IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0328

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DAVID ALLEN PEIN,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Tenth Judicial District Court,
Fergus County, The Honorable Heather Perry, Presiding

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ISSUES PRESENTED

1. Whether the district court had jurisdiction to conduct a trial and sentencing on bifurcated Counts IV and VIII, when Appellant had previously appealed his resentencing upon revocation of his deferred sentence on Count VI.

2. Whether a deferred prosecution agreement (DPA) for Counts IV and VIII was lawful when it was filed as its own document but it was also referenced in a simultaneously filed plea agreement resolving the other counts.

3. Whether Appellant was subject to double jeopardy when he was prosecuted on Counts IV and VIII based on conduct different from his prior conviction for Count VI.

4. Whether Appellant's sentence is illegal based on his claim that marijuana should not be a "schedule I dangerous drug."

5. Whether Appellant meets his heavy burden to show beyond a reasonable doubt that the criminal forfeiture statute is facially unconstitutional in all applications.

CASE PRESENTED

I. The nine charges, the DPA for Counts IV and VIII, the plea agreement disposing of the remaining charges, and Pein's conviction for Count VI

In October 2016, the State charged Appellant David Allen Pein with three counts of criminal distribution of dangerous drugs on/near school property, with

one charge under an accountability theory (**Counts I-III**). (Doc. 4.) In the alternative, Pein was charged with criminal distribution of dangerous drugs (**Count IV**), criminal possession of dangerous drugs (**Count V**), criminal possession of dangerous drugs with intent to distribute (**Count VI**), criminal possession of drug paraphernalia (**Count VII**), and two counts of use of possession of property subject to criminal forfeiture (**Count VIII-IX**). (*Id*.)

In this appeal, Pein challenges his convictions for **Count IV** (drug distribution) and **Count VIII** (home forfeiture). Some of Pein's claims challenging these counts relate tangentially to **Count VI** (drug possession with intent to distribute).

Via Count IV, the State alleged that Pein "purposely or knowingly sold the dangerous drug marijuana." (Doc. 4 at 3, *date later amended via* Second Am. Inf., Doc. 269 at 1.) The affidavit detailed the controlled buy with police using a confidential informant (CI) on September 24, 2016, as well as explained that during a later home search on September 29, 2016, "nine of the twenty dollar bills [of money that was recovered from the buy]" were verified by photos of the money taken with the serial numbers prior to the buy. (Doc. 2 at 3, 4-5.)

Via Count VIII, the State charged Pein with use or possession of property subject to criminal forfeiture. The State explained that "during August and September 2016," Pein "knowingly. . . owned, used . . . real property to facilitate

the distribution of the dangerous drug of marijuana." (Doc. 4 at 4; *accord* Doc. 269.)

But the State's charge, alleged conduct, and date were different for Count VI—criminal possession of dangerous drugs with intent to distribute—specifically, "on or about September 29, 2016, the defendant possessed the dangerous drug marijuana, with the intent to distribute it." (Doc. 4 at 3.) The State explained the "439 grams" of marijuana seized on September 29, 2016, as well as weighing equipment, several phones, marijuana paraphernalia, and Ziploc bags. (Doc. 2 at 4.)[1]

On June 30, 2017, the State and Pein entered a DPA for Counts IV and VIII (distribution, home forfeiture) pursuant to Mont. Code Ann. § 46-16-130. The State agreed to defer prosecution for ten years, contingent to Pein fully complying with the agreement. (Doc. 36 at 3, attached to Appellee's Br. as App. 1.) In return, Pein agreed to voluntarily forfeit his three vehicles and any money seized through the search warrant, pertaining to Count IX. (App. 1 at 4.) The agreement contemplated that after the expiration of ten years with no violations, the counts would be "dismissed with prejudice" at that time. (*Id.*)

[1] Thus, while the State's charge for Count IV concerned marijuana that had already been distributed, the State's charge for Count VI, possession, concerned marijuana that had been later seized by police on September 29, 2016, but had not yet been distributed.

The same day, the parties entered into a Mont. Code Ann. § 46-12-211(1)(c) plea agreement. (Doc. 37 at 5, attached to Appellee's Br. as App. 2.) The agreement summarized that: (1) Pein would resolve Counts IV and VIII through the DPA; (2) Pein would plead guilty to Count VI; and (3) the State would move to dismiss Counts I, II, III, V, VII, and IX at sentencing. (App. 2 at 8.) For Count VI, the parties agreed to jointly recommend a five-year deferred sentence. (*Id.*)

On July 6, 2017, the court held a change of plea hearing for Count VI. Pein admitted that he possessed marijuana with the intent to distribute it, and that the total weight of the seized marijuana was 439 grams. (7/6/17 Tr. at 7-8, 11.) The district court accepted the guilty plea. (*Id*. at 13; Doc. 39.)

On March 22, 2018, the district court held a sentencing hearing for Count VI. Lewistown Police Officer Levi King explained the 439 grams of marijuana seized was worth about $4,180.95. (3/22/18 Tr. at 16, 18.) For his part, Pein admitted that, at the time the investigation against him was pending, he did not have a valid medical marijuana card. (*Id*. at 32-33.)

The district court adopted the plea agreement and the DPA. (3/22/18 Tr. at 47; Doc. 52, Judgment for Count VI, attached to Appellee's Br. as App. 3.) The court imposed a deferred five-year sentence for Count VI. (3/22/18 Tr. at 47.) The court granted the State's motion to dismiss Counts I, II, III, V, VII, and IX. (3/22/18 Tr. at 51; Doc. 52 at 5-6.)

Pein appealed his conviction for Count VI, challenging the condition prohibiting him from accessing a medical marijuana card. This Court affirmed. *State v. Pein*, 2019 MT 167N, 397 Mont. 551, 455 P.3d 440.

II. Count VI:[2] The revocation of the deferred sentence and sentencing

On June 10, 2020, the State moved to revoke Pein's deferred sentence for Count VI, explaining that Pein was recently charged with criminal possession of dangerous drugs and paraphernalia, and he admitted to his parole office to using methamphetamine and marijuana. (Doc. 70, Petition/ROV.) On January 19, 2021, the State again moved to revoke Pein's deferred sentence, explaining that Pein was recently charged with two felony assault on a peace officer counts and five related misdemeanors. (Doc. 109, Petition/ROV.)

Meanwhile, Pein petitioned the district court to expunge Count VI under the Montana Marijuana Regulation and Taxation Act. *See* DV-22-39. The district court denied Pein's petition, and this Court affirmed. *Pein v. State*, 2023 MT 38N, 441 Mont. 392, 525 P.3d 25.

[2] While Pein does not challenge Count VI here, this information is provided for context relating to how Pein's claims progressed, as related to Pein's jurisdictional and double jeopardy claims.

