

IN THE SUPREME COURT OF THE STATE OF MONTANA  
CAUSE NO. DA 23-0328

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STATE OF MONTANA,  
Plaintiff and Appellee,  
and  
DAVID ALLEN PEIN,  
Defendant and Appellant.

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**Appellant/Defendant's Opening Brief**

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On Appeal from the District Court of the Tenth Judicial District  
of the State of Montana, In and For Fergus County

Before the Honorable Kathy Seeley  
Cause No. DC-14-2016-0000066-IN

RUFUS I. PEACE  
Peace Law Group, LLC  
7643 Gate Parkway  
Suite 104-1267  
Jacksonville, FL 32256  
Telephone (904) 253-3492  
[rufus@integrityfirstlaw.com](mailto:rufus@integrityfirstlaw.com)

AUSTIN KNUDSON  
Montana Attorney General  
C. MARK FOWLER  
Bureau Chief Appellate Services  
Bureau P.O. Box 201401  
Helena, MT 59620-1401  
[dojsupremecourtefilings@mt.gov](mailto:dojsupremecourtefilings@mt.gov)

KENT M. SIPE  
County Attorney  
Fergus County  
801 W. Broadway  
Lewistown, MT 59457

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## STATEMENT OF THE ISSUES

- I. The district court lacked subject matter jurisdiction to proceed with trial on two counts within the Appellant's case when a notice of appeal had been filed addressing the conviction and sentencing of the Appellant for one count within the same cause of action.
- II. A deferred prosecution agreement is void and unlawful when it is entered into as a condition of a plea agreement, within the same case, and the condition within the plea agreement is unsupported by and in violation of statutory authority authorizing plea agreements and deferred prosecution agreements.
- III. The Appellant was twice put in jeopardy when he had previously been convicted for charges which were part of the same transaction and known to the prosecutor at the time of his previous conviction, a conviction which had not been set aside, reversed or vacated.
- IV. Appellant's sentence is illegal where it was based on the incorrect statute, because marijuana is not a schedule I dangerous drug, and a separate statute governs sentencing for distribution of all other schedules of dangerous drugs.
- V. Montana Code Annotated § 45-9-206's forfeiture requirement is facially unconstitutional and violates Montana's protections against excessive

finer because it removes the sentencing judge's ability to consider the required proportionality factors which protect defendants from excessive fines.

### **STATEMENT OF THE CASE**

This case has a long and twisted history, it began in 2016 following an investigation into Appellant David Allen Pein ("Pein") for marijuana distribution, an enterprise he was running from his house. To confirm their suspicions, officers sent a confidential informant to complete three purchases of marijuana from Pein. The officers used this to gain a search warrant for Pein's house, during which additional marijuana and cash was found, including cash used by the confidential informant to purchase the marijuana.

After the search, Pein was charged with nine counts, all felonies, two of which were forfeiture charges, including forfeiture of Pein's home. The parties negotiated an unusual resolution to the case; the State and Pein agreed to enter into a plea agreement, whereby Pein would plead guilty to Count VI, a possession of dangerous drugs with the intent to distribute charge. As a condition of the plea agreement, Pein would also be subject to a 10-year deferred prosecution agreement for Counts IV and VIII, Count IV being a distribution of dangerous drugs charge, and Count VIII being a possession of property subject to forfeiture charge, related to Pein's home. The remaining counts were dismissed.

In line with the plea agreement, on July 6, 2017, Pein entered a guilty plea to Count VI, and was later sentenced to a 5-year deferred imposition of sentence. Pein appealed a condition of his sentence to this Court, who affirmed the sentence as imposed.

On June 10, 2020, the State filed its first petition to revoke Pein's deferred sentence and reinstated the prosecution of Pein for Counts IV and VIII. While this was ongoing, Pein petitioned to have his conviction for Count VI expunged based on the Montana Marijuana Regulation and Taxation Act; his petition was denied by the district court, again appealed to this Court, and this Court again affirmed the lower court.

On March 14, 2023, following an adjudicatory hearing, the district court revoked Pein's deferred sentence. He was later sentenced under the 2016 statute to four years in the Montana Department of Corrections.

Pein then initiated the present appeal.

On February 9, 2024, following a four day jury trial, Pein was convicted on Counts IV and VIII. On April 30, 2024, Pein was sentenced to seven years in the Montana Department of Corrections, with the counts running concurrently to each other. The sentencing court also ordered Pein's house be forfeited, but stayed the forfeiture pending this appeal.

## **SUMMARY OF ARGUMENT**

Pein argues that the district court lost jurisdiction when he initiated this appeal following his conviction for Count VI, and his convictions for Counts IV and VIII should be vacated for lack of jurisdiction.

Further, the deferred prosecution agreement was contrary to statutory requirements and therefore void at the time it was entered into, and the prosecution against Pien could not be reinitiated.

Pein also argues he was twice put into jeopardy when he was tried for Counts IV and VIII when his prior conviction for Count VI was not set aside, revoked or otherwise invalid.

Additionally, Pein argues his sentence was illegal because marijuana is not a schedule I dangerous drug and the incorrect sentencing statute was applied in his case.

Finally, Pein alleges Montana's automatic forfeiture requirement is facially unconstitutional because it is a mandatory fine which does not allow the sentencing judge to weigh the proportionality factors as required to protect defendants from excessive fines.

### **STATEMENT OF FACTS**

Beginning in early 2016, Lewistown Police Department began investigating Pein for the suspected distribution of marijuana. As part of that investigation, the police enlisted a Confidential Informant (CI), later identified as Wendy Lunceford,

to conduct undercover buys on August 26, 2016<sup>1</sup>, September 2, 2016, and September 24, 2016. See Doc. 2, Motion and Affidavit in Support for Leave to File Information, and Transcript of Proceedings, February 8, 2024, Third Day of Jury Trial (Tr. JT Day 3), 79:13-80:9.

On August 26, 2016, the CI purchased 10.23 grams<sup>2</sup> (0.36 ounces) of marijuana with cash provided by the police with recorded serial numbers. Tr. JT Day 3, 187:6-18.

On September 2, 2016, the CI purchased another 10.33 grams (0.36 ounces) of marijuana with cash provided by the police with recorded serial numbers. *Id.*

On September 24, 2016, the CI purchased 17.79 grams (0.62 ounces) of marijuana with cash provided by the police with recorded serial numbers. *Id.*

In total, the CI purchased 38.35 grams (1.35 ounces) from Pein during the undercover portion of the police investigation.

