.2d 809, 329 P.3d 864 (2014) 6

State v. Garrison, 118 Wn.2d 870, 827 P.2d 1388 (1992) 10

State v. Mills, 154 Wn.2d 1, 109 P.3d 415 (2005) 6

State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) 9

State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010) ... 6, 8, 9

State v. Womac, 160 Wn.2d 643,160 P.3d 40 (2007) 5

United States Supreme Court Decisions

Blockberger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) 5

California v. Green, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970) 14

Franks v. Delaware, 438 U.S. 154, 155-56, 98 S.Ct 2674, 57 L.Ed.2d 667 (1978) 10

Kyllo v. United States, 533 U.S. 27, 40, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001) 9

Federal Court Decisions

United States v. Brian, 507 F.Supp. 761 (D.R.I.1981) 11

United States Constitution

Fifth Amendment 5, 6

Fourth Amendment 9

Fourteenth Amendment 9, 10

Sixth Amendment 14

Washington Constitution

Article I, § 3 9

Article I, § 7 9

Article I, § 9 ..... 5, 6

Article I, § 21 6

Article I, § 22 6

Court Rules

CrR 4.7 14

RAP 13.3(a)(1) 1

RAP 13.4(b) 1, 15

A. IDENTITY OF PETITIONER

James O'Cain, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. O'Cain seeks review of the Court of Appeals decision dated April 18, 2016. A copy is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. The double jeopardy clauses of the state and federal constitutions prohibit a person from being punished multiple times for a single unit of prosecution. Here, the jury found Mr. O'Cain guilty of multiple counts of possession of a controlled substance with intent to deliver at the same time and place. The Court of Appeals ruled that multiple punishments are permitted when the underlying allegations involved different controlled substances, even when the jury was not asked to decide whether the possession involved different substances. Where the jury was only asked to find the accused person possessed a "controlled substance," does it violate double jeopardy to impose multiple punishments for a single act of possession?

2. When the State uses a confidential informant's allegations to obtain a search warrant and refuses to disclose the informant's identity or other aspects of the investigation, the defense may request that the court conduct a hearing, including in camera review, if there are grounds to doubt the veracity and accuracy of claims material to the search warrant. Should this Court review whether the State's refusal to reveal any information about the investigation to the defense and the court's refusal to conduct any in camera review, deny him his ability to contest an intrusion of his privacy rights under the Fourth Amendment and article I, section 7, as well as the right to due process of law?

D. STATEMENT OF THE CASE

Police arrested James O'Cain as he walked into his home on October 14, 2013. 3RP 250-51.[1] In his coat pocket, the police found several small rocks of crack cocaine, small bindles of heroin, and three small plastic baggies of methamphetamine. 3RP 255, 259, 262; 4RP 426, 427, 430. Armed with a search warrant and a drug-sniffing trained dog, the police found an additional supply of cocaine, heroin, and

[1] The verbatim report of proceedings consists of five volumes of consecutively paginated transcripts.

methamphetamine together in a closet cabinet. 3RP 376-77, 384-86, 390-92; 4RP 431-35.

The prosecution charged Mr. O'Cain with six counts of possession of a controlled substance with the intent to deliver. CP 9-10.

Mr. O'Cain attempted to investigate the allegations used to obtain the search warrant, but the detective who prepared the warrant refused to disclose any information. CP 12; 1RP 6. The detective said a secret, paid informant had purchased drugs from Mr. O'Cain but would not disclose this paid informer's identity, the dates the unnamed informer claimed to have bought drugs from Mr. O'Cain, or give further details about the alleged drug sales that formed the basis of the warrant, claiming the need to keep the informant's identity secret. CP 12-13, 108-117; 1RP 22, 27, 31. In response, Mr. O'Cain filed a motion for the court to conduct an ex parte review of the information used to obtain the search warrant or otherwise require the State to disclose this information to the defense. CP 14-16. Mr. O'Cain alleged there was evidence of inconsistencies and a basis to suspect falsehoods in the search warrant application sufficient to justify further inquiry by the court into the factual basis of the warrant. CP 11-93. The court refused to conduct any ex parte review and rejected Mr. O'Cain's request for

further discovery about the identity of the paid informant or the details of the police investigation. CP 94-95; 1RP 30; 2RP 83.