The district court waited until the expungement appeal was over before proceeding with the Count VI revocation and disposition. (3/14/23 Tr. at 21-22.) At the adjudicatory hearing, the district court ruled that Pein violated his deferred sentence, (*id*. at 40-41), and revoked Pein's deferred sentence for Count VI (Doc. 177).

On April 18, 2023, the district court resentenced Pein to the Department of Corrections for four years, no time suspended, concurrent to a separate sentence in DC-2020-79.[3] (4/18/23 Tr. at 62, 65-66; Doc. 193, Order on Resentencing at 2.)

III. The resurrection of Counts IV and VIII after Pein's violations of the DPA, followed by the trial and sentencing

On June 10, 2020—at the same time the State instigated revocation procedures for Count VI—the State noticed an intent to proceed with trial on Counts IV and VIII after Pein's violations of the DPA. (Doc. 71.) The district court set the counts for trial. (Doc. 168 at 3.)

Pein filed a motion to dismiss, arguing that the plea agreement statute did not contemplate DPAs, thus deferred prosecution was not allowed under that statute. (Doc. 171 at 2.) Pein also argued that Counts IV and VIII should be dismissed "pursuant [to] 46-11-503(1)(b)[,]" the double jeopardy statute. (*Id*. at 3.) The State

[3] While this matter was pending, Pein racked up various misdemeanor and felony charges in several matters unrelated to the 2016 marijuana operation.

responded. (Doc. 172 at 3.) After holding a hearing, the district court denied Pein's motion. (3/14/23 Tr. at 2-5; Doc. 180, attached to Appellee's Br. as App. 4.)

Four days before trial, Pein reraised the double jeopardy claim, this time arguing that the proofs of facts from Pein's prior conviction for Count VI precluded the current prosecution for Counts IV and VIII. (Doc. 262.) Pein argued that the 439 grams of marijuana seized for which his conviction for Count VI was based upon, were the same facts that constituted the bases for Counts IV and VIII. (*Id*. at 2-3.) The district court reserved ruling until the State filed a written response, which the State filed one day before trial. (2/2/24 Tr. at 17; Doc. 271 (State's response, available at Appellant's App. H).) The district court issued an order denying Pein's motion to dismiss. (Doc. 275, attached to Appellee's Br. as App. 5.)

The next day, on February 6, 2024, Counts IV and VIII proceeded to jury trial, but voir dire was not completed because they ran through the jury pool. More jurors were called for a second day of voir dire. (*See* Doc. 276, min ent.)

After voir dire on February 7, 2024, but before opening statements occurring the next day, the district court issued an order clarifying its prior orders related to double jeopardy, explaining the scope of the permissible evidence as related to Counts IV and VIII. (Doc. 283, attached to Appellee's Br. as App. 6.)

On February 9, 2024, the jury reached guilty verdicts for both counts. (Doc. 289; 2/9/24 Tr. at 40.)

Next, Pein filed an "Objection to Forfeiture of Home" wherein he argued that his home forfeiture was "grossly disproportionate to" his marijuana dealing operation. (Doc. 297.) The State responded, also attaching as exhibits the forfeiture statutes, the market value of the home, a comparable market analysis, photos of the home, a price analysis, and a title report. (Doc. 299, exhibits; Doc. 301 (title report).)

On April 30, 2024, the district court sentenced Pein to the Montana State Prison for seven years for both counts (App. B at 2; 4/30/24 Tr. at 52), concurrently to each other, and concurrently to Pein's other unrelated matters: DC-2020-79 and DC-2023-15. (App. B. at 2; 4/30/24 Tr. at 52.) After further discussing Pein's claim related to forfeiture, the court ordered that Pein forfeit his property. (Doc. 303 at 2, 9, available at Appellant's App. B; 4/30/24 Tr. at 52.)

FACTS PRESENTED

I. The offenses

On August 24, 2016, Lewistown Police Officer Randy Poser arranged for Wendy Lunceford, a CI, to do a controlled buy at Pein's house. (2/8/24 Tr. at 29-30.) Prior to the buy, Lunceford was searched and fitted with a wire. (*Id*. at

86.) Lunceford approached Pein's residence and contacted Pein's now-ex-wife Kathleen Duncan (formerly Kathleen Pein). (*Id*. at 30.) Lunceford asked Kathleen if Pein could come out, and he did. (*Id*. at 83.) Lunceford asked to buy marijuana from Pein. (*Id*. at 30-31, 83.) Pein first asked Lunceford several questions, including if she was "wired[.]" (*Id*. at 83-84.) Pein went into his house. Kathleen returned outside, holding the marijuana in a cup. (*Id*. at 31, 84-85.) Lunceford paid for the marijuana with cash that she was previously provided with from police, of which the cash serial numbers had been previously photocopied and documented. (*Id*. at 31.) Lunceford put the cash into the cup and retrieved the marijuana. (*Id*. at 34.) She returned to the nearby police vehicle and provided the marijuana to them. (*Id*. at 31, 84.) They returned to the police station and debriefed. (*Id*.)

On September 2, 2016, Lunceford did another controlled buy at Pein's residence. (2/8/24 Tr. at 39, 87.) Prior to the buy, police again photographed the money to be used to document the serial numbers and briefed Lunceford, searched her, fitted her with a wire, and gave her the previously photographed money. (*Id*. at 39-40.) This time, Lunceford went inside Pein's house and into his kitchen. (*Id*. at 40, 86, 88.) She saw Pein gather marijuana that was on some cookie sheets, weigh it on a scale, and put it into a bag. (*Id*. at 88, 105.) Lunceford paid him with the money from police and left. (*Id*. at 88-89.) While Lunceford was there,

another unidentified individual in a red Suburban also pulled up. (*Id*. at 42, 92-93.) She returned the marijuana to nearby officers, was searched, wrote a report, and went home. (*Id*. at 89.)

On September 24, 2016, Lunceford conducted a third controlled buy. (2/8/24 Tr. at 89.) The same prep occurred. (*Id*. at 90, 119-24.) Lunceford went to the front gate near Pein's house and called out to him. (*Id*. at 90.) Pein came out. (*Id*.) They both went into the house and into the kitchen. (*Id*. at 91.) Pein provided her marijuana for cash. (*Id*.) As Lunceford was about to leave, two teenagers walked into his house. (*Id*. at 92, 96.) They stood off behind her. (*Id*.) As Lunceford left, she said hi to the kids. (*Id*.) She then returned to the waiting police officers and provided the marijuana to them. (*Id*. at 91-92.) The same debriefing process occurred. (*Id*. at 92.) The marijuana was in a small plastic baggy in a brown paper bag. (*Id*. at 130.)

The three baggies of marijuana were submitted to the crime lab for testing. (2/8/24 Tr. at 147.) The crime lab confirmed that the samples contained marijuana and THC. (*Id*. at 184.)[4]

Nine $20 bills matching the serial numbers for the controlled buys were recovered from Pein. (2/8/24 Tr. at 149, 164, 168-69.) Pein told Lewistown

[4] While proof of quantity of marijuana is not an element of distribution, the three marijuana purchases weighed 11.6 grams, 11.6 grams, and 19.4 grams, respectively for each event, via the uncertified scale. (2/8/24 Tr. at 36, 45, 132.)

