

**In the Supreme Court for the State of Montana**

Supreme Court No. OP 25-\_\_\_\_\_

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Bryce Everett Peterson,

Petitioner,

-vs-

Brian Gootkin, Montana Department of Corrections;  
Austin Knudsen, Attorney General,

Respondents.

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**Petition for Writ of Habeas Corpus**

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## INTRODUCTION

Pursuant to *Mont. Code Ann. § 46-22-101*, *Mont. R. App. P. 14*, Bryce Everett Peterson (Peterson) petitions this Court for a Writ of Habeas Corpus. “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.” *Mont. Code Ann. § 46-22-101(1)*.

The writ should issue on the grounds that Peterson is being unlawfully restrained of liberty since he remains subject to conditions of parole stemming from a facially invalid sentence. He is also subject to an additional 20-years imprisonment on his overall sentence if his parole is rescinded or revoked. Finally, if he discharges his sentence and is ever revoked, he faces a potential additional 6 months in jail.

Peterson asserts his sentences violate the constitutional right to be free from double jeopardy. “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 . . . violates the constitutional right to be free from double jeopardy- have the ability to challenge its legality.” *Lott v. State*, 2006 MT 279, ¶22 (finding conviction in violation of Montana’s statutory double jeopardy guarantee is a jurisdictional claim that cannot be waived).

Peterson specifically challenges that his punishment for Count V- Aggravated Burglary, in violation of *Mont. Code Ann. § 45-6-204(1)(2)(b)*, and Count VI- Partner or Family Member Assault (2<sup>nd</sup> Offense), a misdemeanor, in violation of *Mont. Code Ann. § 45-5-206* violate his right against double jeopardy. Peterson also asserts his convictions for Count II- Aggravated Assault, in violation of *Mont. Code Ann. § 45-5-202*, and Count III- Assault with a Weapon, in violation of *§ 45-5-213*, constitute a double jeopardy violation.

This petition is properly before the Court because Peterson’s illegal convictions have subjected him to conditions of parole from the Montana Board of Parole and the jurisdiction of the State of Montana. This court has jurisdiction over this proceeding pursuant to *Mont. Code Ann. § 46-22-202*, *Mont. R. App. P. Rule 14*, and *Article VII, Section 2* of

the Montana Constitution. While Peterson is no longer imprisoned, he remains restrained of liberty by virtue of his supervision by the Montana Board of Parole and, ultimately, sanction by the Montana Department of Corrections (DOC). *Jones v. Cunningham*, 371 U.S. 236, 243, 83 S. Ct. 373, 377 (1963) (“While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the ‘custody’ [of the parole board] within the meaning of the habeas corpus statute . . . .”). Peterson is still subject to immediate sanction and revocation back to the custody of the DOC if he violates the conditions of his parole.

### **FACTS AND BACKGROUND**

On November 6, 2008, the Ravalli County Attorney charged Peterson with Aggravated Kidnapping (Count I); Aggravated Assault (Count II); Assault with a Weapon (Count III); Intimidation (Count IV); Aggravated Burglary (Count V); and Partner of Family Member Assault, 2<sup>nd</sup> Offense, a misdemeanor (Count VI). These charges stemmed from events all occurring on the same day—October 17, 2008—against the same alleged

victim. (Ex. A).

On September 10, 2009, Peterson entered *Alford* pleas to the charges in the Information without any formal plea agreement. (Ex. B). On November 13, 2009, the district court sentenced Peterson on all six counts, resulting in a commitment to the Montana State Prison for a period of 70 years with 20 of those years suspended. (Ex. C).

Specific to this petition, Peterson was sentenced on Count V- Aggravated Burglary, to 20 years, all suspended, concurrent to Count IV- Intimidation. Ex. C at 3. The district court sentenced Peterson to 6 months, all suspended, on the PFMA charge, concurrent to Count IV. On Count II- Aggravated Assault, Peterson was sentenced to 20 years, none suspended, consecutive to Count I- Aggravated Kidnapping. Finally, Peterson was also sentenced on Count III-Assault with a Weapon, to ten years, none suspended, consecutive to his sentence in Count II- Aggravated Assault.