Mr. O'Cain was convicted after a jury trial of six counts of possession of a controlled substance with the intent to deliver. CP 163-68. The prosecution agreed that the six counts constituted the same criminal conduct. CP 176.

On appeal, the Court of Appeals agreed with Mr. O'Cain that the duplicative counts of possession of a controlled substance relating to his possession of the same substance at the same time constituted a single unit of prosecution for purposes of double jeopardy. Slip op. at 10. It ordered three of the convictions vacated. *Id.* But it rejected his argument that by only asking the jury to determine whether Mr. O'Cain possessed a "controlled substance," the jury verdict only supported a single unit of prosecution. Slip op. at 11.

The Court of Appeals also ruled that Mr. O'Cain was not entitled to information about the confidential informant whose allegations were used to investigate Mr. O'Cain and obtain a search warrant.

E. ARGUMENT

1. The multiple convictions for the same offense, as defined by the jury's verdict, constitutes a single unit of prosecution for purposes of double jeopardy.

The double jeopardy clauses of the state and federal constitutions protect against multiple punishments for the same offense. *Blockberger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); *In re Personal Restraint of Orange*, 152 Wn.2d 795, 816, 100 P.3d 291 (2004); U.S. Const. amend. 5; Const. art. I, § 9.[2] "Double jeopardy concerns arise in the presence of multiple convictions, regardless of whether resulting sentences are imposed consecutively or concurrently." *State v. Womac*, 160 Wn.2d 643, 657, 160 P.3d 40 (2007).

When a person is charged with violating the same statutory provision a number of times, multiple convictions violate double jeopardy unless each conviction is predicated on a separate "unit of prosecution." *State v. Adel*, 136 Wn.2d 629, 634-35, 965 P.3d 1072 (2002). The prosecution may not divide conduct that constitutes a

single unit of prosecution into multiple charges for which it seeks separate punishment. *Id.*

When assessing what offense the jury considered, the reviewing court must also review the jury instructions. The to-convict instruction "serves as a yardstick" defining the essential elements that the jury must find in order to convict the accused person. *State v. France*, 180 Wn.2d 809, 815, 329 P.3d 864 (2014). It sets forth the elements that underlie a jury's verdict as a matter of common law and due process. *State v. Mills*, 154 Wn.2d 1, 6-7, 109 P.3d 415 (2005).

In addition, the state constitution strongly protects the right to a trial by jury and unanimous verdict under article I, sections 21 and 22. *State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.3d 913 (2010). A sentencing judge must take the jury's finding at face value based on manner that the instructions ask the jury to find essential facts. *Id.* at 897-99.

Mr. O'Cain was charged with six counts of possession with intent to deliver a controlled substance. CP 9-10. The jury received

---

[2] The double jeopardy clause of the federal constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense, and the Washington Constitution provides that no individual shall "be twice put in jeopardy for the same offense." U.S. Const. amend. 5; Const. art. I, § 9.

nearly identical to-convict instructions for each count. CP 148-53. For example, for count 1, the jury was asked to decide, in pertinent part, whether the prosecution proved beyond a reasonable doubt:

> (1) That on or about October 14, 2013, the defendant possessed a controlled substance, separate and distinct from *conduct* in Counts 2, 3, 4, 5, and 6;
> (2) That the defendant possessed the substance with the intent to deliver a controlled substance.
>
> CP 148 (Instruction 16) (emphasis added).