Assistant Police Chief Levi King that he got the money from selling his truck, then changed his story to it being an insurance payout for damages to his partner's vehicle. (*Id*. at 150.)

Kathleen testified that, during August and September 2016, Pein would fulfill orders for marijuana after "multiple phone calls a day." (2/8/24 Tr. at 200.) She confirmed that Pein would weigh marijuana in the kitchen and usually meet the person outside the house near the front gate to make the exchange. (*Id*. at 200-01.) But "[v]ery few people were allowed to come up to the front door and get it." (*Id*. at 200.) She explained that Pein "didn't trust a lot of people." (*Id*. at 202.) Nonetheless, Pein "had a lot of people coming in and out." (*Id*.) She witnessed the transactions, including the weighing of marijuana in the kitchen. (*Id*. at 200-01.) Kathleen admitted that, when Pein was not home, she would complete transactions, with Pein coaching her on how much to charge or how much to weigh. (*Id*. at 203-04.) Kathleen would go with Pein to Bozeman to buy from a dealer there to reup larger quantities for Pein's resale. (*Id*. at 205-06.) Once back in Lewistown, Pein would make calls to start selling and distributing. (*Id*. at 206.)

Pein lived at 209 East Broadway in Lewistown. (2/8/24 Tr. at 125.) The 2016 tax assessment showed that Pein was the owner of the home. (*Id*. at 127-28.) Kathleen testified it was Pein's house and he was the one who purchased it. (*Id*. at 198.) They both made payments to the title company, in cash. (*Id*.)

Kathleen confirmed that in September 2016, Pein was making money by selling marijuana from the house. (2/8/24 Tr. at 199-200.) Even when he would meet people at his gate for the transaction, he was still on his property. (*Id*. at 202.) She explained that he would use the proceeds to buy larger quantities of marijuana or some of the money was "put in with my regular money that I was using from my job to purchase things." (*Id*. at 205.) She explained that Pein stored his marijuana, paraphernalia, scale and money in a box in a nook where a microwave should have been next to the stove. (*Id*. at 204.) He also stored additional marijuana in a wood basket and in a safe in the house. (*Id*. at 207.)

II. Evidence relating to offenses

Count IV concerned the third and final transaction "on September 24th, 2016." (2/9/24 Tr. at 17.) The State's evidence in support were the lab results confirming the substance was marijuana (Ex. 134), the photocopies of actual bills given to Lunceford (Ex. 141), and the "9" $20 dollar bills "used from transaction # 3 on September 24th, 2016, [that] were recovered." (2/9/24 Tr. at 17-18; Exs. 136-40.) Count VIII, forfeiture of home, concerned the "multiple times" Lunceford bought marijuana at Pein's home, the witness testimony that Pein owned the home, and the tax documents in support. (2/9/24 Tr. at 19.)

III. Pein's challenge to the DPA

In his first motion to dismiss, Pein argued that the plea agreement on Count VI's reference to the DPA made the DPA "illegal" and his prosecution for Counts IV and VIII should "therefore be dismissed." (Doc. 171 at 1.) Pein contended that the DPA statute—Mont. Code Ann. § 46-16-103—"stands on its own" and was separate and distinct from the plea agreement statute in Mont. Code Ann. § 46-12-211. Pein claimed nothing in the statutes indicated "they are to be mixed or to be used together." (*Id*. at 3.)

The district court ruled that both agreements "are duly executed contracts, both by their own terms and the statutes governing contracts" and that Pein had received the benefit of dismissal of several counts with prejudice, avoiding imprisonment, and having a deferred sentence for Counts IV and VIII. (App. 4 at 7.) The court explained that Pein benefited from the State not pursuing Counts IV and VIII "which could entail life imprisonment and forfeiture of his real property and residence." (*Id*. at 8.) Finally, the court concluded that neither the plea agreement statute nor the diversion statute "precludes resolution of a criminal cause by using both forms of agreement (Plea and Pre-Trial Diversion)[,]" further explaining that both statutes speak to "'charges,' not cases/causes as [a] whole." (*Id*.)

IV. Pein's double jeopardy challenge

A. The first motion to dismiss

Pein's first motion to dismiss also argued the prosecution should be dismissed "pursuant [to] 46-11-503(1)(b)," the double jeopardy statute. (Doc. 171 at 3.) The court rejected Pein's argument that "prosecution of Counts IV and VIII is somehow barred by *res judicata* based on Defendant's conviction for Count VI[,]" explaining:

> 1. Mont. Code Ann. § 46-11-503 must be read in its entirety. It speaks to both one transaction and to lesser included offenses if dismissed or if Defendant is acquitted. By its own terms, it speaks to 'former prosecution.' Here, prosecution was *deferred* as to Counts IV and VIII. No final judgment as to those counts was ever reached.
>
> 2. Defendant both acknowledged and agreed to the Pre-Trial Diversion Agreement for both of these counts. He explicitly waived several substantive rights to reach a resolution he believed was in his best interests.

(App. 4 at 8 (emphasis in original).)

B. The second motion to dismiss

Four days before trial, Pein filed a second motion to dismiss based on statutory double jeopardy. (Doc. 262 at 2.) This time, Pein argued that he was convicted under Count VI for the 439 grams of marijuana seized, and that the same facts constituted the bases for Counts IV and VIII. (*Id*. at 2-3.)

The State responded, arguing that: (1) the double jeopardy argument was waived; (2) there was only ever one prosecution; and (3) even if there was a "former prosecution" of Count VI, Counts IV and VIII were not based on the same

transaction. (Doc. 271 at 15.) Regarding the third point, the State explained that "Count IV charges the defendant with Criminal Distribution of Dangerous Drugs for selling 19.4 grams of marijuana to a confidential informant named Wendy Lunceford on September 24, 2016." (*Id*. at 15-16.) And the State explained that "Count VIII charges the defendant with Use or Possession of Property Subject to Criminal Forfeiture, alleging he used his residence to sell the dangerous drug marijuana." (*Id*.) On the other hand, the State explained that Count VI was based on events occurring on September 29, 2016. (2/2/24 Tr. at 16.)

The district court denied Pein's motion, explaining:

> Clearly Counts IV and Count VI have different elements of proof, not the least of which is different marijuana amounts and sale(s). There is no double jeopardy attached to Counts IV and VIII. Based on the State's Response, the trial at matter for Counts IV and VIII will focus on events that occurred prior to September 29, 2016.

(App. 5 at 2.)