On September 29, 2024, the police executed a search warrant upon Pein's residence. Doc. 2, ¶ 7. During the search, the officers found and seized numerous electronic devices, along with numerous glass bongs, other paraphernalia, marijuana seeds, scales, weapons, \$3,500 in cash, and 439 grams (15.48 ounces). *Ibid.* The

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<sup>1</sup> The Motion and Affidavit in Support identifies the transaction date as August 26, 2016, testimony at trial indicated the date was August 24, 2016 (Tr. JT Day 3, 56:17-57:5); the date does not impact the analysis in this Appeal.

<sup>2</sup> The weights identified are based upon testimony from the Montana State Crime Lab and differ from the initially reported weights from law enforcement due to the Crime Lab removing the weight of any packaging.

officers also noted that various vehicles were at the residence: a 2001 Pontiac Firebird, 1985 Nissan 300; and a 1998 Ford Ranger. *Ibid.*

The officers compared the bills comprising \$3,500 in cash to the previously recorded serial numbers used by the CI and located nine twenty dollar bills that matched those given to the CI. *Id.*, ¶ 8.

On October 18, 2016, Pein was charged by information with:

**Count I:** Criminal Distribution of Dangerous Drugs on/near School Property, by accountability, generally alleging on August 26, 2016, Pein sold dangerous drugs within 1,000 feet of an elementary school.

**Count II:** Criminal Distribution of Dangerous Drugs on/near School Property, generally alleging on September 2, 2016, Pein sold dangerous drugs within 1,000 feet of an elementary school.

**Count III:** Criminal Distribution of Dangerous Drugs on/near School Property, generally alleging on September 23, 2016, Pein sold dangerous drugs within 1,000 feet of an elementary school.

**OR IN THE ALTERNATIVE TO COUNT III:**

**Count IV:** Criminal Distribution of Dangerous Drugs, generally alleging on September 23, 2016<sup>3</sup>, Pein purposely or knowingly sold marijuana.

**Count V:** Criminal Possession of Dangerous Drugs, generally alleging on September 29, 2016, Pein possessed marijuana, at the time being illegal.

**Count VI:** Criminal Possession of Dangerous Drugs with Intent to Distribute, generally alleging on September 29, 2016, Pein possessed marijuana with the intent to distribute it.

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<sup>3</sup> This date was corrected by Amended Information to reflect August 24, 2016. See Doc. 255.

**Count VII:** Criminal Possession of Drug Paraphernalia, generally alleging that on September 29, 2016, Pein possessed with the intent to use drug paraphernalia.

**Count VIII:** Use or Possession of Property Subject to Criminal Forfeiture, generally alleging that Pein used his residence in the distribution of marijuana, and the residence was subject to forfeiture.

**Count IX:** Use or Possession of Property Subject to Criminal Forfeiture, generally alleging the previously identified vehicles, electronics and paraphernalia were used by Pein to distribute marijuana and all were subject to forfeiture.

Doc. 4, Information.

On June 29, 2017, after several motions and other proceedings not at issue in this Appeal, Pein and the State entered into both a Pre-Trial Diversion Agreement and a Plea Agreement.

**A. Pre-Trial Diversion Agreement**

As part of the Pre-Trial Diversion Agreement, the parties agreed that the State would defer prosecution for Count IV: Criminal Distribution of Dangerous Drugs, and Count VIII: Use or Possession of Property Subject to Forfeiture (Pein's residence). Doc. 36, ¶ 2. The State agreed to defer prosecution for a period of 10 years for these two counts. *Id.*, ¶ 3. In return Pein was required to:

- a) Obey all laws, rules and regulations of the federal, state, and local governments and conduct himself as a good citizen;
- b) Abide by conditions of the Plea Agreement in this case;

- c) Voluntarily agree to forfeit all property identified in Count IX, including:
  - i. 2001 Pontiac Firebird; 1985 Nissan 300; 1998 Ford Ranger; and
  - ii. All money seized or obtained through a search warrant or other legal process.
- d) Sign admissions to both counts.

The agreement further provided that “This matter shall be dismissed with prejudice upon Defendant’s full compliance with the above terms and conditions and after the period of deferral has expired.” *Id.*, ¶ 5.

Finally, Pein agreed to a full waiver of speedy trial and that the State could commence prosecution upon a showing of probable cause that Pein had violated any of the terms or conditions of the agreement. *Id.*, ¶¶ 6-7.

### **B. Plea Agreement and Acknowledgement of Rights**

Separately, Pein and the State entered into a Plea Agreement and Acknowledgement of Rights (Doc. 37) whereby:

1. Pein acknowledged and waived all standard trial rights. *Id.*, ¶¶ 3-27.
2. Acknowledged that he had been properly advised of his rights, and that no promises outside the plea agreement and pre-trial diversion agreement had been made to him. *Id.*, ¶ 28.
3. The Plea Agreement cross-referenced the Pre-Trial Diversion Agreement, noting Counts IV and VIII were addressed through the Pre-Trial Diversion Agreement. *Id.*, PRETRIAL AGREEMENT, 1(A).

4. Pein agreed to enter a plea of guilty to Count VI: Criminal Possession of Dangerous Drugs with Intent to Distribute. *Id.*, PRETRIAL AGREEMENT, 1(B).
5. In return for Pein entering a guilty plea to Count VI, the State agreed to:
  - a. Dismiss Counts I-III, Count V, Count VII, and Count IX at sentencing.
  - b. Recommend, jointly with Pein, that Pein receive a 5-year deferred sentence.

### **C. 2017 Change of Plea Hearing**

On July 6, 2017, Pein entered his guilty plea to Count VI, Criminal Possession of Dangerous Drugs with the Intent to Distribute. Doc. 38, Minute Entry.

Following an advisement of rights and initial inquiry by the court, the court allowed Pein to enter a guilty plea to Count VI. Transcript of Change of Plea, July 6, 2017 (Tr. COP), 2:4-6:21. Pein was then sworn in and defense counsel was asked to provide a factual foundation for the plea. Tr. COP 6:22-7:13.

Specifically, defense counsel (Mr. Larsen) asked and Pein responded as follows:

MR. LARSEN: The charge here alleges that on or about September of 2016 you possessed the drug of marijuana. Is that correct?

MR. PEIN: Correct.

MR. LARSEN: You're aware of that charge?

MR. PEIN: I'm aware.

MR. LARSEN: Now in the past ... earlier in the year in 2016 you were a registered card holder with the Medical Marijuana Act correct?

MR. PEIN: Correct.

MR. LARSEN: And throughout various years in the past you've been a possessor of such a card and a user of medical marijuana?

MR. PEIN: Yes.

MR. LARSEN: Okay. Now during that time, you had accrued an amount of marijuana in excess of the legal limits, correct?

MR. PEIN: Correct.

MR. LARSEN: So, you ... at the time that the search warrant was served on your home you'd accrued an amount greater than 60 grams correct?

MR. PEIN: Yes.