None of the to-convict instructions named the controlled substance at issue. CP 148-53. None of the court's instructions informed the jury that the difference between the six counts was the identity of the substance allegedly possessed. Instead, the instructions asked the jury to find that Mr. O'Cain engaged in "separate and distinct" "conduct" for each count. *Id.*

There was no evidence that Mr. O'Cain had distinct plans to use or dispose of the substances he simultaneously possessed. He was inside his apartment when the police stopped him and had some narcotics in his pocket and more of the same in his closet, along with materials used to package the drugs into smaller portions. 3RP 252, 349, 361-63, 374-86. The State conceded that all six counts constituted the same criminal conduct, demonstrating that Mr. O'Cain had the same

intent to deliver the substances. CP 176. He possessed the substances together, at the same time and place

The jury instructions did not ask the jurors to find that Mr. O'Cain possessed separate substances, only that he possessed a substance with the intent to deliver and "the conduct" was separate and distinct from the other counts. CP 148-53. The jury's verdict does not reflect unanimous findings of separate controlled substances because it was not asked to determine that the prosecution proved different types of substances were the basis of each count. *Id.*

In his closing argument, the prosecutor explained what substance it viewed as correlating with which count. 4RP 500. But the prosecutor's argument is not the law and does not alter the questions before the jury in the instructions. *See Williams-Walker*, 167 Wn.2d at 897-98. The jury instructions asked the jury to determine whether Mr. O'Cain engaged in the conduct of possessing a controlled substance, which constitutes a single unit of prosecution. *See* CP 148.

The Court of Appeals reasoned that Mr. O'Cain was convicted of possessing different drugs, which made the convictions "different in law." Slip op. at 7. But the jury was not asked to make this

determination and the jury's verdict controls the legal elements proven by the prosecution. *Williams-Walker*, 167 Wn.2d at 897-98.

This Court should grant review because the double jeopardy issues, and the importance of the jury's verdict in defining the elements found by the jury, are critical matters of constitutional significance that merit resolution.

2. Mr. O'Cain was prevented from contesting the search warrant used by the State because the State refused to reveal the basis of its investigation.

The Fourth and Fourteenth Amendments of the United States Constitution and Article I, §§ 3 and 7 of the Washington Constitution protect citizens from unreasonable searches and seizures and provide that a search warrant may only be issued upon a showing of probable cause. *Kyllo v. United States*, 533 U.S. 27, 40, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001); *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999); U.S. Const. amends. 4[3] & 14; Wash. Const. Art. I, §§ 3,[4] 7.[5]

---

[3] The Fourth Amendment provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

When a police officer uses intentional or reckless perjury to secure a warrant, "a constitutional violation obviously occurs" because "the oath requirement implicitly guarantees that probable cause rests on an affiant's good faith." *State v. Chenoweth*, 160 Wn.2d 454, 473, 158 P.3d 595 (2007), citing *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S.Ct 2674, 57 L.Ed.2d 667 (1978).

An accused person challenges the validity of a warrant by showing that the warrant affiant made intentional falsehoods or omitted material facts with reckless disregard for the truth. *Franks*, 438 U.S. at 155-56. The defendant's showing must be based on specific facts and offers of proof. *State v. Garrison*, 118 Wn.2d 870, 827 P.2d 1388 (1992).

But an accused person is unable to challenge the accuracy, truthfulness, and reliability of a search warrant if the State refuses to give him access to the information the State used to secure the warrant. *State v. Casal*, 103 Wn.2d 812, 818, 699 P.2d 1234 (1985). The accused cannot investigate and interview the accuser if that person's

---

[4] The Fourteenth Amendment and Article 1, § 3 guarantee due process of law.

identity is kept secret and he therefore "lacks access to the information necessary" to challenge a search warrant. *Id.* The State's authority to maintain the secrecy of an informant's identity must yield to the defendant's right to investigate the allegations against him in certain circumstances. *Id.* at 816. The trial judge has discretion to decide whether the defendant's interest in disclosure outweighs the State's interest in not disclosing information to the defense. *Id.*

In *Casal*, the court endorsed "a simple solution" for a defendant faced with a secret informer. *Id.* at 818. The court may hold an in camera, ex parte hearing. *Id.* If the defendant makes "some minimal showing of inconsistency" in the government's material that supports their assertion of deliberate falsehood or reckless disregard for the truth, the court should conduct further review of the information relied upon in the search warrant. *Id.* at 819, citing *United States v. Brian,* 507 F.Supp. 761, 766 (D.R.I.1981).