C. The clarifying order

During breaks in voir dire, the parties and the court held a running conversation about the double jeopardy issue, particularly on the evidence allowable for Counts IV and VIII as compared to Count VI. (2/6/24 Tr. at 17-25; 2/7/24 Tr. at 10-13, 115-39, 263-65.) Defense counsel explained that "[w]e're asking the Court to [preclude] . . . anything that was involved after September 24th"

as unrelated to Counts IV and VIII. (*Id*. at 123.) This included "everything rom [sic] the search warrant that was executed on the 29th." (*Id*.)

The State countered that "cash that was located in the house" on September 29 was "not evidence of criminal possession with intent to distribute[]" towards Count VI. (2/7/24 Tr. at 124.) Instead, it was "evidence of distribution that has already occurred[.]" (*Id*.) The cash at issue was nine $20 bills "that were given to the informant on September 24th" that were "found in the home" and photographed on September 29. (2/6/24 Tr. at 24; *see* 2/7/24 Tr. at 135.) Thus, the State requested that, if the court held that "what was found in the [September 29] search basically is off the table because it has already been used in support of Count VI[,]" for the court to "differentiate that cash and to find that that is admissible because it did not support criminal possession with intent to distribute [Count VI] but supports criminal distribution which is Count IV and use of property subject to forfeiture which is Count VIII." (2/7/24 Tr. at 124-25.)

The district court ruled:

> With the exception of the nine twenty-dollar bills found in Defendant's residence on September 29, 2016 that are tied to the CI buys conducted prior to the search, the rest of the items seized that day from Defendant's house cannot be used in the State's case-in-chief in this matter. The evidence confirming the identifying information for the nine twenty-dollar bills used for CI buys located in Defendant's residence can be presented (the Court understands that besides testimony there are photos) so long as no reference is made to

> the search or other items that appear to have resulted in the basis for the guilty plea and conviction for Count VI.

(App. 6 at 5.)

V. Pein's forfeiture challenge

Prior to sentencing, Pein filed an "Objection to Forfeiture of Home" wherein he argued that home forfeiture was "grossly disproportionate to" his marijuana dealing operation. (Doc. 297.) Pein argued that his claims were like cases where excessive fines were found in *United States v. Bajakajian*, 524 U.S. 321 (1998), and *Timbs v. Indiana*, 586 U.S. 146 (2019). (*Id.* at 4-5.)

The State responded that Pein and the State had agreed in 2016—subject to the DPA—that Pein would keep his house if he "followed the agreed-upon terms[]" of the agreement. (Doc. 299 at 2.) But because of Pein's violations of the agreement, the State proceeded to trial on Count VIII. (*Id.*) Not only that, but in 2023 the parties entered into a subsequent DPA wherein Pein agreed to sell his property at fair market value, but he withdrew from that agreement and proceeded to trial. (Doc. 299. at 3; *see* Docs. 221-22.) The State explained:

> The real property located at 209 E. Broadway St. is valued at $45,000. Please see Exhibit 3, Comparable Market Analysis. The maximum fine the defendant faces in this matter is $50,000 for Count IV: Criminal Distribution of Dangerous Drugs. It is the State's

> position that forfeiture of the property does not violate the Excessive Fines Clause of the Eighth Amendment of the U.S. Constitution.

(Doc. 299 at 8.) The State explained that "Montana's criminal forfeiture statute requires no threshold amount of drugs to be present to trigger forfeiture." (*Id*.) The State also explained that Montana's forfeiture statute "has not included criminal forfeiture in the statutory scheme regarding imposition of fines and a defendant's ability to pay." (*Id*. at 9.) The State attached a title report, which the district court would later take judicial notice of. (Doc. 301; 4/20/24 Tr. at 35.)

Pein testified at the sentencing hearing he purchased the home in 2012 for $35,000 and it was paid off. (4/30/24 Tr. at 23.)

The district court first explained that it had reviewed Pein's motion but "[n]one of these arguments allay the Court's concerns that you've brought all of this on yourself. Like no one else had you selling marijuana out of your kitchen by a school with the testimony at trial with kids in the kitchen on cookie trays." (4/30/24 Tr. at 48-49.) The court continued:

> The Court has read those cases argued by [defense counsel]. What the Court has weighed that against, and the Court understands what a regressive fine or a regressive tax is[,] right. And the State needs or should not then impose burdens on persons who cannot pay. And the rich should not be treated differently than the poor. But the Court has also got to balance that then with the statute that was in effect in 2015 and with 1-3-232 which is the maxim that you need [to] avoid voidness . . . I'm not going to interpret this as some sort of a license or a leeway for a poor person then to thumb their nose at the law and deal drugs that were illegal and even now if he doesn't, doesn't have a license and it's not compliant with the statutes for marijuana he still

> couldn't sell it out of his house today. And I, I just am not finding anywhere in the law even with the excessive arguments that should give poor people a pass. I just don't see it. He knew what he was doing, and he did it repeatedly and the testimony at the trial indicates that he had no concern for whether or not there was a school nearby, whether or not there were other kids in the house, whether or not they saw him dealing drugs. He literally just had no concern for community or public safety, or responsibility and he thumbed his nose at the law. And the legislature had determined and done a statute that said that that was not acceptable and at least for purposes of this sentence right now until it comes back to me, I'm gonna follow, I'm gonna follow what the legislature said.

(*Id*. at 51-53.) The court found that "dealing drugs out of the kitchen of the house absolutely supports the forfeiture." (*Id*. at 53.) The court continued:

> And I honestly believe that here forfeiture of that item which he should've cherished and never have put at risk by distributing illegal drugs is actually the most proper, that actually is the most proper punishment in this case. It's very clear that if you do x, y will happen and that is pretty clear under the statutes, and I think that's exactly what has happened here.

(*Id*.) The court explained that "forfeiture is harsh and I recognize that and I think it's probably only appropriate when it is egregious, but at least based on my reading and sitting through the trial this appeared to be egregious." (*Id*. at 55.) The court ordered Pein to forfeit his property, but upon Pein's motion, ordered the forfeiture stayed pending appeal. (*Id*. at 52, 57.)

VI. Pein's jurisdictional claim

On June 13, 2023, Pein filed a Notice of Appeal "from the final judgment or order entered in such action on the 24th day of April, 2023." (6/13/23 NOA.) That order entered on April 24, 2023 was the order upon resentencing for Count VI. (Doc. 188.) The Notice of Appeal was docketed as this Cause No. on appeal: DA-23-0328.

At the April 30, 2024 sentencing on Counts IV and VIII, during the time for his allocution, Pein said "Mr. Chad Wright, the appellate defender division asked me to make this statement in open air court prior to the appeal being filed so we had this on record." (4/30/24 Tr. at 45.)

> **COURT**: Mr. Chad Wright asked you to make a statement on his behalf knowing that you were represented by Ms. DeWolf.
>
> **PEIN**: I had Mr. Chad Wright in this case Your Honor. This case is currently under appeal in D3, D23-083 [sic, DA 23-0328]. 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.

