

IN THE SUPREME COURT OF THE STATE OF  
MONTANA No. OP 24-

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MICHAEL ANTHONY GOMEZ,

Petitioner,

v.

JIM SALMONSEN,  
Warden, Montana State Prison,

Respondent.

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**PETITION FOR WRIT OF *HABEAS CORPUS***

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## PETITION

Petitioner MICHAEL ANTHONY GOMEZ (“Mr. Gomez”), presently imprisoned at the CoreCivic Saguaro Correctional Center, in Eloy, Arizona, respectfully requests the Court, pursuant to § 46-22-201(1), M.C.A., to grant his Petition for a Writ of *Habeas Corpus*, vacate his sentence imposed by the First Judicial District Court, and remand to that court directing it to issue a new judgment in accordance with the arguments presented herein, due to an illegal and facially invalid sentence.

Specifically, under § 46-18-201(3)(a)(iv)(A), M.C.A., upon a plea of guilty, a district court may sentence a criminal defendant to the Montana Department of Corrections (DOC), “however, all but the first 5 years of the commitment to the department of corrections must be suspended” subject to certain exceptions for offenses for which Mr. Gomez was not convicted.

Mr. Gomez pled guilty, *via* an Alford Plea, to the criminal offense of Sexual Intercourse Without Consent (SIWC), a felony violation of § 45-5-503(1), M.C.A., and was sentenced by the First Judicial District Court on March 24, 2022, to forty (40) years at DOC, with twenty (20) suspended upon conditions (See attached, Judgment and Commitment, Exhibit A).

As argued below, this sentence is unlawfully restraining Mr. Gomez's liberty and is subjecting him to illegal imprisonment, because the district court's 40-year/20 suspended DOC commitment exceeds the five (5) year restraint imposed by § 46-18-201(3)(a)(iv)(A), M.C.A.

### **JURISDICTION**

This Petition is properly before this Court pursuant to its original *habeas corpus* jurisdiction under § 46-22-101, M.C.A.; § 46-22-202, M.C.A.; Article II, Section 19 of the Montana Constitution. Pursuant to § 46-22-201, M.C.A., Mr. Gomez verifies and affirms the following facts and legal arguments.

Mr. Gomez is in the custody of the Montana State Prison and Montana Department of Corrections *via* the Western Interstate Compact Program. As a result of this program, Mr. Gomez is currently in custody at CoreCivic Saguaro Correctional Center, in Eloy, Arizona. Petitioner's DOC identification number is # 3031739.

Although Mr. Gomez is incarcerated in Arizona, this Court maintains jurisdiction under The Western Interstate Compact, codified at §46-19-301, M.C.A., specifically, Article IV, (3) and (8):

(3) Inmates confined in an institution pursuant to the terms of this compact shall at all times be subject to the jurisdiction of the sending state and may at any time be removed therefrom for transfer to a prison or other institution within the sending state, for transfer to another institution in which the sending state may have a

contractual or other right to confine inmates, for release on probation or parole, for discharge, or for any other purpose permitted by the laws of the sending state; provided that the sending state shall continue to be obligated to such payments as may be required pursuant to the terms of any contract entered into under the terms of Article III.

(8) Any inmate confined pursuant to the terms of this compact shall have any and all rights to participate in and derive any benefits, incur or be relieved of any obligations, or have such obligations modified or the inmate's status changed on account of any action or proceeding in which the inmate could have participated if confined in any appropriate institution of the sending state located within such state.

Mr. Gomez is currently serving a forty year (40) sentence to the DOC, with twenty (20) suspended upon conditions, and a parole restriction of seven (7) years for the offense of SIWC, violation of § 45-5-503(1), M.C.A.

As argued below, Mr. Gomez is entitled to a writ of *habeas corpus* from this Court, due to an illegal and facially invalid sentence ordered by the First Judicial District Court imposing a forty (40) year, with twenty (20) suspended DOC commitment which exceeds the five (5) year restraint imposed by § 46-18-201(3)(a)(iv)(A), M.C.A.

## **FACTUAL AND PROCEDURAL BACKGROUND**

The facts set forth below are sufficient to address the legal arguments raised by this Petition.

By an Amended Information filed in March of 2021, the State charged Mr. Gomez with the following offenses: Count I: SIWC, a felony violation of § 45-5-503(1), M.C.A.; Counts II and III: Sexual Assault, felonies in violation of § 45-5-502(1), M.C.A.; Count IV: Sexual Abuse of Children, a felony violation of § 45-5-625(1)(b), M.C.A.; Count V: Surreptitious Visual Observation or Recordation, a misdemeanor violation of § 45-5-223(1)(b), M.C.A.; and Count VI: Stalking, a felony violation of §§ 45-5-220(1)(a) and (b), M.C.A.

The charges stem from Mr. Gomez's alleged actions in 2011-2020 towards his minor stepdaughter A.G., who had significant mental health issues at the time she made the allegations against him, as was even hospitalized for a period of time at Shodair Children's Hospital in Helena.