Mr. O'Cain was unable to investigate the allegations used to obtain the search warrant because the State refused to disclose any underlying information. 1RP 22. The detective whose observations and

---

[5] Article 1, § 7 of the Washington Constitution states, "No person shall be disturbed in his private affairs, or his home invaded, without authority of

investigation form the sole basis for the search warrant application would not answer Mr. O'Cain's questions or provide any information about the background of the investigation. CP 12; 1RP 22, 27, 31. The detective claimed Mr. O'Cain sold drugs to a paid informant but would not even reveal the dates of the alleged conduct or describe the car Mr. O'Cain allegedly drove to the drug sale. CP 12; 1RP 31-33; 2RP 83. This lack of information left O'Cain unable to investigate the veracity of the informant or show inaccuracies in the search warrant affidavit that undercut the allegations. 1RP 22, 31.

At best, Mr. O'Cain could show that the car the detective alleged he drove during some of the conduct at issue was in the repair shop at the time and could not have been used as the detective claimed. 1RP 31; 2RP 83; CP 119-24. In addition, although the detective's search warrant application set forth his experience to bolster the reliability of his investigation, the detective did not tell the issuing magistrate that he had been disciplined by the police department for lying in the past and for making racist comments when arresting an African-American person. CP 12-13, 108-09. Mr. O'Cain is African-American. CP 13.

---

law."

Mr. O'Cain argued that he had a basis to cast doubt on the veracity of the allegations and could show some material inconsistencies or inaccuracies in the search warrant. He was prevented from preparing a defense and gathering any further information necessary to challenge the search warrant. CP 14-16; 1RP 6-11, 22, 31-33. Citing *Casal*, he asked the court to hold a hearing, review the evidence ex parte, or require disclosure of the details of the investigation, including the informant's identity. CP 14-16, 1RP 7-11, 27, 30; 2RP 85. The court refused, ruling that Mr. O'Cain had not met his burden of showing there were material inconsistencies in the search warrant application. 1RP 30; 2RP 85.

The State must justify preventing the defendant from challenging the criminal charges by independently verifying the officer's observations. *State v. Darden*, 145 Wn.2d 612, 625-26, 41 P.3d 1189 (2002). For this reason, the State cannot build a case based on an officer's observations yet refuse to reveal the location of the officer who made the observations. *Id.* If the State wants to maintain confidentiality of an investigation, it can choose not to rely on this confidential information in its case. *Id.*

Likewise, an accused person has a constitutional right to cross-examine witnesses and receives extra latitude when testing the credibility of essential state's witnesses. *California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970); *State v Jones*, 168 Wn.2d 713, 721, 230 P.3d 576 (2010). Even if a rule of evidence limits an avenue of questioning, that rule must be construed in light of the overarching right to present a defense and "it cannot be used to bar evidence of extremely high probative value per the Sixth Amendment." *Jones*, 168 Wn.2d at 723. Discovery rules permit wide latitude to be apprised of matters reasonably calculated to lead to admissible evidence. CrR 4.7(a)(3).

These fundamental rules and principles demonstrate the court's error in refusing to review, even ex parte, the underlying the allegations used to obtain a search warrant. CP 94-95; 1/12/15RP 85. Mr. O'Cain cast doubt on the claim that each drug sale could have occurred as the search warrant alleged and that also showed the detective failed to disclose information affecting his credibility. CP 12-13, 119-24.

Mr. O'Cain was entitled to at least an in camera hearing. *Casal*, 103 Wn.2d at 822-23. This Court should grant review to address this issue and clarify the oblgations of an accused person who cannot mount

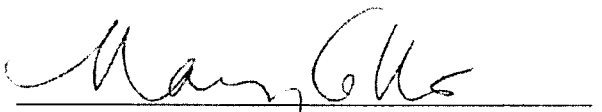
a challenge to the legality of an intrusion into a private affair due to the State's refusal to provide critical information. Mr. O'Cain should be given the opportunity to have the court review the necessary information and disclose the secret discovery so that he may contest the legality of the search. *Id.*