(*Id*. at 45-46.) The Court redirected Pien to any statement he wished to make regarding the two counts for sentencing. (*Id*. at 46.) Pein was ultimately moved to remote view his sentencing based on his frequent interruptions. (*Id*. at 49.)

On May 1, 2024, the judgment was entered for Counts IV and VIII. (App. B.) On June 11, 2024, Pein filed an "Amended Notice of Appeal" in this

matter, DA 23-0328, explaining that he was now appealing the final judgment "entered in such action on the 1st day of May, 2024." (6/11/24 NOA, attached to Appellee's Br. as App. 7.) Specifically, Pein explained that his "Amended Notice of Appeal considers bifurcated charges" from "DC-16-66." (App. 7 at 1.)

SUMMARY OF THE ARGUMENT

Pein's argument that his June 13, 2023 notice of appeal relating to Count VI somehow divested the district court from considering the bifurcated charges of Counts IV and VIII for trial fails. It is well established that an appeal to this Court divests the district court of jurisdiction over the judgment from which the appeal is taken. Pein acknowledged in his first notice of appeal on June 13, 2023, that he was appealing his judgment upon resentencing for Count VI. Accordingly, Pein's argument could show that the district court was precluded from continuing proceedings on Count VI after his final judgment in April 2023, which it never did anyway. And considering that Pein nonetheless filed a *second* notice of appeal here a year later on June 11, 2024, appealing Counts IV and VIII, Pein's argument that his first notice of appeal has any effect on the district court's jurisdiction for Counts IV and VIII falls flat.

The district court correctly rejected Pein's argument that the DPA statutes and plea agreement statutes were violated. Pein has pointed to no statute or

precedent supporting his view that there can be no reference to a DPA in a plea agreement. And neither the plea agreement statute nor the diversion statute prohibits such action. Regardless, Pein wholly fails to identify, much less prove, prejudice.

The district court also correctly rejected Pein's double jeopardy claim. Pein was not twice put in jeopardy based on his argument that the State relied on evidence seized relating to Count VI on September 29, 2016, because the conduct and evidence in support of Counts IV and VIII were not part of the same transaction as Count VI. The marijuana at issue for Counts IV and VIII was seized during the three controlled buys, occurring prior to September 29. And while the money evidence from the same earlier transactions were later seized on September 29, it was unrelated to Count VI, criminal *possession* with *intent* to distribute, because the money concerned completed sales and distributions from, at the latest, September 24, 2016. Count VI was not part of the same transaction as Counts IV and VIII.

Pein's additional new argument that marijuana should not be a schedule 1 drug today has no relevance to his conduct in 2016, the state of the law related to marijuana distribution offenses in 2016, and the validity of his sentence pertaining to his conduct in 2016.

Pein fails to meet his high burden to show—beyond a reasonable doubt—that the criminal forfeiture statute is unconstitutional in all applications. Pein's arguments fail based on the scheme of the forfeiture statutes and the Supreme Court's direction for courts to review forfeiture as related to gross disproportionality—an as-applied inquiry. Finally, while here Pein abandons his as-applied challenge he raised below, the district court considered the gravity of Pein's drug dealing operation in relation to the forfeiture.

STANDARDS OF REVIEW

Whether a court has subject matter jurisdiction is a question of law that this Court reviews de novo. *State v. Zeilie*, 2025 MT 90, ¶ 12, ____ Mont. ____, ____ P.3d ____.

A district court's interpretation and construction of a statute is a question of law that this Court reviews de novo for correctness. *State v. Denny*, 2025 MT 62, ¶ 11, 421 Mont. 218, 566 P.3d 503 (citation omitted).

Denial of a motion to dismiss based on statutory double jeopardy is a question of law reviewed by this Court for correctness. *City of Helena v. O'Connell*, 2019 MT 69, ¶ 8, 395 Mont. 179, 438 P.3d 318.

This Court reviews a criminal sentence for legality. *State v. Villabos*, 2024 MT 301, ¶ 7, 419 Mont. 256, 560 P.3d 617.

A claim that a criminal sentence violates a constitutional provision is reviewed de novo. *State v. Gibbons*, 2024 MT 63, ¶ 20, 416 Mont. 1, 545 P.3d 686.

ARGUMENT

I. The district court had jurisdiction to conduct a trial and sentencing on Counts IV and VIII.

Pein argues that he filed a notice of appeal on "June 13, 2023 following Pein's revocation and resentencing on Count VI," which Pein argues "divested [the district court] of jurisdiction [for Counts IV and VIII] to proceed further until the appeal was served or stayed." (Appellant's Br. at 25-26.) Pein's argument fails to inform this Court of his "Amended Notice of Appeal" appealing his final judgment for Counts IV and VIII around one year later, on June 11, 2024. (App. 7.)

A criminal defendant may only appeal "from a final judgment of conviction and orders after judgment which affect the substantial rights of the defendant." Mont. Code Ann. § 46-20-104(1). A final judgment is a judgment that "conclusively determines the rights of the parties and settles all claims in controversy in an action or proceeding[.]" M. R. App. P. 4(1)(a). The appellant must "designate the final judgment or order or part thereof from which the appeal is taken." M. R. App. P. 4(4)(a). This Court will "not consider an appeal from an order not designated in the notice of appeal." *State v. Spotted Blanket*, 1998 MT

59, ¶ 12, 288 Mont. 126, 955 P.2d 1347 (citation omitted). It is well established that an "appeal to this Court divests the district court of jurisdiction *over the order or judgment from which the appeal is taken*." *Kruckenberg v. City of Kalispell*, 2004 MT 185, ¶ 10, 322 Mont. 177, 94 P.3d 748 (citation omitted, emphasis added). Indeed, "once a valid sentence has been pronounced, the court imposing the same is lacking jurisdiction to vacate or modify the sentence, except as provided by statute . . . ." *Zeilie*, ¶ 19 (citation omitted).

Here, while Pein may be able to establish that his June 13, 2023 appeal of the final order upon resentencing pertaining to Count VI entered on April 24, 2023 divested the district court from continuing to issue orders relating to Count VI, *see Kruckenberg*, ¶ 10, that is a non-issue here because the district court never thereafter issued any subsequent orders on Count VI. In any event, Pein challenges Counts IV and VIII in this appeal, not Count VI. Thus, any claim that the district court lacked jurisdiction to conduct trial and sentencing on bifurcated Counts IV and VIII while Count VI was on appeal is meritless, particularly because there was no final appealable order at issue divesting the district court of jurisdiction for Counts IV and VIII until May 1, 2024, when the final order on those counts was issued. Pein acknowledged as much by filing a subsequent "Amended Notice of Appeal" on June 13, 2024, challenging his final judgment for Counts IV and VIII

entered into on May 1, 2024. Accordingly, Pein's jurisdictional argument—which is only logically related to Count VI—should be rejected.