After a direct appeal and various collateral attacks on his sentence, Peterson first became eligible for parole on April 15, 2021. He was eventually granted parole by BOPP on March 20, 2024, and approved for

Interstate Compact to the state of Arizona on May 29, 2024. Peterson now resides in Arizona, subject to supervision by the conditions imposed by the Montana Board of Pardons and Parole as well as the standard conditions of parole of the Arizona Department of Corrections, Rehabilitation, and Reentry. Ultimately, any violation could result in his return to the Montana Department of Corrections.

### **ARGUMENT**

#### **Punishments Imposed in Counts V and VI violate Statutory and Constitutional Guarantees Against Double Jeopardy.**

##### *A. Convictions for PFMA and Aggravated Burglary Violate M.C.A. § 46-11-410*

“As we noted in *Russell*, nothing under the rules of double jeopardy analysis precludes the State from seeking, and obtaining, a conviction on a more serious charge and a lesser-included offense to the more serious charge,” *State v. Williams*, 2010 MT 58, ¶ 38; (discussing *State v. Russell*, 2008 MT 417, ¶ 20). A defendant may not, however, be convicted of more than one offense if one offense is included in the other. *Mont. Code Ann. § 46-11-410(2)(a)*.

When a second offense is charged as a predicate to a principal charge, the accused cannot be convicted of the principal charge without having committed the predicate offense. “When the State chooses to charge the offenses in that fashion, the offenses merge. The predicate offense becomes a lesser included offense. . . .” *State v. Russell*, 2008 MT 417, ¶ 26, 347 Mont. 301, 198 P.3d 271. *Russell* dealt with a conviction wherein aggravated assault was the predicate offense element for the felony homicide.

The Montana Supreme Court reaffirmed *Russell* this year in *State v. Stokes*, 2024 MT 32, ¶ 6, 415 Mont. 208, 211, 543 P.3d 601, 603. In that case, the State charged assault with a weapon as a predicate offense for burglary. This Court reversed, holding assault with a weapon was the predicate offense and therefore became a lesser included offense. “Having been improperly convicted of these two offenses, Stokes’s remedy is to reverse the conviction for the lesser-included assault with a weapon offense only and to remand for resentencing.” *Stokes*, 2024 MT 32, ¶ 7.

The Court also examined the interplay between assault and aggravated burglary in *State v. Rodriguez*, 2024 MT 132, ¶ 27, 417 Mont. 52, 61, 551 P.3d 292, 299. There, the State attempted to distinguish between the two crimes by arguing that the assault happened outside of the home, while the burglary happened within the home. The Court reversed, noting the jury instructions and the facts charged did not distinguish between the two.

As charged and convicted in Peterson’s case, the PFMA was the predicate offense to the aggravated burglary charge. The PFMA was therefore an included offense, as well as an element of the aggravated burglary itself. Ex. A. “[F]rom the states choice in framing the charges...” *Russell* at 307-308, the State charged Petitioner with aggravated burglary, including the assault as a predicate offense, to make it “aggravated.” Peterson was then convicted of both aggravated burglary and PFMA. Peterson’s punishments imposed for both crimes are in violation of Montana's statutory restriction on multiple convictions and must, therefore, be vacated under *Mont. Code Ann. §*

46-11-410(2)(a). Peterson's case should be remanded for a new sentencing hearing.

*B. The PFMA and Aggravated Burglary convictions violate Montana's Constitutional Double Jeopardy Right.*

*Article II, Section 25* of Montana's Constitution provides: "No person shall be again put in jeopardy for the same offense previously tried in any jurisdiction." *Mont. Const., Art. II, Sec. 25*. This clause "prohibits the legislature from imposing on criminal defendants multiple punishment for the same offense." *State v. Guillaume*, 293 Mont. 224, 233 (1999).