Mr. Gomez had never been charged or convicted of a crime prior to this action and, significantly, his criminal history showed no convictions in other states, let alone any prior sexual offenses.

On November 5, 2021, upon his trial counsel's advice, Mr. Gomez entered Alford Pleas to Counts I, V, and VI, in exchange for the State's dismissal of Count II, III, and IV.

On January 21, 2022, the Court heard witness testimony, including testimony from psychologist Dr. Robert Page, who performed a psychosexual evaluation of Mr. Gomez, and testified that he was at a low risk of reoffending (See attached, 1/21/22 Sent. Hearing Transcript, at 15:15-15:18, Exhibit **B**).

On March 24, 2022, the district court sentenced Mr. Gomez on Count I to forty (40) years at the DOC, 20 suspended upon conditions, and imposed a parole restriction of seven (7) years, and on Count IV, six (6) months at the Lewis and Clark County Jail, and on Count VI, one (1) year at the Jail, all to run concurrently (Exhibit **A**).

The basis for the seven (7) year parole restriction was that the fourteen (14) year old female victim would be out of school by the time Mr. Gomez would become parole-eligible (See, 1/21/22 Sent. Hearing Transcript, at 155:1-15:19; 117:23-118:3, Exhibit **B**).

The Court can take judicial notice pursuant to Rule 201, Mont.R.Evid., that the female victim will be eighteen (18) years-old by the time she graduates high school in the Spring of 2024.

Mr. Gomez timely appealed to this Court when represented by the Montana Appellate Defender Office, however, he ultimately agreed to voluntarily dismiss same.

Mr. Gomez voluntarily dismissed his appeal in order to have the file remanded to the district court so that he could obtain representation by undersigned private counsel and file a motion to withdraw his guilty plea.

This Court dismissed Mr. Gomez' appeal on or about February 22, 2023 (See attached Order Dismissing Appeal (DA 22-0205), dated February 22, 2023, Exhibit C).

Mr. Gomez' motion to withdraw his guilty plea was denied on or about April 27, 2023 (See attached, Order on Motion to Withdraw Guilty Plea (DDC-2020-321), dated April 27, 2023, Exhibit D).

### ARGUMENT

Section 46-22-101, M.C.A., governs the issuance of writs of *habeas corpus* and provides in subsection (1) that “every person imprisoned or otherwise restrained of liberty within this state may prosecute a writ of *habeas corpus* to inquire into the cause of imprisonment or restraint and, if illegal, to be delivered from the imprisonment or restraint.” Under § 46-22-201(1), M.C.A., a prisoner, on behalf of counsel, may petition for *habeas* relief when he is “unlawfully imprisoned or restrained of liberty.”

Under Article II, Section 19, of the Montana Constitution, “[t]he privilege of the writ of *habeas corpus* shall never be suspended.”

Indeed, this Court has noted the following:

[t]he central function of the courts is the pursuit of justice. Like all human endeavors, this pursuit is occasionally flawed. The writ of habeas corpus is designed to correct such flaws and to remedy “extreme malfunctions in the state criminal justice systems.” *Jackson v. Virginia*, 443 U.S. 307, 332 n.5, 99 S. Ct. 2781, 2796 n.5, 61 L. Ed. 2d 560 (1979) (Stevens, J., concurring). Habeas corpus affords relief to those in society who have been “grievously wronged.” *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 1721, 123 L. Ed. 2d 353 (1993). “From the time of the Magna Charta, the Great Writ of Habeas Corpus has been liberally employed as a means of guaranteeing that [justice] be accomplished and that a miscarriage of justice will be remedied. For at its heart, the writ represents an acknowledgment of the principle that the rights of freedom of the individual are worthy of protection.” *State v. Perry*, 232 Mont. 455, 462-63, 758 P.2d 268, 273 (1988) (citations omitted), overruled on other grounds *State v. Clark*, 2005 MT 330, ¶ 32, 330 Mont. 8, 125 P.3d 1099.

*Lott v. State*, 2006 MT 279, ¶ 20, 334 Mont. 270, 150 P.3d 337.

While § 46-22-101(2), M.C.A., normally bars relief from a sentence for a person who has exhausted the remedy of appeal, this Court has held that this provision does not apply to a facially invalid sentence, as it would constitutionally suspend the writ and result in a “grievous wrong and a miscarriage of justice.”

*Lott*, ¶ 22.

Specifically, this Court reasoned the following:

In light of the writ's history and purpose, as well as Montana's constitutional guarantee in Article II, Section 19, that the writ of habeas corpus shall never be suspended, we conclude that, as applied to a facially invalid sentence--a sentence which, as a matter of law, the court had no authority to impose--the procedural bar created by § 46-22-101(2), MCA, unconstitutionally suspends the writ. We hold that incarceration of an individual pursuant to a facially invalid sentence represents a "grievous wrong," *Brecht*, 507 U.S. at 637, 113 S. Ct. at 1721, and a "miscarriage of justice," *Perry*, 232 Mont. at 462, 758 P.2d at 273, warranting habeas corpus relief. When the delegates ratified the 1972 Constitution, they intended, at a minimum, that an individual incarcerated pursuant to a facially invalid sentence--for example, a sentence which either exceeds the statutory maximum for the crime charged or which violates the constitutional right to be free from double jeopardy--have the ability to challenge its legality.