II. The district court correctly interpreted the DPA and plea agreement statutes.

Pein argues that a plea agreement cannot reference a DPA because a plea agreement "leads to a full resolution of the case." Pein argues any reference to the DPA in the plea agreement is an "illegal term and must be voided[.]" (Appellant's Br. at 31-32.) Pein further claims that the DPA he entered into was "fundamentally unfair[]" because "a defendant theoretically exposes themselves to an extended period of incarceration or supervision." (*Id*. at 32.) Pein poses a hypothetical situation that the State could wait until a DPA almost expires before pursuing resumption of conviction on the charges. (*Id*. at 32-33.)[5]

Pein's arguments fail. As the district court accurately observed, Pein has pointed to no statute or precedent supporting his view that there can be no reference to a DPA in a plea agreement. And neither the plea agreement statute

[5] For the first time on appeal, Pein also raises ancillary arguments related to speedy trial and the statute of limitations. But Pein waived speedy trial, as required by statute, in the pretrial diversion agreement. (App. 1 at 4; Mont Code Ann. § 46-16-130(b) (2015).) And the State did not violate the statute of limitations when it filed an Information in 2016 commencing the prosecution. *See* Mont. Code Ann. § 45-1-205(2)(a) (commencement of felony prosecution in five years from commission); Mont. Code Ann. § 45-1-205(8) (commencement is when Information is filed.)

nor the diversion statute prohibits such action. *See* Mont. Code Ann. §§ 46-12-211 (2015); 46-16-130 (2015). The district court correctly explained that both statutes reference "charges[,]" not whole cases. (App. 4 at 8.)

The plea agreement accurately recounted the resolution of all nine counts, including a brief explanation that the parties agreed to "resolve "Count IV . . . and Count VIII . . . through a [DPA], incorporated here by reference[.]" (App. 2 at 8.) The parties separately filed the DPA for Counts IV and VIII. (App. 1.) The district court rightly ruled that both agreements "are duly executed contracts, both by their own terms and the statutes governing contracts[.]" (App. 4 at 7.) Thus, the district court accurately held there was no improper "mixing" of the plea agreement and the DPA. The conviction on Count VI occurred via the plea agreement. The deferred prosecution of Counts IV and VIII occurred via the DPA.

Far from being unfair, as the district court reasoned, Pein received the substantial benefits of "a deferred imposition of sentence, no imprisonment, and having Counts I, II, III, V, VII, and IX dismissed with prejudice." (App. 4 at 7.) Pein also received via the DPA the benefit of "preclud[ing] the State from pursuing conviction on Counts IV and VIII, which could entail life imprisonment and forfeiture of his real property and residence." (*Id*. at 8.) And Pein "never complained about the benefits he received as a result of both agreements until the petitions to revoke were filed." (*Id*. at 4-5.) Thus, Pein's undeveloped argument

that his effective sentence (theoretically) could somehow be extended due to his DPA fails. The opposite is true—Pein avoided substantial potential imprisonment from nine counts via the plea agreement and DPA. And Pein does nothing here to counter the voluntary nature of his admissions and his freely given agreement in both the plea agreement and the DPA. (*See* App. 1 at 5; App. 2 at 4.)

All that was required of Pein was to comply with the terms of both agreements. And Pein agreed in both the DPA and the plea agreement to not commit any new offenses. (App. 2 at 10; App. 1 at 4.) Thus, upon committing new offenses and violating both agreements, Pein was subject to revocation of his deferred sentence for Count VI via the plea agreement, and he was subject to resumption of prosecution for Count IV and VIII via the DPA. This is clearly authorized by the DPA statute. Mont. Code Ann. § 46-16-130(1)(a)(i), (c). Accordingly, even if Pein were correct that there should be no reference to the DPA in the plea agreement, it would have no substantive effect in this matter because his charges were resumed via his violations related to the DPA. Pein cannot prove prejudice.

III. The district court correctly denied Pein's double jeopardy claim.

Pein argues that he was twice held in jeopardy because "the money found in Pein's house" was used "to convict Pein of Count IV and VIII[,]" which Pein claims was also "used to convict Pein for Count VI." (Appellant's Br. at 35.)

Montana Code Annotated § 46-11-503(1) (2015) provides that "[w]hen 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." Montana Code Annotated § 46-1-202(23) (2015) provides that "same transaction" means conduct consisting of a series of acts or omissions that are motivated by:

> (a) a purpose to accomplish a criminal objection and that are necessary or incidental to the accomplishment of that objective; or
>
> (b) a common purpose or plan that results in the repeated commission of the same offense or effect upon the same person or the property of the same person.

"Whether two or more offenses arise from the same transaction or involve the same criminal objective does not depend on the elements of the charged offenses, but rather on the defendant's underlying conduct and purpose in engaging in that conduct." *State v. Glass*, 2017 MT 128, ¶ 12, 387 Mont. 471, 395 P.3d 469. For example, this Court rejected a "same transaction" claim where a defendant was already convicted of indecent exposure based on offenses on earlier dates, and then

the defendant was subsequently charged with indecent exposure based on different dates and victims. *State v. Waldrup*, 264 Mont. 456, 459, 872 P.2d 772, 774 (1994) (concluding no double jeopardy error occurred because the defendant's conduct was based on allegations that he exposed himself to different victims on different dates in each charged incident).

Here, for Count IV, the State alleged that Pein distributed marijuana to CI Lunceford on September 24, 2016. In other words, Pein had a motivation through his conduct to actually *distribute* 19.4 grams of marijuana to Lunceford on that date. But, as to Count VI, Pein's alleged conduct on September 29, 2016, was the *possession* of 439 grams of marijuana with *intent* to distribute, but he had not yet distributed the marijuana. Thus, the cash recovered from Pein's home on September 29, 2016, had a clear connection to the September 24, 2016 sale for Count IV, as it was verified by serial numbers to be the same cash used in the same September 24 exchange. The parties and the court were exceedingly careful to isolate and verify the money used for the CI controlled buy on September 24, 2016, as related to Count IV, which only went towards the elements for Count IV, not Pein's prior prosecution for Count VI. And the criminal forfeiture charge in Count VIII concerned Pein's criminal objective to use his home to distribute marijuana, as evidenced through the three controlled buys occurring before September 29, 2016. Accordingly, Pein's argument that the money used in this

matter was part of the "same transaction" for double jeopardy purposes fails because the proof of conduct for distribution is not the same criminal objection as possession. The charges were not part of the "same transaction," particularly in this case because they involved different offenses with different conduct and motivations, but, as in *Waldrup*, they also concerned different dates and different evidence in support of those dates.

For the first time on appeal, Pein also argues his convictions are infirm because the State used evidence from a previously dismissed Count I to support the State's charges in this matter. Since Pein did not properly preserve this issue for appeal by first raising it in the district court, the only possible avenue for this Court to address his argument is under this Court's plain error review. Pein has not asked the Court to invoke the plain error doctrine. Having failed to request plain error review in his opening brief, it is too late for Pein to ask for plain error review in a reply brief. *State v. King*, 2013 MT 139, ¶ 40, 370 Mont. 277, 304 P.3d 1 ("[W]e will not apply the plain error doctrine when it was raised for the first time in a reply brief.").