The Montana Supreme Court held in *Guillaume* that the application of a weapon enhancement statute to felony convictions, for which the underlying offense requires proof of use of a weapon, violates the double jeopardy provision in the Montana constitution, see *Guillaume*, 293 Mont. at 231. The Court was, "guided by the fundamental principle embodied in double jeopardy," that, "double jeopardy exemplifies the legal and moral concept that no person should suffer twice for a single act." *Id.* Because the defendant was being

punished twice for his use of a weapon in the assault, the court reversed the lower court sentencing order and remanded for rehearing and re-sentencing. *Id* at 233.

Here, Peterson’s convictions under Counts V and VI violate the double jeopardy provisions of the Montana Constitution under *Article II, Section 25* as interpreted in *Guillaume*. Peterson’s conviction and sentence for aggravated burglary is explicitly predicated on the Commission of an assault. As such, Peterson’s additional sentence of 6 months imposed under Count VI for the assault (PFMA), based on the same aggravated burglary “with the purpose to commit an assault therein,” constitutes duplicitous punishment and effectively causes the Petitioner to “suffer twice for a single act.” Petitioner’s sentence for the assault under Count VI, predicated upon the same assault to obtain a conviction for aggravated burglary under Count V, violates the double jeopardy provision of the Montana Constitution. Peterson’s case should be remanded back to the district court with instructions to vacate the duplicative conviction and hold a new sentencing hearing.

The Montana Constitution, “affords greater protection against multiple punishments for the same offense than does the *Fifth Amendment* to the United States Constitution,” *Guillaume* at 230-231. Thus, where the *Fifth Amendment* protects against multiple punishments for the same offense, “the double jeopardy clause of the Montana constitution provides at least the same protection,” *Id.* at 232.

The federal Double Jeopardy clause set forth in the *Fifth Amendment* to the United States Constitution, which applies to Montana through the *Fourteenth Amendment*, also precludes Petitioner’s sentences for the assault (PFMA, Count VI) and aggravated burglary. The United States Supreme Court has held that, “[a] defendant’s conviction for felony murder based on a killing in the course of an armed robbery barred a subsequent prosecution against the same defendant for the robbery.” *Illinois v. Vitale*, 447 U.S. 410, 420 (1980) (*discussing Harris v. Oklahoma*, 433 U.S. 682 (1977)).

Although Peterson’s case is not a subsequent prosecution case, the United States Supreme Court has also held that it is a violation of double jeopardy for the courts to impose punishment(s) for the same

offense unless explicitly authorized to do so by the legislature. *Whalen v. United States*, 445 U.S. 684, 689 (1980). Here, Montana's legislature has explicitly prohibited multiple punishments where “one offense is included in the other.” *Mont. Code Ann. § 46-11-410(2)(a)*.

Thus, under *Vitale* and *Whalen*, where Peterson’s conviction for the aggravated burglary under Count V requires a finding that Peterson also committed an assault, the *Fifth Amendment* prohibits the State from further punishing Peterson for the underlying predicate offense of assault. Peterson’s case should be remanded back to the sentencing court for a new sentencing hearing.

## II. The Punishments Imposed in Counts II and III Violate Montana’s Statutory and Constitutional Guarantees Against Double Jeopardy.

*A. The Aggravated Assault and Assault with a Weapon convictions violate Mont. Code Ann. § 46-11-410.*

Peterson was charged with and convicted of Aggravated Assault, in violation of *Mont. Code Ann. § 45-5-202* (Count II). Specifically, the State alleged that “[o]n or about Oct. 17, 2008, in Ravalli County, Mt defendant . . . committed the offense of aggravated assault by purposely or knowingly . . . with the use of physical force or contact causing

reasonable apprehension of serious bodily injury in,” the victim H.P. As charged in this case for Count II, a person commits aggravated assault if he (1) “purposely or knowingly,” (2) “causes reasonable apprehension of serious bodily injury,” (3) “in” the victim H.P.