F. CONCLUSION

Based on the foregoing, Petitioner James O'Cain respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 18th day of May 2016.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JAMES MASTER OCAIN, Appellant.	)	No. 73191-2-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: April 18, 2016

BECKER, J. — James O'Cain[1] was convicted of six counts of possession of a controlled substance with intent to deliver. Two of the convictions were for cocaine, two for methamphetamine, and two for heroin. Double jeopardy was not violated when O'Cain's convictions were for possessing three different drugs with the intent to deliver because the convictions were different in law and in fact. Double jeopardy was violated when O'Cain was convicted twice for possessing the same drugs with the intent to deliver. Such convictions constitute one unit of prosecution where there were not two distinct intents to deliver. We remand.

[1] In the amended information, the name of the defendant James Master O'Cain was misspelled as James Master Ocain. The proper spelling of his name will be used in the opinion with the exception of the caption, which has not been changed.

FACTS

On October 7, 2013, the King County Sheriff's Office obtained a warrant to search appellant James O'Cain's person, apartment, and two cars. One week later, on October 14, 2013, a team of detectives and a supervising sergeant went to O'Cain's apartment to execute the search warrant.

The detectives searched O'Cain's person. In his jacket pocket, they found, among other items, a plastic sandwich bag containing small rocks of crack cocaine, three small dime bags of methamphetamine imprinted with golden skulls on a black background, 0.3 grams each, and a baggie containing about 16 individually-packaged portions of heroin, 0.14 grams each.

The detectives also searched O'Cain's apartment. In the master bedroom closet, detectives found a locked file cabinet. Inside the file cabinet was a locked safe. Inside the locked safe, detectives found, among other items, a 66.3-gram brick of powder cocaine, a pill container holding a single baggie of 28 grams of methamphetamine, and a 27-gram lump of heroin. The safe also contained two small digital scales and more golden-skull-imprinted baggies.

O'Cain was charged by amended information with six counts of possession of a controlled substance with intent to deliver. Two of these counts charged cocaine, two charged methamphetamine, and two charged heroin, corresponding to the drugs found in O'Cain's jacket pocket and in the locked safe. A jury found O'Cain guilty as charged. O'Cain appeals.

CHALLENGE TO SEARCH WARRANT

In the detective's affidavit supporting probable cause for the warrant, the detective reported that O'Cain sold drugs to a confidential informant on four separate occasions. Before trial, O'Cain sought to challenge the search warrant. The detective refused to reveal the identity of the confidential informant or any further details regarding O'Cain's alleged drug sales to the informant. O'Cain moved the trial court for an in camera hearing to determine whether there was probable cause to search his person and apartment, pursuant to State v. Casal, 103 Wn.2d 812, 818, 699 P.2d 1234 (1985). The trial court denied his request, stating that the basis for his request was speculative and that he had not demonstrated any inconsistency or the required materiality. O'Cain assigns error to the trial court's refusal to conduct an in camera hearing.

There is a presumption of validity with respect to the affidavit supporting a search warrant. Franks v. Delaware, 438 U.S. 154, 171, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Before the defendant will be allowed a hearing to challenge the warrant, he must make a substantial preliminary showing that the affiant knowingly and intentionally, or with reckless disregard for the truth, included a false statement in the warrant affidavit. Franks, 438 U.S. at 155-56. When a defendant is faced with a confidential informant, however, he "lacks access to the very information that Franks requires for a threshold showing of falsity." Casal, 103 Wn.2d at 818.

An in camera hearing under Casal can solve this problem. A trial court should exercise its discretion to conduct an in camera examination of the affiant

or confidential informant where a defendant presents information which (1) casts a reasonable doubt on the veracity of material representations made by a search warrant affiant and (2) the challenged statements are the sole basis for probable cause to issue the search warrant. Casal, 103 Wn.2d at 813.