Moreover, Pein does not sufficiently explain his new challenge relating to Count I, nor does he even endeavor to identify any prejudice. "A defendant urging plain error reversal bears the burden of firmly convincing this Court that (1) the claimed error implicates a fundamental right and (2) failure to review the alleged

error may result in a manifest miscarriage of justice, leave unsettled the question of the proceedings' fundamental fairness, or compromise the integrity of the judicial process." *State v. Ament*, 2025 MT 97, ¶ 11, ___ Mont. ___, ___ P.3d ___ (internal quotations and citations omitted, collecting cases). Pein's claim is necessarily based on Mont. Code Ann. § 46-11-503(1)(b)—the only double jeopardy statute he mentions in his argument—thus the claim fails because Count I did not result "in a conviction that has not been set aside, reversed, or vacated." It is "not this Court's job to conduct legal research on [a party's] behalf, to guess as to his precise position, or to develop legal analysis that may lend support to that position." *State v. Gomez*, 2007 MT 111, ¶ 33, 337 Mont. 219, 158 P.3d 442. This Court should decline to exercise plain error review.

IV. Pein's claim that marijuana should not be a schedule 1 drug fails.

Pein argues for the first time on appeal that marijuana should not be classified as a schedule 1 drug, and his sentence is accordingly illegal. Pein's new argument is contradictory to his concession at trial: "[W]e're absolutely willing to concede that in 2015 marijuana was a dangerous drug or at least classified as such. And then we can have, there is statutory language . . . marijuana is listed as a dangerous drug in 2015 under schedule one." (2/8/24 Tr. at 247.)

In 2016, marijuana was classified as a schedule 1 drug, and it is still classified as a schedule 1 drug today. *See* Mont. Code Ann. § 50-32-222(4)(x) (2015), (2025). Nonetheless, the "law in effect at the time of the commission of the crime controls as to the possible sentence." *State v. Thomas*, 2019 MT 155, ¶ 10, 396 Mont. 284, 445 P.3d 777 (citation omitted).

At the time of Pein's offense in 2016, recreational marijuana use was not legal, but the Montana Medical Marijuana Act (MMA) "altered" the "criminal liability" under the criminal provisions for "persons complying with the MMA[.]" *State v. Sutton*, 2018 MT 143, ¶ 14, 391 Mont. 485, 419 P.3d 1201 (citing codification at Mont. Code Ann. § 50-46-301 through -345); *see also* Mont. Code Ann. § 50-46-301 (2015). Thus, if Pein were able to show that he met the provisions under the MMA at the time of his offense, and that he cultivated marijuana in authorized amounts and was a registered cardholder, he could have met the altered liability under the MMA, regardless of the drug scheduling as part of the criminal offense scheme. But Pein did not possess a valid medical marijuana card at the time of the police investigation against him to preclude his criminal liability for marijuana distribution. (3/22/18 Tr. at 32-33.) And nothing in the MMA allows unauthorized and unsanctioned *distribution* of marijuana without a valid state license to do so. Pein's additional argument that this Court should usurp the Board of Pharmacy's authority in Scheduling dangerous drugs

based on marijuana becoming recreationally legal in 2021 has no bearing on the legality of Pein's sentence based on his conduct in 2016. Pein's arguments fail.

V. Pein's facial challenge to the forfeiture statute fails.

A. The facial challenge does not establish under all circumstances that the forfeiture statute is facially unconstitutional.

Pein argues that Mont. Code Ann. § 45-9-206(1) violates the Eighth Amendment and Montana's constitution. Pein abandons his as-applied challenge raised below, and instead repeatedly clarifies he is *solely* mounting a facial challenge to the forfeiture statute—for the first time on appeal. *See* Appellant's Br. at 6 ("Statement of Issues"); *id*. at 9 ("forfeiture requirement is facially unconstitutional"); *id*. at 44 ("This Court should find Mont. Code Ann. § 45-9-206(1) facially unconstitutional . . . ."). He relies on *Gibbons* and *State v. Yang*, 2019 MT 266, ¶ 18, 397 Mont. 486, 452 P.3d 897.

The prohibition against excessive fines is fully applicable to the States, *Timbs*, 586 U.S. at 149-50, and covers two types of forfeitures: in rem forfeitures and in personam forfeitures. *Bajakajian*, 524 U.S. at 333. An in personam forfeiture is a forfeiture that is used to punish an individual for committing a criminal offense. *Id*. at 328, 332. Courts evaluating in personam forfeitures must

determine whether the forfeiture is "grossly disproportional to the gravity of a defendant's offense." *Id.* at 334.

While this Court generally allows pursuit of facial challenges for the first time on appeal, *State v. Coleman*, 2018 MT 290, ¶¶ 7-11, 393 Mont. 375, 431 P.3d 26, Pein has not developed any argument supporting his claim that Montana's forfeiture statute is unconstitutional in all applications. As the South Carolina Supreme Court has explained—and contrary to what Pein argued below—nothing in *Timbs* acted to "categorically bar" forfeiture "or render any statute unconstitutional; instead, it dealt with incorporation under the Fourteenth Amendment." *Richardson v. Twenty Thousand Seven Hundred Seventy-One and 00/100 Dollars, United States Currency*, 437 S.C. 290, 308, 878 S.E.2d 868, 877 (2022). Indeed, "[b]ecause a claim that forfeiture violates the Excessive Fines Clause is inherently fact-intensive, it fits well within the scope of an as-applied challenge, *not within the scope of a facial challenge*." *Id*. (emphasis added) (reversing circuit court's conclusion that forfeiture statute was facially unconstitutional under the Excessive Fines Clause).

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). "In reviewing constitutional challenges to

legislative enactments, the constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt." *State v. Sedler*, 2020 MT 248, ¶ 5, 401 Mont. 437, 473 P.3d 406 (citation omitted). Thus, the party challenging a statute bears the burden of proving it is unconstitutional beyond a reasonable doubt and, if any doubt exists, it must be resolved in favor of the statute. *Sedler*, ¶ 5 (collecting cases). "A facial challenge to a statute considers only the text of the statute itself, not its application to the particular circumstances of an individual." *Freedom Path, Inc. v. IRS*, 913 F.3d 503, 508 (5th Cir. 2019).

Pein's facial challenge fails at the outset. Pein would have to establish—beyond a reasonable doubt—that no set of circumstances exist that result in any property subject to forfeiture being proportional to the gravity of the offense. Legislative enactments are presumed constitutional. The text of the forfeiture statute shows that the Legislature considered proportionality by intentionally selecting certain types of property subject to forfeiture in relation to certain enumerated crimes. In other words, the Legislature narrowly tailored the type and scope of criminal forfeiture at issue—which includes real property value used in drug distribution offenses.