Peterson was also charged with and convicted of Assault with a Weapon in violation of *Mont. Code Ann.* § 45-5-213 (Count III). The State alleged that “[o]n or about Oct. 17, 2008, in Ravalli County, Mt defendant . . . committed the offense of aggravated assault by purposely or knowingly causing reasonable apprehension of serious bodily injury in” the victim H.P. ”by use of a handgun.” As charged in this case for Count III, a person commits aggravated assault if he (1) “purposely or knowingly,” (2) “causes reasonable apprehension of serious bodily injury,” (3) “in” the victim H.P. (4) “by use of a handgun.” (Ex. A).

Both Counts II and III require (1) “purposely or knowingly” as the mental state; (2) “reasonable apprehension of serious bodily injury” as the conduct; and (3) in H.P. as the required attendant circumstance. Count III incorporates only one additional element not found in Count II “by use of a handgun.” Count II ultimately “is established by proof of

the same or less than all the facts required to establish the Commission of the offense charged," *Mont. Code Ann. § 46-1-202(9)(a)*, under Count III.

Recognizing that the "*Blockburger* test" is simply a guide to determining whether the legislature intended multiple punishments, see *Missouri v. Hunter*, 459 U.S. 359 (1983), Montana's legislature enacted *Mont. Code Ann. § 46-11-410(2)(a)*, prohibiting conviction on two offenses when one is included within the other. The use of the *Blockburger* test is inappropriate in a lesser- included offense analysis because Montana has statutorily defined what constitutes a lesser- included offense and *Blockburger* may unnecessarily confuse the issue, see *State v. Becker*, 2005 MT 75, ¶22; see also *State v. Beavers*, 1999 MT 260, ¶27.

Furthermore,

"Our case law permits two different applications of the language in § 45-5-213(1)(b), MCA, which makes it a crime to cause 'reasonable apprehension of serious bodily injury in another by use of a weapon or what reasonably appears to be a weapon.' Under one application a crime is committed if a person uses a weapon or what reasonably appears to be a weapon to cause

reasonable apprehension of serious bodily injury in the victim. Under the second application, a crime is also committed if a person simply causes reasonable apprehension that the victim will sustain serious bodily injury from a weapon if it reasonably appears to the victim that a weapon is involved, whether actually seen or not...”

“It is not technically correct that ‘use of a weapon’ (or, presumably, what appears to the victim to be a weapon) is a requisite element of the offense,”

*State v. Smith*, 2004 MT 1911, P25-26.

Utilizing the comparison of a lesser included defense as set forth in *State v. Wetherell*, 2010 MT 37, ¶ 12-14, both aggravated assault under *Mont. Code Ann. § 45-5-202* (Count II) and assault with a weapon under *Mont. Code Ann. § 45-5-213* (Count III) reflect the same societal norm (same legal norm, Title 45, Chapter 5 “Offenses Against the Person”, Part 2 “Assault and Related Offenses”), the same mental state (“purposely or knowingly”), the same intent (“to cause reasonable apprehension of serious bodily injury”), and upon the same victim. The only difference between Counts II and III, as charged, is “by use of a handgun” asserted in Count III. Thus, Count II is a lesser-included

offense of Count III, and both counts should have merged for sentencing purposes.

The sentencing court imposing consecutive punishments for Counts II and III, despite *Mont. Code Ann. § 46-1-202(9)(a)* clearly indicating one is a lesser-included of the other, constitutes duplicitous punishment in violation of *Mont. Code Ann. § 46-11-410(2)(a)* and the *Fifth Amendment* to the U.S. Constitution.