As to the first prong, O'Cain argues that he has met the Casal threshold by submitting repair shop invoices showing that the car the detective said O'Cain was driving was in the repair shop during some of the time period at issue. But the type of car driven by O'Cain was immaterial to the issue of probable cause to search O'Cain's person and apartment, where all the drugs in question were found. No drugs were found in O'Cain's cars. Even if the type of car were material, the repair shop invoices presented by O'Cain do not cast a reasonable doubt on the veracity of the detective's representations regarding these cars. The detective wrote in his affidavit that "within the last week" he saw O'Cain driving his Cadillac at a drug sale to a confidential informant and also saw this same Cadillac parked behind O'Cain's apartment building. The detective's affidavit was dated October 7, 2013, so "within the last week" would be approximately September 30 to October 6, 2013. The repair shop invoices submitted by O'Cain show that this Cadillac was in the shop on the morning of October 1, 2013, and from October 4 through 11, 2013. This leaves several days, including September 30, part of October 1, and October 2 and 3, that the detective could have seen the Cadillac as he alleges. The detective's affidavit, on its face, is not inconsistent with the repair shop invoices submitted by O'Cain.

O'Cain has not cast a reasonable doubt on the veracity of the detective's representations regarding these cars.

O'Cain also argues that he met the Casal threshold by submitting internal investigation documents from the King County Sheriff's Office. The documents showed that the affiant detective had been disciplined in the past for giving a false report regarding his personal vehicle being stolen from his house, and that he had once been reprimanded for referring to a juvenile as "'monkey butt'" or "'monkey boy.'" O'Cain argues that the affiant detective should have disclosed this past disciplinary history in his affidavit. He cites no authority requiring such disclosure. Both of these incidents occurred over 15 years ago. They are unrelated to the information in the search warrant. O'Cain has not specified how the detective's past discipline casts a reasonable doubt on any specific material representation that the detective made in the affidavit.

As to the second prong of the Casal test, the statements challenged by O'Cain are not the sole basis for probable cause to issue the search warrant. The detective's affidavit details how he and other detectives observed O'Cain selling drugs to a confidential informant on four separate occasions. These drug sales, rather than the type of car driven by O'Cain, were the basis for probable cause to issue the search warrant.

DOUBLE JEOPARDY

On appeal, O'Cain makes two double jeopardy arguments. He first argues that all six of his convictions for possession of a controlled substance with intent to deliver constitute a single "unit of prosecution" based on the to-convict

jury instructions. Alternatively, he argues it is a double jeopardy violation to convict him twice for possessing the same drug at the same time and place. Whether a criminal defendant is placed in double jeopardy in a particular circumstance is a question of law that we review de novo. State v. Womac, 160 Wn.2d 643, 649, 160 P.3d 40 (2007).

The double jeopardy clause of the Fifth Amendment and article I, section 9 of the Washington Constitution protect defendants against multiple punishments for the same offense. To determine if a defendant has been punished multiple times for the same offense, the Washington Supreme Court has traditionally applied the "same evidence" test. State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). The same evidence test mirrors the federal "same elements" standard adopted in Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Under the same evidence test, double jeopardy is violated if a defendant is convicted of offenses which are the same in law and in fact. Calle, 125 Wn.2d at 777-78. If each offense, as charged, includes elements not included in the other, or requires proof of a fact that the other does not, the offenses are different and multiple convictions can stand. State v. Adel, 136 Wn.2d 629, 633, 965 P.2d 1072 (1998). The same evidence test applies only to a situation where a defendant has multiple convictions for violating distinct or separate statutory provisions. Adel, 136 Wn.2d at 633.

In contrast, where the defendant is convicted of violating one statute multiple times, the "unit of prosecution" test applies. Adel, 136 Wn.2d at 633.

The proper inquiry is what unit of prosecution the legislature has intended as the punishable act under the specific criminal statute. Adel, 136 Wn.2d at 634.