MR. LARSEN: Okay. Now in addition to that you had stored this marijuana at your home here in Lewistown correct?

MR. PEIN: Correct. MR. LARSEN: In Fergus County Montana?

MR. PEIN: Yes.

MR. LARSEN: Okay. And of that marijuana that you possessed at your house you had intent regarding at least a portion of it to either sell, give or otherwise distribute to a third person correct?

MR. PEIN: Correct.

MR. LARSEN: You seem in question of that. The charge here is criminal possession of a dangerous drug with the intent to distribute it. So, question would simply be did you have the intent to either share, give or sell that drug to a third party or did you not?

MR. PEIN: Yes.

MR. LARSEN: Okay. So, you did have the intent ...

MR. PEIN: Not really, I didn't want to, no.

MR. LARSEN: ... to give it to a third party.

MR. PEIN: No.

MR. LARSEN: It's a yes or no.

MR. PEIN: Yes.

MR. LARSEN: Yes, okay. You did have the intent then. All right. So those two elements possessing marijuana in excess of 60 grams with an intent to either give, sell or otherwise distribute to another party is what leads you to plead guilty here today correct?

MR. PEIN: Correct.

MR. LARSEN: Okay. Again, I want to be sure that those are the facts that lead you to plead guilty here today.

MR. PEIN: Yes.

Tr. COP, 7:14-9:21

In response to follow up questions from the State, Pein admitted and agreed the total weight of the marijuana seized on September 29, 2016 was 439 grams (15.49 ounces). Tr. COP, 11:13-16.

Thereafter, the court accepted Pein's guilty plea and ordered a Presentence Investigation Report be completed. Tr. COP, 13:16-14:2.

#### **D. First Sentencing Hearing and Judgment**

On March 12, 2018, Pein was sentenced as it relates to Count VI. See Transcript of Sentencing Hearing, March 22, 2018 (Tr. 1st Sent.).

Following testimony, the State and Pein followed the plea agreement, with both jointly recommending a 5-year deferred imposition of sentence, which the court adopted as its sentence, along with all standard conditions in the presentence investigation report. Tr. 1st Sent. 43:22-47:22.

On April 3, 2018, the court issued its Sentencing Order and Judgment, which was appealed on May 31, 2018. Doc. 52 & 59.

### **E. First Appeal**

On May 31, 2018, Pein filed his first appeal from the lower court's decisions related to the underlying charges in DA 18-0304. In his first appeal, Pein challenged the constitutionality of the lower court's denial of his use of medical marijuana to treat his medical conditions.

Following briefing, this Court issued its non-cite opinion at 2019 MT 167N, affirming the lower court's prohibition against Pein's medical use of marijuana and finding the restriction had the necessary nexus to the underlying offense, and was legal and reasonable. *State v. Pien*, 2019 MT 167N, ¶ 18, 397 Mont. 551, 455 P.3d 440.

### **F. Revocation of Deferred Sentence and Termination of Pre-Trial Agreement.**

On June 10, 2020, the State filed its first Petition for Revocation, asking the court to revoke Pein's 5-year deferred imposition of sentence, as it relates to Count VI. See Doc. 70.

Within its Report of Violation, Probation and Parole alleged:

Count I: On April 29, 2020, Pein was charged with Criminal Possession of Dangerous Drugs and Criminal Possession of Drug Paraphernalia.

Count II: On April 29, 2020, Pein admitted to using Methamphetamine and Marijuana, and his urine sample confirmed this use.

Count III: On April 29, 2020, during a search of Pein's home marijuana and associated paraphernalia were discovered.

Doc. 70, attached Report of Violation.

On June 10, 2020, along with its Petition to Revoke Deferred Sentence, the State filed its Motion to Set Scheduling Conference, alleging Pein had violated the Pre-Trial Agreement and declaring the State intended to proceed with prosecution on Counts IV and VIII. Doc. 71.

On January 19, 2021, the State filed its Second Petition for Revocation of Deferred Imposition of Sentence. Doc. 109. Within its Second Petition, the State added the following two allegations:

Count I: On December 26, 2020, Pein was charged with two felonies and five misdemeanors, including Assault on a Peace Officer, two counts, and Owner Permitting Operation of a Vehicle Without Liability Insurance, Disobedience to Direction of Safety/Peace Officer, Obstructing a Peace officer or Other Public Servant, Criminal Mischief, and Resisting Arrest.<sup>4</sup>

Count II; On December 29, 2020, Pein provided a urine sample that was positive for THC.

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<sup>4</sup> These charges and their associated conviction are being appealed in DA 23-406, which has not been briefed at the time of this writing.

Doc. 109, attached Addendum to Report of Violation.

### **G. Proceedings Generally**

After the State's Petition for Revocation and notice of its intent to proceed with prosecution of Counts IV and VIII, a host of motions, substitutions of counsel and continuances occurred, along with the case being sent to mediation. See Docket, generally.

During the pendency of proceedings, Pein was appointed multiple counsels, one of which admitted to failing to conduct any pre-hearing investigation or have spoken with Pein regarding the allegations, leading the court to find assigned counsel ineffective and order appointment of new counsel. See Doc. 152, Order Following July 14, 2022, Adjudicatory Hearing.

### **H. Second Appellate Proceedings**

On April 20, 2022, Pein petitioned the district court, DV-22-39, to expunge his conviction for Count VI, and appealed that court's denial of expungement to this Court in DA 22-0314. *Pein v. State*, 2023 MT 38N, 441 Mont. 392, 525 P.3d 25. Following the passage of Montana Marijuana Regulation and Taxation Act, certain previous convictions for marijuana related convictions. Mont. Code Ann. § 16-12-113.

On February 28, 2023, this Court issued its Opinion in *Pein v. State*, wherein it determined Pein was not eligible for expungement or other relief because he

possessed more than two ounces of marijuana, as the amount of marijuana at issue in Count VI was fifteen ounces. ¶ 5.

### **I. Adjudication of Deferred Sentence and Resentencing**

On March 14, 2023, the court held an adjudicatory hearing on the State's petitions to revoke Pein's deferred sentence for Count VI. See Doc. 177.

The court determined that the allegations contained in the State's first and second petitions to revoke were proven, and ordered a new presentence investigation report be completed prior to deposition. Doc. 177, ¶¶ 1-2.

On April 18, 2023, the court held a resentencing hearing, where it applied the statute governing criminal possession with intent to distribute in 2016. Transcript of Resentencing, April 18, 2023 (Tr. Resent.), 2:15-3:1. The statute in 2016 read:

#### **45-9-103 Criminal possession with intent to distribute.**

(1) Except as provided in Title 50, chapter 46, a person commits the offense of criminal possession with intent to distribute if the person possesses with intent to distribute any dangerous drug as defined in 50-32-101.