Had the State charged Peterson with aggravated assault in violation of *Mont. Code Ann. § 45-5-202* and sought an enhancement for the use of a weapon during the aggravated assault under *Mont. Code Ann. § 46-18-221(1)*, there would be no double jeopardy violation. *State v. Whitehorn*, 2002 MT 54, P46 (“nor is double jeopardy violated when a defendant's conviction for aggravated assault under § 45-5-202, is enhanced by § 46-18-221.”).

Peterson could not be guilty of assault with a weapon under *Mont. Code Ann. § 45-5-213*, (Count III) without having also committed aggravated assault under *Mont. Code Ann. § 45-5-202* (Count II) in this

case. When the sentencing court imposed consecutive punishments for Counts II and III affecting his overall total sentence, the Petitioner became twice punished for the same lesser included act in place, time, upon the same person, with the exact same intent to cause the same reasonable apprehension of serious bodily injury.

*B. Conviction on the Assault with a Weapon and Aggravated Assault counts violates Montana's Constitutional Double Jeopardy Right.*

As argued above, *Article II, section 25* of Montana's Constitution affords at least the same protections against multiple punishments for the same offense as the *Fifth Amendment* to the United States Constitution. *Guillaume* at 230-232. Because aggravated assault became a lesser included offense of assault with a weapon, the consecutive punishment imposed for Count II out of the same transaction as Count III, Violates *Article II, Section 25* of Montana's constitutional protections against double jeopardy as contemplated by *Guillaume*.

Here, where Count II is a lesser included offense of Count III (“from the States choice in framing the charges,” *Russell*, ¶ 27), the

consecutive punishment imposed under Count II violates the double jeopardy provision of Montana's Constitution under *Article 2, section 25* as interpreted in *Guillaume*. Peterson's sentence for Aggravated Assault under Count II is established by proof of less than all the facts required to establish the assault with a weapon offense under Count III (see Ex. A), thus constituting duplicitous punishment effectively causing Peterson to "suffer twice for a single act."

Therefore, Peterson's sentence for Aggravated Assault under Count II, a lesser included offense of assault with a weapon under Count III violates the double jeopardy provision of the Montana Constitution requiring the case to be remanded for a new sentencing hearing to strike the punishment imposed under Count II.

### **Conclusion**

For the foregoing reasons, Peterson respectfully requests the Court reverse the district court's Judgment and remand for a new sentencing hearing to strike the double jeopardy punishments resulting from Counts V and VI and Counts II and III, respectively. Peterson is

currently restrained from liberty by facially invalid sentences, and this Court should grant relief.

Count II, a double jeopardy punishment as it relates to Count III, adds an additional 20-year consecutive sentence to his overall sentence. Counts V and VI, while fully suspended by the district court, threaten an additional period of incarceration, specifically 6 months on Count VI, should Peterson's ever be revoked after discharging his sentence.

Respectfully submitted this 21st day of February 2025.

/s/ Nick K. Brooke  
Nick K. Brooke  
Stephens Brooke, P.C.  
*Attorney for Petitioner*

## Certificate of Compliance

I, Nick K. Brooke, hereby certify that the foregoing complies with Mont. Rule App. P. 14(9), in that it contains a table of contents and does not exceed 4,000 words. Exact number of words, as calculated by my WORD software is 3,597 words.

Dated this 21<sup>st</sup> day of February 2025.

/s/ Nick K. Brooke  
Nick K. Brooke  
Stephens Brooke, P.C.  
*Attorney for Petitioner*

VERIFICATION

I, Bryce Peterson, hereby declare, under penalty of perjury, that I am illegally incarcerated and restrained of my liberty. I have reviewed the Petition for a Writ of Habeas Corpus and certify that, to the best of my knowledge, the representations made therein are true and correct.

Dated this 20<sup>th</sup> day of February, 2025.

A handwritten signature in black ink, appearing to read 'Bryce Peterson', written over a horizontal line.

Bryce Peterson

## CERTIFICATE OF SERVICE

I, Nicholas Kirby Brooke, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 02-21-2025:

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