To determine if double jeopardy was violated when O'Cain was convicted of possession with intent to deliver *different* drugs, we apply the same evidence test. See, e.g., State v. O'Neal, 126 Wn. App. 395, 415-17, 109 P.3d 429 (2005) (holding same evidence test applies where defendant was charged with manufacturing two different drugs), aff'd, 159 Wn.2d 500, 150 P.3d 1121 (2007). O'Cain was charged with, and convicted of, unlawful possession with intent to deliver three different drugs: cocaine, heroin, and methamphetamine. O'Cain's convictions for possessing with intent to deliver the three different drugs were different in fact because each required proof of the specific type of drug. The same convictions were also different in law because he was charged with separate violations of the criminal drug statutes. He was charged with possession with intent to deliver methamphetamine in violation of RCW 69.50.401(2)(b). He was charged with possession with intent to deliver cocaine and heroin in violation of RCW 69.50.401(2)(a), which covers controlled substances classified in Schedules I and II. Heroin is defined as a controlled substance in Schedule I, RCW 69.50.204(b)(11). Cocaine is defined as a controlled substance in Schedule II, RCW 69.50.206(b)(4). Thus, the convictions were different in law. Because O'Cain's convictions for possession with intent to deliver cocaine, methamphetamine, and heroin were different in fact and law, double jeopardy was not violated when his convictions were for different drugs.

To determine if double jeopardy was violated when O'Cain was convicted of two counts each of possession with intent to deliver the *same* three drugs, we apply the "unit of prosecution" test. See, e.g., Adel, 136 Wn.2d at 634. In Adel, the Washington Supreme Court illustrated the unit of prosecution test by discussing two cases where defendants were charged with two counts of possession with intent to deliver the same drug: State v. McFadden, 63 Wn. App. 441, 820 P.2d 53 (1991), review denied, 119 Wn.2d 1002 (1992), and State v. Lopez, 79 Wn. App. 755, 904 P.2d 1179 (1995).

In McFadden, the defendant went to an apartment to sell cocaine to an informant. Adel, 136 Wn.2d at 637-38. Police raided the apartment and caught McFadden with 5.5 grams of cocaine. Adel, 136 Wn.2d at 638. Police then searched the van McFadden had driven to the apartment and discovered another 83.9 grams of cocaine. Adel, 136 Wn.2d at 638. He was charged and convicted of two counts of possession with intent to deliver. Adel, 136 Wn.2d at 638. The Washington Supreme Court said that two units of prosecution were satisfied. The first unit of prosecution was satisfied by McFadden's possession of drugs in the apartment, which he intended to sell to the people in the apartment. Adel, 136 Wn.2d at 638. The second unit of prosecution was satisfied by McFadden's possession of the drugs in the van with the "obvious intent to deliver them to unknown buyers in the future." Adel, 136 Wn.2d at 638. "The two crimes were premised on the showing that McFadden had two *separate and distinct* intents to deliver drugs in his possession—one intent to sell in the present to the occupants

of the apartment and one intent to sell drugs in the future." Adel, 136 Wn.2d at 638.

Adel then contrasted the facts of Lopez. Lopez was arrested in a car during a controlled drug buy with an informant. Adel, 136 Wn.2d at 638. Officers found the cocaine Lopez had just purchased from the informant on the floorboard of the car. They also found cocaine, unrelated to the present deal, on Lopez's person. Adel, 136 Wn.2d at 638-39. "The cocaine on his person was packaged in 14 bindles and appeared to be intended for distribution." Adel, 136 Wn.2d at 639. Lopez was charged with two counts of possession with intent to deliver, one count based on the cocaine he had just purchased from the informant and the other count based on the separate cocaine found on his person. Adel, 136 Wn.2d at 639. Adel held that there was just one unit of prosecution. "Lopez may have had two distinct quantities of cocaine under his dominion and control, and evidence showed the two quantities came from separate sources, but none of that evidence was relevant to the unit of prosecution with intent to deliver. The evidence failed to establish more than one intent to deliver the drugs in the future—there were not two distinct intents to deliver, as there were in McFadden." Adel, 136 Wn.2d at 639.

Implicit in Adel's discussion of Lopez and McFadden is the recognition that conduct demonstrating a "separate and distinct" intent to deliver forms the unit of prosecution for the possession with intent to deliver statute. See also In re Pers. Restraint of Davis, 142 Wn.2d 165, 175, 12 P.3d 603 (2000) (analyzing a charge of possession with intent to manufacture under the same statute and concluding

that a "separate and distinct" intent to manufacture drugs forms the unit of prosecution). The issue is thus whether O'Cain had a "separate and distinct" intent to deliver the same drugs when they were found on his person versus in the locked safe.