(2) A person convicted of criminal possession of an opiate, as defined in 50-32-101, with intent to distribute shall be imprisoned in the state prison for a term of not less than 2 years or more than 20 years and may be fined not more than \$ 50,000, except as provided in 46-18-222.

(3) A person convicted of criminal possession with intent to distribute not otherwise provided for in subsection (2) shall be imprisoned in the state prison for a term of not more than 20 years or be fined an amount not to exceed \$ 50,000, or both.

(4) Practitioners, as defined in 50-32-101, and agents under their supervision acting in the course of a professional practice are exempt from this section.

Mont. Code Ann. § 45-9-103 (2015).

Following testimony and argument, the court resentenced Pein for Count VI to four years Department of Corrections, none suspended, with credit for 257 days time served and 60 days street time. Tr. Resent., 62:16-63:1.

On April 25, 2023, Pein was served with notice of his right to request a sentencing review of his newly imposed sentence, which Pein did appropriately request at the time. Doc. 189 & 190.

On June 13, 2023, Pein filed his Notice of Appeal to this Court regarding his conviction and resentencing on Count VI, this gave rise to the appellate case presently before the Court, DA 23-0328. However, the district court continued with trial and other proceedings relating to Counts IV and VIII.

#### **J. Lead Up to and Completion of Jury Trial for Counts IV and VIII**

Prior to the Jury Trial beginning, Pein filed his Motion to Dismiss Counts IV and VIII to Avoid Placing Defendant in Double Jeopardy, arguing Pein's prior conviction, within the same case of Count VI involved the same facts or evidence that would be used to convict him for Counts IV and VIII, and placed Pein at risk twice for the same offense for which he was initially convicted. Doc. 262.

The State responded opposing Pein's motion arguing there was only one prosecution that began October 18, 2016 and continued through the guilty plea for Count VI in March 2018, and up and until the trial on Counts IV and VIII. Doc. 217.

On February 5, 2024, the court issued its Order Denying Defendant's Motion to Dismiss Counts IV and VIII, reasoning that the prior conviction for Count VI involved a discrete period of time, September 29, 2016 and the evidence related to the search that occurred on that day. Doc. 275.

On February 6, 2024, the first day of jury trial, the court and parties readdressed the double jeopardy issue. Transcript of Jury Trial, Day 1, February 6, 2024 (Tr. JT Day 1), 17:7-10. The State asked for clarification and to be able to bring in evidence obtained during the September 29, 2016 search, in particular the money that was provided to the CI and later recovered during the search. *Id.*, 18:3-25:17. The district court reserved ruling on the issue of admissibility of the money recovered during the search, but provided by the CI during previous undercover buys. *Id.*, 25:16-25.

On February 7, 2024, the district court issued its order clarifying its ruling on the double jeopardy issue, allowing the state to introduce evidence of the nine twenty dollar bills found during the search of Pein's home and that were related to the earlier CI purchases. Doc. 283.

On February 9, 2024, the jury returned a guilty verdict for Count IV and VIII. See Verdict, Doc. 289.

### **K. Sentencing for Counts IV and VIII**

On April 30, 2024, the district court sentenced Pein for Counts IV and VIII. See Transcript of Proceedings, Sentencing, April 30, 2024, generally. As to Count IV, the court sentenced Pein to seven years in the Montana State Prison, and for Count VIII Pein was sentenced to seven years in the Montana State Prison, run concurrently. *Id.*, 52:4-10, & 25. The court further ordered the forfeiture of Pein's home. *Id.*, 52:9-12.

### **STANDARDS OF REVIEW**

I. Whether a court has subject matter jurisdiction is a question of law which this Court reviews for correctness. *Gazette v. State*, 2008 MT 287, ¶ 6, 345 Mont. 385, 387, 190 P.3d 1126, 1128; *Boe v. Court Adm'r for the Mont. Judicial Branch*, 2007 MT 7, ¶ 5, 335 Mont. 228, P 5, 150 P.3d 927, P 5 (citation omitted).

II. When this Court reviews criminal sentences for legality, the review is de novo. *State v. Reynolds*, 2017 MT 317, ¶ 15, 390 Mont. 58, 408 P.3d 503.

III. This Court exercises plenary review of constitutional issues. *State v. Jensen*, 2020 MT 309, ¶ 9, 402 Mont. 231, 235, 477 P.3d 335, 338. The constitutionality of a statute is presumed, and the party challenging the constitutionality of a statute bears the burden of proving the statute conflicts with the constitution beyond a

reasonable doubt. *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 12, 382 Mont. 256, 368 P.3d 1131. "If any doubt exists, it must be resolved in favor of the statute." *Mont. Cannabis Indus. Ass'n*, ¶ 12.

## ARGUMENT

### **I. THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION TO PROCEED WITH TRIAL ON REMAINING COUNTS AFTER PIEN FILED HIS APPEAL FOR THE PREVIOUS CONVICTION.**

Subject matter jurisdiction is subject to challenge or review at any time on motion, or sua sponte by the court, and cannot be established or maintained by consent or waiver of the parties. *Gottlob v. DesRosier*, 2020 MT 210, ¶ 7, 401 Mont. 50, 470 P.3d 188. Subject matter jurisdiction is "the fundamental power and authority of a court to determine and hear an issue." *State v. Rich*, 2022 MT 66, ¶ 15, 408 Mont. 178, 183-84, 507 P.3d 176, 179 (internal citations omitted).

Since at least 1954, it has been the rule in Montana that upon the filing of a notice of appeal, subject matter jurisdiction is divested from the district court and passes to this Court. *Julian v. Buckley*, 191 Mont. 487, 490-91, 625 P.2d 526, 528 (1981), citing to *Benolken v. Miracle*, 128 Mont. 262, 273 P.2d 667 (1954); *State v. Arlington*, 265 Mont. 127, 166, 875 P.2d 307, 330 (1994); see also *State v. Allen*, Nos. DA 22-0651, DA 22-0678, DA 22-0679, DA 22-0680, 2024 Mont. LEXIS 440, at \*6 (Apr. 23, 2024) (voiding orders entered by the district court after a notice of appeal was filed).

In the present case, Pien has brought three appeals, some of which have no impact on the current issues before the Court, but one of which does. First, following his March 12, 2018, sentencing for Count VI, Pien appealed in DA 18-0304, challenging the constitutionality of the lower court's denial of his use of medical marijuana to treat his medical conditions. This appeal was resolved before the 2024 trial ensued or any other actions by the district court that impacted Pien's case. Then Pien appealed the district court's denial of expungement for his conviction for Count VI to this Court in DA 22-0314. *Pein v. State*, 2023 MT 38N, 441 Mont. 392, 525 P.3d 25.