*Lott*, ¶ 22.

Such is the case here. The district court was required to comply with § 46-18-201(3)(a)(iv)(A), M.C.A., which provides authority for a district court to sentence a criminal defendant to DOC, "however, all but the first 5 years of the commitment to the department of corrections must be suspended" subject to certain exceptions for offenses for which Mr. Gomez was not convicted.

In other words, the district court could not lawfully impose a DOC sentence unless it suspended all but the first five years, which it did not do. *State v. Southwick*, 2007 MT 257, ¶ 28, 339 Mont. 281, 169 P.3d 698 ("Southwick's

sentence is facially illegal. . . the five year DOC commitment in each case was valid, but not the suspended portions following Southwick's DOC commitment").

A "district court only has the authority to impose a sentence based on the authority granted by the applicable statute" and "[a]ny sentence that exceeds such authority is illegal and facially invalid." *Southwick*, ¶ 26 (citing *State v. Hicks*, 2006 MT 71, ¶ 41, 331 Mont. 471, 133 P.3d 206; *State v. Ruiz*, 2005 MT 117, ¶ 8, 327 Mont. 109, 112 P.3d 1001). *Hicks* is instructive where this Court held that a district court's imposition of lengthy DOC commitment (14 years, none suspended) was unlawful because it did not comply with the "all but the first five years" suspension requirement. *Hicks*, ¶ 45 (here, the District Court imposed a lengthy, albeit illegal, sentence to the DOC"); *see also*, *State v. Jackson*, 2007 MT 186, ¶ 17, 338 Mont. 344, 165 P.3d 321 (reversing defendant's sentence and remanding "for re-sentencing in compliance with [the statutory requirement] that 'all but the first 5 years of the commitment to the department of corrections must be suspended'"); *Agner v. Ferriter*, OP 09-0225 (June 2, 2009) (granting petition for writ of *habeas corpus* on the basis sentence was illegal and remanding for statutory compliance that "any time in excess of five years" must be suspended).

Accordingly, Mr. Gomez has established his entitlement to *habeas* relief from this Court, on the basis the district court unlawfully sentenced him to a forty (40) year DOC commitment, without suspending thirty five (35) years.

Mr. Gomez should only be required to serve five (5) years, with the remainder suspended.

This Court should therefore declare his sentence facially invalid and because Mr. Gomez is unlawfully restrained, order that his sentence be reduced to five (5) years at DOC, with the remainder suspended, or in the alternative, remand to the district court for appropriate resentencing.

Mr. Gomez ultimately desires to discharge the lawful portion of his sentence, and then return to California, where he has a job waiting for him, in order to care for his elderly, ailing, widowed mother.

### **CONCLUSION**

Mr. Gomez is presently serving a facially invalid sentence, requiring this Court to grant his Petition and issue a Writ of *Habeas Corpus*, reversing his sentence and ordering that he only be required to serve 5 years at DOC. In the alternative, the Court should reverse and remand for appropriate resentencing.

Respectfully submitted this 7<sup>th</sup> day of February, 2024.

JEREMY S. YELLIN, ESQ.  
P.O. Box 564  
Havre, MT 59501

/s/ Jeremy S. Yellin, Esq.  
Attorney for Appellant

**DECLARATION**

I, Jeremy S. Yellin, on behalf of Petitioner Gomez, swear and declare under the maximum penalty of perjury that the foregoing is true and verified.

*/s/ Jeremy S. Yellin, Esq.* \_\_\_\_\_  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Petition was served on the Attorney General of the State of Montana via the e-filing service on this 7<sup>th</sup> day of February, 2024, and mailed to the following:

State of Montana  
Office of the Attorney General  
P.O. Box 201401  
Helena, MT 59620

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Petition is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 2,433 words, excluding certificate of service and certificate of compliance.

/s/ Jeremy S. Yellin, Esq.

Jeremy S. Yellin, Esq.

**APPENDIX**

Judgment and Commitment (DDC-2020-321) (3/29/22).....Exhibit **A**

Sent. Hearing Transcript (DDC-2020-321) (1/21/22)..... Exhibit **B**

Order Dismissing Appeal (DA 22-0205) (2/22/23)..... Exhibit **C**

Order on Motion to Withdraw Guilty Plea (DDC-2020-321) (4/27/23).....Exhibit **D**

## CERTIFICATE OF SERVICE

I, Jeremy S. Yellin, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 02-08-2024:

Jim Salmonsén (Respondent)  
Austin Knutson, Attorney General  
P.O. Box 201401  
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Service Method: Conventional

Electronically signed by Emily A. Vaughn on behalf of Jeremy S. Yellin  
Dated: 02-08-2024