The State argues that the evidence in O'Cain's case is quite similar to McFadden and was sufficient for the jury to conclude that O'Cain had separate and distinct temporal intents to deliver—present and future—for the drugs found on his person versus in the safe. We disagree. In contrast to McFadden, O'Cain was not in the middle of a drug delivery when he was searched and arrested. He was at home. There is no evidence that he was delivering drugs at the time. Nor was there any evidence of when O'Cain planned to deliver any of the drugs. The facts that some of the drugs were in his jacket pocket and packaged in smaller, more individually-sized packets is not evidence of *when* O'Cain intended to deliver them. The evidence does not show that O'Cain had an intent to deliver the cocaine on his person that was separate and distinct from his intent to deliver the cocaine in the locked safe. The same is true of the methamphetamine and heroin. The evidence failed to establish more than one intent to deliver drugs in the future, as in Lopez. His convictions for possession with intent to deliver the same drugs therefore punish a single unit of prosecution. His second convictions for cocaine, heroin, and methamphetamine violate double jeopardy and must be stricken.

EFFECT OF TO-CONVICT INSTRUCTIONS

For each of the six counts, the court instructed the jury that to convict O'Cain it must be proved that he "possessed a controlled substance, separate and distinct from conduct in" all the other counts with the intent to deliver each substance. O'Cain makes two arguments regarding the effect of these to-convict instructions.

O'Cain argues that all six of his convictions constitute a single unit of prosecution "under the law of the case" because none of the six to-convict jury instructions name the controlled substance at issue. He has not cited authority indicating that the unit of prosecution analysis depends on how the offenses are defined in the to-convict instructions. Under Adel, the question is what unit of prosecution the legislature intended as the punishable act under the specific criminal statute.

O'Cain also raises a sufficiency of the evidence challenge based on the jury instructions. Evidence is sufficient to support a conviction when, viewed in the light most favorable to the State, a rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). O'Cain argues that there was insufficient evidence to prove that he engaged in "separate and distinct" conduct for all six counts, as the jury instructions required. He cites State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998). In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the "to convict" instruction. Hickman, 135 Wn.2d at 102.

O'Cain argues that a rational trier of fact could not have found that his conduct as to any one count was separate and distinct from his conduct as to any other. He contends the evidence was sufficient to support only one count of possessing a controlled substance with intent to deliver.

After our double jeopardy analysis above, only three of O'Cain's convictions remain at issue, one for each distinct type of drug. The evidence was sufficient to prove that O'Cain engaged in separate and distinct conduct for these three convictions because the evidence showed that he possessed different drugs.

In short, O'Cain fails to demonstrate that any of his convictions fail because of the use of six identical to-convict instructions that do not name the controlled substance.

O'Cain's request for a new trial is denied. The judgment is reversed and remanded to strike the three convictions that violate double jeopardy.

Becker, J.

WE CONCUR:

Trickey, ACJ

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73191-2-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Ian Ith, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[ian.ith@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: May 18, 2016
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

May 18, 2016 - 3:58 PM

Transmittal Letter

Document Uploaded: 731912-Petition for Review.pdf

Case Name: STATE V. JAMES OCAIN
Court of Appeals Case Number: 73191-2

Party Respresented: PETITIONER
Is this a Personal Restraint Petition? ◯ Yes ◉ No
Trial Court County: ____ - Superior Court # ____

The document being Filed is:

- ◯ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ◯ Statement of Arrangements
- ◯ Motion: ____
- ◯ Answer/Reply to Motion: ____
- ◯ Brief: ____
- ◯ Statement of Additional Authorities
- ◯ Affidavit of Attorney Fees
- ◯ Cost Bill
- ◯ Objection to Cost Bill
- ◯ Affidavit
- ◯ Letter
- ◯ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ◯ Personal Restraint Petition (PRP)
- ◯ Response to Personal Restraint Petition
- ◯ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ◯ Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

PAOAppellateUnitMail@kingcounty.gov
ian.ith@kingcounty.gov