The appeal most at issue, is the case before the Court today, DA 23-0328, which was filed on June 13, 2023 following Pien's revocation and resentencing on Count VI. During the pendency of this appeal, the district court has behaved as if it did not exist, or as if it was an appeal in a completely separate case, yet it is not. The present appeal is obviously not complete and has not been stayed at any time to allow the district court case to proceed.

Pein himself attempted to address the issue of subject matter jurisdiction at his sentencing but was shut down by the district court:

MR. PEIN: I had Mr. Chad Wright in this case Your Honor. This case is currently under appeal D3, D23-083. This case is currently under appeal with the Montana Supreme Court so I'm asking that this case, as a motion yes that you could make a decision on ...

COURT: Oh, Mr. Pein, I didn't ask you for a motion.

MR. PEIN: Correct, but as an accommodation ...

COURT: No, no, here's the deal and I'll put you in the law library and you'll just listen.

Transcript of Proceedings, April 30, 2024, Sentencing, 46: 3-13.

Further, the State has consistently argued that the 2024 trial was merely a continuation of the prosecution that included Count VI, to which Pien pled guilty to in 2018 and for which his suspended sentence was revoked and Pien resentenced in 2023, well before the 2024 trial. If the State's argument has merit, then upon filing of his notice of appeal, which was an appeal from a final judgment and imposition of sentence, then the district court was divested of jurisdiction to proceed further until the appeal was resolved or stayed. Moreover, Pien had no choice but to file the notice of appeal when he did, because an appeal must be taken within 60 days of a judgment or order made appealable. See Mont. R. App. P. 4(5)(b)(ii).

Put simply, every action taken by the district court after the June 13, 2023 filing of notice of appeal was an action taken by the district court without jurisdiction, and as such must be voided and have no effect, including the 2024 trial and sentencing of Pien.

## **II. ENTERING INTO A PLEA AGREEMENT AND DEFERRED PROSECUTION AGREEMENT WAS CONTRARY TO STATUTORY REQUIREMENTS, UNLAWFUL AND VOID**

As an initial matter, as part of the deferred prosecution agreement Pein waived his right to speedy trial, absent this agreement the statute of limitations would have run and Pein's right to speedy trial would have attached before the charges were reinstated. See Mont. Code Ann. § 45-1-205(2)(a) (the statute of limitations for felony charges is 5 years after it is committed).

Plea agreements are contracts generally subject to applicable contract law standards. *State v. Arellano*, 2024 MT 108, ¶ 11, 416 Mont. 406, 549 P.3d 428; *State v. Collins*, 2023 MT 78, ¶ 14, 412 Mont. 77, 528 P.3d 1106. However, because defendants waive fundamental state and federal constitutional rights when they are induced to plead guilty by reason of a plea agreement, defendants have a substantive right to be treated fairly throughout the plea-bargaining process. *Arellano*, ¶ 11; *Collins*, ¶ 14 (internal citations omitted).

Where a contract has a single object and that object is unlawful, the entire contract is void. Mont. Code Ann. § 28-2-701(2); *Arellano*, ¶ 12. Since contract principles apply to plea agreements, obligations within plea agreements cannot include the enforcement of illegal provisions. *Arellano*, ¶ 12; *State v. Cleveland*, 2014 MT 305, ¶ 23, 377 Mont. 97, 338 P.3d 606.

In Montana, parties may resolve a criminal matter by entering into a plea agreement, but they are limited to the statutory requirements and may not engage in creative solutions, specifically the statute provides:

**(1)** The prosecutor and the attorney for the defendant, or the defendant when acting pro se, may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the prosecutor will do any of the following:

**(a)** move for dismissal of other charges;

**(b)** agree that a specific sentence is the appropriate disposition of the case; or

**(c)** make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that the recommendation or request may not be binding upon the court.

...

Mont. Code Ann. § 46-12-211 (2015)<sup>5</sup>.

For their part of the agreement, prosecutors are limited to either dismiss charges, agree to a specific sentence, or recommend or agree not to oppose a specific sentence. Moreover, the statute places requirements upon the court to review the plea agreement:

**(2)** Subject to the provisions of subsection (5), if a plea agreement has been reached by the parties, the court shall, on the record, require a disclosure of the agreement in open court or, on a showing of good cause in camera, at the time that the plea is offered. ...

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<sup>5</sup> The 2015 version of this statute is identical to the current statute, and current legal interpretation and precedent applies for its interpretation.

**(3)** If the court accepts a plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

**(4)** If the court rejects a plea agreement of the type specified in subsection (1)(a) or (1)(b), the court shall, on the record, inform the parties of this fact and advise the defendant that the court is not bound by the plea agreement, afford the defendant an opportunity to withdraw the plea, and advise the defendant that if the defendant persists in the guilty or nolo contendere plea, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

Mont. Code Ann. § 46-12-211.

Additionally, district courts are authorized to and should reject plea agreements that contemplate unlawful resolutions. See *Arellano*, ¶ 16 (district court correctly rejected plea agreement because it proposed a sentence not authorized by law).

Like plea agreements, deferred prosecution agreements are statutorily governed, specifically the statute provides:

**(1)**

**(a)** Prior to the filing of a charge, the prosecutor and a defendant who has counsel or who has voluntarily waived counsel may agree to the deferral of a prosecution for a specified period of time based on one or more of the following conditions:

**(i)** that the defendant may not commit any offense;

**(ii)** that the defendant may not engage in specified activities, conduct, and associations bearing a relationship to the conduct upon which the charge against the defendant is based;

**(iii)** that the defendant shall participate in a supervised rehabilitation program, which may include treatment, counseling, training, or education;

**(iv)** that the defendant shall make restitution in a specified manner for harm or loss caused by the offense; or

**(v)** any other reasonable conditions.

**(b)** The agreement must be in writing, must be signed by the parties, and must state that the defendant waives the right to speedy trial for the period of deferral. The agreement may include stipulations concerning the admissibility of evidence, specified testimony, or dispositions if the deferral of the prosecution is terminated and there is a trial on the charge.

**(c)** The prosecution must be deferred for the period specified in the agreement unless there has been a violation of its terms.

**(d)** The agreement must be terminated and the prosecution automatically dismissed with prejudice upon expiration and compliance with the terms of the agreement.

**(2)** A condition of pretrial diversion may be for the court to refer a defendant for evaluation to determine the appropriateness of proceedings pursuant to Title 53, chapter 21.

**(3)** After a charge has been filed, a deferral of prosecution may be entered into only with the approval of the court.

**(4)** A prosecution for a violation of 61-8-401, 61-8-406, 61-8-410, or 61-8-411, or 61-8-465 may not be deferred.

Mont. Code Ann. § 46-16-130 (2015)<sup>6</sup>.