The *Richardson* Court further explained how facial forfeiture challenges do not work: "Just as one could hypothetically envision unlimited amounts of money

or multiple vehicles being subject to forfeiture, other scenarios would most certainly survive a constitutional challenge, such as the forfeiture of a smaller amount of cash connected to selling contraband." *Richardson*, 437 S.C. at 308. Here, Pein should not be relieved of his high burden to establish beyond a reasonable doubt, even beyond the forfeiture occurring here, that each and every application of the forfeiture statute would be unconstitutional, considering different types and quantities of forfeiture in relation to different crimes.

But Pein's argument does not even endeavor to distinguish between the real property in subsection (h) of the statute between the numerous other items subject to forfeiture as related to various enumerated crimes in the same statute. Mont. Code Ann. § 45-9-206(3)(a)-(h). Is the statute also unconstitutional because it requires forfeiture of "money, raw materials, products, equipment, and other property" used in the cultivating, delivering, or exporting a dangerous drug for certain drug offenses? *See* Mont. Code Ann. § 45-9-206(3)(a). Is the statute unconstitutional in drug matters for requiring forfeiture of "everything of value furnished or intended to be furnished in exchange for a dangerous drug" or "all proceeds traceable to such an exchange?" Mont. Code Ann. § 45-9-206(3)(e)(i)(ii). As the *Richardson* Court has noted, the only way Pein could prove his claim is to go through each portion of the statute, pose hypotheticals covering a range of activities and scenarios, and then claim that those hypotheticals would violate the constitution every time.

Montana's Legislature has rationally concluded that the instrumentalities, fruits, and premises used for drug distribution are forfeitable, and the State has a legitimate interest in preventing the unlawful profiting from illegal drug distribution efforts. The United States Supreme Court has "emphasized in our cases interpreting the Cruel and Unusual Punishments Clause," that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Bajakajian*, 524 U.S. at 336 (collecting cases). Pein has put forth no argument at all justifying the invalidation of the forfeiture statute here, and this Court should reject the insufficiently pled claim on appeal.

B. While Pein abandons his as-applied challenge, the district court appropriately conducted a disproportionality inquiry here.

While Pein clearly argues he is merely raising a facial challenge on appeal, even if this Court analyzed Pein's abandoned as-applied challenge, it would fail. Pein argues that the "mandatory" nature of the forfeiture statute gave the district court here "no options" but to order forfeiture, presumably based on a claim that the district court here failed to conduct an ability to pay analysis under *Yang* and *Gibbons*. (Appellant's Br. at 43.)

A fine violates the Excessive Fines Clause if it "is grossly disproportional to the gravity of [a defendant's] offense." *Bajakajian*, 524 U.S. at 324. "Whether a fine is constitutionally excessive calls for an application of a constitutional

standard to the facts of a particular case." *Bajakajian*, 524 U.S. at 336 n.10. This Court has explained that, while it has overruled *State v. Good*, 2004 MT 296, 323 Mont. 378, 100 P.3d 644, as applying forfeiture law to restitution, its otherwise adoption of *Bajakajian*'s "excessiveness analysis remains good law." *Yang*, ¶ 22. Under *Bajakajian*, courts consider the gravity of the offense which "necessarily means the seriousness and severity of the crime." *State v. O'Malley*, 169 Ohio St. 3d 479, 492, 2022-Ohio-3207, 206 N.E.3d 662, 676 (2022) (citing *Bajakajian*, 524 U.S. at 339-40).

Here, Pein's forfeiture was never mandatory because a sentencing court is constitutionally required to consider proportionality. *Bajakajian*, 524 U.S. at 337. As the *Richardson* Court ruled, this Court could too rule that *Bajakajian* "expressly require[s] an inquiry into whether a forfeiture is grossly disproportionate to the underlying criminal offense." *See Richardson*, 437 S. C. at 308-09. That's what the district court did here. The court considered the gravity of the offense, the seriousness of the crime, and the amount and impact of forfeiture in reaching its conclusion. (4/30/24 Tr. at 50-51.) The court also considered: (1) the clear nexus between the use of the property and the drug dealing operation; (2) Pein's egregious dealing drugs in the kitchen and in the front yard, sometimes with children around; (3) Pein's undisputed culpability; and (4) the intent of the Legislature in enacting such laws.

On the other hand—while this Court has not otherwise held that an ability to pay analysis is required for criminal forfeiture—it should decline to do so here. *Gibbons* did not discuss forfeiture. Instead, *Gibbons* relied heavily on Mont. Code Ann. § 46-18-231—a statute that requires an ability to pay analysis before imposition of discretionary fines. But Mont. Code Ann. § 46-18-231 does not apply to forfeiture provisions. As such, the test for whether forfeiture violates the Excessive Fines Clause is simply proportionality, which necessarily goes toward an as-applied challenge. *See Bajakajian*, 524 U.S. at 334. In other words, what matters here is the constitutional requirements for a court to consider at the time of forfeiture, not a mere statute that has no clear application to forfeiture. Persuasive authority—including the Ninth Circuit—has declined to extend an analysis of the "harshness of the forfeiture" beyond in rem forfeitures, let alone to in personam forfeitures. *Pimentel v. City of Los Angeles*, 115 F.4th 1062, 1072-73 (9th Cir. 2024) (citing *United States v. Dubose*, 146 F.3d 1141, 1146 (9th Cir. 1998)). As explained by the Seventh Circuit rejecting an invitation to make an ability to pay inquiry regarding forfeiture: "The Supreme Court has declined to address whether the sanctioned person's financial condition is relevant to the excessiveness inquiry." *Grashoff v. Adams*, 65 F.4th 910, 921 (7th Cir. 2023) (citing *Timbs*, 586 U.S. at 688; *Bajakajian*, 524 U.S. at 240 n.15) "So do we." *Id*.

Finally, if this Court rules that an ability to pay analysis is required for someone to forfeit property, the district court also did so at sentencing. In discussing the home forfeiture, the district court assumed that the "State . . . should not [] impose burdens on persons who cannot pay[]" and the "rich should not be treated differently than the poor." (4/30/24 Tr. at 51.) The court recounted Pein's testimony at the same hearing of "all of the things he could possibly do due to . . . his resume being so impressive." (*Id*. at 54; *see id*. at 24-31.) The court explained "So, I actually think Mr. Pein can pay lots of things . . . ." (*Id*. at 54.) If this Court somehow reaches Pein's as-applied challenge, it should reject it.

CONCLUSION

This Court should affirm Pein's convictions and sentences for Counts IV and VIII.

Respectfully submitted this 28th day of May, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief 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 9,920 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Roy Brown
ROY BROWN

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0328

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DAVID ALLEN PEIN,

Defendant and Appellant.

APPENDIX

Fergus County Cause No. DC-2016-66

Montana Supreme Court Cause No. DA 23-0328

CERTIFICATE OF SERVICE

I, Roy Lindsay Brown, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-28-2025:

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