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<sup>6</sup> Mont. Code Ann. § 46-16-130(3) was modified in the 2021 legislative session removing the requirement the court approve the pretrial diversion; all that is required in the current statute is notice to the court of the agreement.

At the time Pein entered into the deferred prosecution agreement at issue in this appeal, the statute specifically required approval by the court. Meaning the court had before it both the plea agreement and deferred prosecution agreement for review.

Little relevant precedent has been issued by this Court interpreting the statute governing deferred prosecution agreements; however, in a 2005, unpublished opinion, this Court approved a pre-trial agreement that included a plea agreement that would be enforceable, if the deferred prosecution was revoked. *State v. Dreidlein*, 2005 MT 259N, 2005 Mont. LEXIS 448 (Mont. 2005). This is logical because it is similar to confessions of judgment which are authorized by statute and are commonly included as part of settlement agreements to resolve civil contract disputes. See Mont. Code Ann. § 27-9-102; *Farmers Union Mut. Ins. Co. v. Staples*, 2004 MT 108, ¶ 33, 321 Mont. 99, 90 P.3d 381. This allows the party entering into a settlement protection from contingent liability in case the party providing the confession of judgment should fail to abide by the settlement agreement. *Staples*, ¶ 33.

However, the opposite is not true, it would make no logical sense to provide a confession of judgment which contains a settlement agreement, because a confession of judgment, once presented to the court leads to a full resolution of the case. Similarly, a plea agreement is meant to fully resolve the case at issue because

it leads to a conviction, while a deferred prosecution agreement is meant to put the case off, based on specific conditions.

Additionally, incorporating a deferred prosecution agreement into a plea agreement is not authorized by statute, because the prosecutor's options are limited to those choices provided by statute. Incorporating the deferred prosecution agreement constitutes an illegal term and must be voided, and have no effect. See *Arellano*, ¶ 12.

Moreover, the incorporation of a deferred prosecution agreement into a plea agreement is fundamentally unfair and creates absurd practical results that are evident in this case. See *Arellano*, ¶ 11 (requiring fundamental fairness in plea agreements). By entering into a deferred prosecution agreement incorporated into a plea agreement, a defendant theoretically exposes themselves to an extended period of incarceration or supervision. For instance, in the present case, Pein agreed to and received a 5 year deferred imposition of sentence as part of the plea agreement, and a 10 year deferment of prosecution as part of the deferred prosecution agreement. Had either agreement stood alone, the maximum sentence available to the State would have been 20 years, but taken together, Pein's deferred imposition of sentence could have been revoked at 4 years 364 days, after which he could have received a maximum 20 year imprisonment sentence. Then five years later, at the 9 year, 364 day mark, the State could decide to revive its prosecution under the deferred

prosecution agreement, and seek another 20 year incarceration sentence. This made Pein's actual exposure 40 years of incarceration, after Pien had been on supervision for nearly 5 years. This makes the combination of these agreements fundamentally unfair.

This procedure has also led to absurd results, which should be apparent here, Pien has been before this Court on two prior occasions. Consider this Court upheld the district court's denial of Pein's petition to expunge his conviction for Count VI on the basis that it involved more than two ounces of marijuana. See *Pein v. State*, 2023 MT 38N, 441 Mont. 392, 525 P.3d 25. This begs the question if Pein could now request that his current conviction for Count IV be expunged because it involved less than two ounces of marijuana, and all the other marijuana was fully adjudicated in his prior appeal. Although this question is not before the Court today, it likely could be soon, based on the history of this case. Additionally, as pointed out above, the combination of these agreements has led to multiple final orders, all of which are appealable, and which calls into question when and if the district court lost jurisdiction during portions of the case it was attempting to adjudicate.

This Court should reverse Pein's conviction for Counts VI and VII because the deferred prosecution agreement was void at the time it was entered into by the parties, and the statute of limitations for Counts VI and VII had run at the time the State reinitiated prosecution and Pein's right to a speedy trial would be violated.

### **III. PIEN WAS TWICE PUT IN JEOPORDY FOR THE SAME TRANSACTION.**

Both the Fifth Amendment to the U.S. Constitution and Article II, Section 25 of the Montana Constitution, protect individuals from being twice placed in jeopardy. *State v. Burton*, 2017 MT 306, ¶ 15, 389 Mont. 499, 407 P.3d 280. Additionally, in Montana greater protections against multiple prosecutions have been enacted by statute. See Mont. Code Ann. §§ 40-11-503 to -505; *Burton*, ¶ 20 (internal citations omitted). These additional protections are commonly referred to as “statutory double jeopardy” provisions, and the application of both the Constitutional and statutory double jeopardy protections are often analyzed together. *Burton*, ¶ 20.

When two or more offenses are known to the prosecutor, are supported by probable cause, and are consummated prior to the original charge and jurisdiction and venue of the offenses lie in a single court, a prosecution is barred if the former prosecution resulted in a conviction that has not been set aside, reversed, or vacated. Mont. Code Ann. § 46-11-503(1)(b). The plain language of this statute bars the continued prosecution of Pein after his conviction for Count VI was fully adjudicated.

Broken down, to bar further prosecution, the statute requires that Pein show:

1. Two or more offenses were known to the prosecutor to be supported by probable cause;

2. The offenses were consummated prior to the original charge;
3. Jurisdiction and venue lie in a single court;
4. The former prosecution resulted in a conviction that has not been set aside, reversed or vacated.

Mont. Code Ann. § 46-11-503(1)(b).

In the present case, Pein's conviction for Count VI was a final conviction, that was not set aside, reversed or vacated. There is no doubt that all facts were known to the prosecutor, all of them were included in the same information and supported by probable cause. Further, there is doubt all of the acts alleged were consummated prior to the original charge, again they were all contained in the same charging documents. Likewise, it is clear that jurisdiction and venue were within a single court, it was the same court from start to finish.

Based on the plain language of the statute, the reinitiation of prosecution for Counts IV and VIII were barred by Pein's conviction on Count VI.

This is especially true because evidence used to convict Pein for Count VI, and evidence that was in support of dismissed counts was later used at trial to gain a conviction for Counts IV and VIII. In particular, the money found in Pein's house was used to convict Pein for Count VI, and then reintroduced at trial to convict Pein of Count IV and VIII. Additionally, the drugs introduced at trial were seized as a result of the State's investigation to Count I, specifically State's exhibit 102, 11.6

grams of marijuana was from the very first CI purchase from Pein, on August 26, 2024:

MS. ADAMS: I've just handed you what's previously been marked as State's Exhibit 102. Do you recognize that?

MR. POSER: Yes, I do.

MS. ADAMS: What is it?

MR. POSER: The marijuana from transaction one from David Pein.

Transcript of Jury Trial, Day 3, February 8, 2024 (Tr. JT Day 1), 35:5-11.

This count was dismissed as part of the plea agreement, but the State used the evidence from the dismissed count to gain a guilty verdict in the later trial for Counts IV and VIII, this constitutes double jeopardy. Count I had already been dismissed, and fully adjudicated, just like Count VI, yet the State used evidence from both of these counts to prove Pein's guilt on Counts IV and VIII.

Pein's trial and conviction for Counts IV and VIII constitute double jeopardy and this Court should vacate his conviction.

#### **IV. MARIJUNA IS NOT A SCHEDULE I DANGEROUS DRUG AND AS SUCH THE INCORRECT SENTENCING SCHEME WAS APPLIED.**

The Court's role in interpreting statutes is to "ascertain and carry out the Legislature's intent." *In re Marriage of Rudolf*, 2007 MT 178, ¶ 41, 338 Mont. 226, 164 P.3d 907; *see also* Mont. Code Ann. § 1-2-102. To do so, courts strive to

ascertain and declare what is in the terms or substance contained in the statute at issue. Mont. Code Ann. § 1-2-101. Courts must adopt a construction that will give effect to all provisions, if possible. Mont. Code Ann. § 1-2-101. When it is not possible to construe statutory provisions to give effect to all, a specific statute will control over a more general one. Mont. Code Ann. § 1-2-102; *State v. Lamb*, 2021 MT 302, ¶ 8, 406 Mont. 368, 498 P.3d 1252.

There are several statutes to consider in this case, the first is Criminal Possession with Intent to Distribute:

**(1)** Except as provided in Title 16, chapter 12, a person commits the offense of criminal possession with intent to distribute if the person possesses with intent to distribute any dangerous drug as defined in 50-32-101 in an amount greater than permitted or for which a penalty is not specified under Title 16, chapter 12.

**(2)** Except as provided in subsection (3), a person convicted of criminal possession with intent to distribute shall be imprisoned in the state prison for a term of not more than 20 years or be fined an amount not to exceed \$50,000, or both.

**(3)** A person convicted of criminal possession with intent to distribute fentanyl shall be imprisoned in the state prison for a term of not less than 2 years or more than 40 years or may be fined not more than \$50,000, or both. The court may not suspend execution or defer imposition of the first 2 years of the sentence, except as provided in 46-18-222(1) through (4), and during the first 2 years of imprisonment, the offender is not eligible for parole.

**(4)** Practitioners, as defined in 50-32-101, and agents under their supervision acting in the course of a professional practice are exempt from this section.

Mont. Code Ann. § 45-9-103 (2023).

This statute requires that a person intend to distribute a “dangerous drug,” which is defined as:

“Dangerous drug” means a drug, substance, or immediate precursor in Schedules I through V set forth in Title 50, chapter 32, part 2.

Mont. Code Ann. § 50-32-101(6).

“Marijuana” is separately defined as all plant material from the genus Cannabis containing tetrahydrocannabinol (THC) or seeds of the genus capable of germination. § 50-32-101(18).

Further, in Montana what falls in the category of “dangerous drug” is determined by the board of pharmacy (the “Board”). See Mont. Code Ann. § 50-32-101(3), 50-32-202 and 2-15-1733.

The Board is required to consider certain factors when determining if something is a “dangerous drug” and what level of the schedule it falls within. Mont. Code Ann. § 50-32-202. Specifically, in order to be a schedule I dangerous drug, the Board must determine a drug:

1. Has a high potential for abuse; and
2. has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision.

Mont. Code Ann. § 50-32-221.

The Board is required to revise and republish any additions, deletions, or changes to the schedule of dangerous drugs, in accordance with the Montana

Administrative Procedure Act. Mont. Code Ann. § 50-32-209. The Montana Administrative Procedure Act requires a biennial review of administrative rules to determine if any of them should be modified or repealed. Mont. Code Ann. § 2-4-314. Marijuana incorrectly remains listed in the specific list of schedule I drugs. Mont. Code Ann. § 50-32-222(4)(x).

In 2009, the first Montana Medical Marijuana Act was passed, which was replaced in 2011 by a new Montana Marijuana Act with its purpose specifically being to “provide legal protections to persons with debilitating medical conditions who engage in the use of marijuana to alleviate the symptoms of the debilitating medical condition...” 2011 Mt. ALS 419; 2011 Mt. Laws 419; 2011 Mt. Ch. 419; 2011 Mt. SB 423 So, since, at least 2011 there has been a legitimate medical purpose for marijuana that the Montana Legislator has recognized.

Further, in 2021 the legislature enacted the Montana Marijuana Regulation and Taxation Act, providing the recreational use of marijuana. Mont. Code Ann. § 16-12-101. Which again cited, among other things, its purpose as “provide a regulatory system for the providing marijuana for the use of individuals with debilitating medical conditions...” Mont. Code Ann. § 16-12-501.

The listing of marijuana as a schedule I drug cannot be reconciled with the other statutes governing marijuana, and as such the more specific statute should govern.

Here, the Montana Medical Marijuana Act and later Montana Marijuana Act are the specific statutes that address marijuana, and they are the statutes that govern. Simply put, the legislature, and the people of Montana have recognized that marijuana has a valid medical use and therefore cannot be a schedule I drug.

What schedule marijuana actually falls in is irrelevant to this appeal because a person who is found guilty of the distribution of any schedule II through V dangerous drug, without a valid prescription, is guilty of a misdemeanor and may be fined in an amount not to exceed \$1,000, or be imprisoned for a term in a county jail not to exceed 1 year. Mont. Code Ann. § 50-32-208.

Persons alleged to have committed criminal offenses must be charged with violating the law in effect at the time the crime was committed. *Med. Marijuana Growers Ass'n v. Corrigan*, 2012 MT 146, ¶ 20, 365 Mont. 346, 281 P.3d 210. (internal citations omitted). However, when a statute is amended and the amendment lessens or gives an ameliorative benefit to the defendant, the statute in effect at sentencing governs the available sentence that may be imposed on the defendant. See *State v. Wilson*, 279 Mont. 34, 39, 926 P.2d 712, 715 (1996); *State v. Peralta*, 2022 MT 201, ¶ 20, 410 Mont. 316, 519 P.3d 5.

The people of Montana have determined, multiple times, that marijuana has a valid medical purpose, so it cannot be a schedule I drug, and the legislature has established the punishment for distribution of schedule II through V dangerous drugs

is a misdemeanor, and this was the law in effect at the time of both of Pein’s most recent sentencings. This makes both of Pein’s sentences illegal, and as such this Court should vacate his sentence for all counts of conviction and remand for resentencing.

**V. MONTANA CODE ANNOTATED 45-9-206’S FORFEITURE CLAUSE IS FACIALLY UNCONSTITUTIONAL.**

The Eighth Amendment to the United States Constitution and Article II, Section 22, of the Montana Constitution protect citizens from excessive fines and their language is virtually identical. *State v. Forfeiture of 2003 Chevrolet Pickup*, 2009 MT 25, ¶ 9, 349 Mont. 106, 202 P.3d 782. In 2019, for the first time, the U.S. Supreme Court incorporated the Eighth Amendment excessive fines protections to the States through the Fourteenth Amendment due process clause. *Timbs v. Indiana*, 586 U.S. 146, 154, 139 S. Ct. 682, 689 (2019). Importantly, *Timbs* applies the Eighth Amendment requirements to forfeitures, because they are at least in part punitive and constitute a fine. 586 U.S. at 154-155, 139 S. Ct. at 689.

However, applying federal constitutional protections is not necessary in this case because federal protections only provide a backstop to the protections provided to Montana citizens. The Montana Supreme Court has refused to “march lock-step” with the U.S. Supreme Court and when applying Montana’s unique constitutional protections has generally provided more protection to Montana citizens than the federal constitution allows for. See *State v. Covington*, 2012 MT 31, ¶ 20, 364 Mont.

118, 272 P.3d 43 (the Montana Constitution may provide greater protection than the United States Constitution); *State v. Ellis*, 2009 MT 192, ¶ 22, 351 Mont. 95, 210 P.3d 144 (the Montana Constitution provides an enhanced right to privacy); *Woirhaye v. Mont. Fourth Judicial Dist. Court*, 1998 MT 320, ¶ 14, 292 Mont. 185, 972 P.2d 800 (providing for an enhanced right to a jury trial).

Federal protections only require that a fine must bear some relationship to and not be grossly disproportionate to the gravity of the offense that it is designed to punish. *Timbs*, 586 U.S. at 149, 139 S. Ct. at 686.

Whereas, this Court has consistently held that a statute is “facially unconstitutional to the extent it requires a sentencing judge to impose a mandatory fine without ever permitting the judge to consider whether the fine is excessive.” *State v. Yang*, 2019 MT 266, ¶ 18 397 Mont. 486, 452 P.3d 897; *State v. Gibbons*, 2024 MT 63, ¶ 57, 416 Mont. 1, 28, 545 P.3d 686, 703.

In *Yang*, this Court found a mandatory fine of 35% of the market value of any dangerous drugs possessed by a defendant to be facially unconstitutional because it removed the judicial discretion of the sentencing judge, and was in conflict with the Mont. Code Ann. § 46-18-231(3) (requiring judges to determine if the offender has the ability to pay the contemplated fine). ¶ 17. This violated Montana’s protection against excessive fines, making the automatic 35% of street value fine facially unconstitutional. *Yang*, ¶ 28.

More recently, this Court analyzed a mandatory minimum fine for a fifth or subsequent DUI contained in Mont. Code Ann. § 61-8-731(3) (2019), which required a fine in an amount not less than \$5,000 or more than \$10,000. *Gibbons*, ¶ 52. The *Gibbons* Court reaffirmed the *Yang* Court’s reasoning and rule, that Article II, Section 22, of the Montana Constitution requires that the sentencing judge be able to consider “the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine will impose” before ordering the offender to pay a fine.” *Gibbons*, ¶ 61, quoting Mont. Code Ann. § 46-18-231(3).

It is the mandatory nature of the fines that is offensive to this Court, and the statute at issue is likewise mandatory in nature, stating simply that upon conviction of Use or Possession of Property Subject to Criminal Forfeiture, the “property subject to criminal forfeiture is forfeited to the state and must be disposed of...” Mont. Code Ann. § 46-9-206(1).

This leaves the sentencing judge with no options, they must order the property forfeited to the State, regardless of the value of the property, and without consideration of the gravity of the facts supporting the offense committed. *Pein*’s case is a perfect example of the disproportionate nature of this statute. Even taking all the counts of conviction into account, the value of the marijuana *Pien* was accused of possessing and/or selling amounted to approximately \$4,500, in today’s money.

See Transcript of Proceedings, Sentencing, April 30, 2024, 39:6-8. For this \$4,500 in value, Pien lost his home, valued by the State to be worth at least \$45,000 . *Id.*, 37:13-15.

Finally, this would fail even the federal test, the value of the drugs possessed or sold is 1/10th the value of the home lost, making it grossly disproportionate.

This Court should find Mont. Code Ann. § 45-9-206(1) facially unconstitutional because it does not allow the sentencing judge to consider, before imposing the forfeiture, the proportionality factors protecting an offender from excessive fines.

### **CONCLUSION**

For the foregoing reasons, this Court should vacate Pein's sentence and conviction for Counts IV and VIII, and hold that Montana Code Annotated § 45-9-206' forfeiture mandate is facially unconstitutional.

DATED this 15th day of January 2025.

PEACE LAW GROUP, LLC

/s/Rufus I. Peace  
Rufus I. Peace  
*Attorney for Appellant/Defendant*

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Appellant's Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes, quoted, and indented material; and that the word count calculated by Microsoft Word Professional Edition is 9,078 words, excluding the Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance.

DATED this 15th day of January 2025.

PEACE LAW GROUP, LLC

*/s/Rufus I. Peace*  
Rufus I. Peace  
*Attorney for Appellant/Defendant*

**APPENDIX**

Order on Resentencing, April 18, 2023 .....Appendix A

Judgment and Sentence for Counts IV and VIII, April 30, 2024 ..... Appendix B

Motion to Dismiss Counts IV and VIII, January 20, 2023 ..... Appendix C

State’s Response to Motion to Dismiss Counts IV and VIII, February 7, 2023  
.....Appendix D

Order Denying Motion to Dismiss Counts IV and VIII, March 16, 2023  
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Notice of Appeal, June 13, 2023..... Appendix F

Motion to Dismiss for Double Jeopardy, February 2, 2024 .....Appendix G

State’s Response to Double Jeopardy Motion, February 5, 2024 .....Appendix H

Order Denying Motion for Double Jeopardy, February 5, 2024 ..... Appendix I

Order Clarifying Order on Double Jeopardy, February 7, 2024 ..... Appendix J

## CERTIFICATE OF SERVICE

I, Rufus I. Peace, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 01-16-2025:

Austin Miles Knudsen (Govt Attorney)  
215 N. Sanders  
Helena MT 59620  
Representing: State of Montana  
Service Method: eService

Kent M. Sipe (Govt Attorney)  
801 W. Broadway  
Lewistown MT 59457  
Representing: State of Montana  
Service Method: eService

Electronically Signed By: Rufus I. Peace  
Dated: 01-16-2025