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

STATE OF MONTANA,

Plaintiff and Appellee,

and

DAVID ALLEN PEIN,

Defendant and Appellant.

Appellant/Defendant's Reply Brief

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

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TABLE OF AUTHORITIES

Cases

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REPLY

I. THE STATE'S ARGUMENT FAILS TO SHOW THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION TO PROCEED WITH TRIAL ON REMAINING COUNTS AFTER PIEN FILED HIS APPEAL FOR THE PREVIOUS CONVICTION.

In its Response, the State argues that the district court was not divested of jurisdiction by way of Pein's June 13, 2023, appeal following Pien's revocation and resentencing on Count VI. The State relies upon a selective reading of this Court's precedent in *Kruckenberg v. City of Kalispell*, 2004 MT 185, ¶ 10, 322 Mont. 177, 94 P.3d 748.

The State focuses on one sentence: "It is the 'appeal to this court [that] divests the district court of jurisdiction over the order or judgment from which the appeal is taken.'" *Kruckenberg*, ¶ 10. However, this ignores the sentence immediately preceding this quote: "The filing of an appeal to this Court stays ***all proceedings*** in the district court, thereby removing jurisdiction from that court to proceed further in the matter." *Id*., ¶ 10, (emphasis added)(quoting *McCormick v. McCormick*, 168 Mont. 136, 138, 541 P.2d 765, 766 (1975)); See also *Green v. C. R. Anthony Co.*, 194 Mont. 102, 107, 634 P.2d 629, 632 (1981) ("The notice of appeal was properly served and filed. It is well established that the filing of an appeal to this Court stays proceedings, thereby removing jurisdiction from a District Court or Workers' Compensation Court to proceed further in the matter."); *In re Marriage of Carlson*,

220 Mont. 204, 207, 714 P.2d 116, 118 (1986) (invalidating district court's judgment filed after notice of appeal was filed).

In re Marriage of Carlson is especially instructive, because it tracks the State's argument and shows the argument lacks merit. Within *In re Marriage of Carlson*, the district court issued a judgment, after which a party filed a notice of partial appeal complaining the district court had not addressed child support, attorney fees, or costs. 220 Mont. at 208, 714 P.2d at 118. The district court then issued a new judgment addressing these issues, and this Court voided the new judgment because of the previously filed notice of appeal. *Ibid*.

District courts do retain some jurisdiction after an appeal is filed but it is that authority needed to enforce its judgment, pending appeal. *Brockington v. Eleventh Judicial Dist. Court*, 385 Mont. 539, 382 P.3d 866 (2016). This includes actions like contempt proceedings, because they are an independent of the appealed action. *Ibid*.

In the present case, this was a singular case (by the State's argument), that was appealed to this Court, and at that point the district court was divested of jurisdiction, until this Court returned the case to the district court, which did not happen.

Accordingly, the district court lacked subject matter jurisdiction to proceed with the prosecution of Pein past the June 13, 2023, notice of appeal, and Pein's convictions for Counts IV and VIII must be set aside.

II. THE STATE FAILED TO COUNTER PEIN'S STATUTORY ARGUMENT THAT PLEA AGREEMENTS CANNOT CONTAIN A DEFERRED PROSECUTION AGREEMENT

The State simply argues that the statutes which govern plea agreements and deferred prosecution agreements (DPA) implicitly authorize the inclusion of a DPA within a plea agreement. However, Mont. Code Ann. § 46-12-211, which governs plea agreements and their contents is very specific in its requirements and limitations, 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).

Under this statute, prosecutors are limited to either dismiss charges, agree to a specific sentence, or recommend or agree not to oppose a specific sentence.

III. THE STATE INCORRECTLY ARGUES PEIN FAILED TO PRESERVE A PORTION OF HIS DOUBLE JEPORDY ARGUMENT BECAUSE IT WAS RAISED BY COUNSEL DURING TRIAL.

Instead of rebutting Pein's argument that Pein suffered double jeopardy, in part, because the same evidence used to convict Pein of Count IV and VIII was also used to convict Pein for Count VI, the State argues that the issue was not addressed at the trial court so it cannot be addressed for the first time on appeal. Pein would agree with this position, except it was addressed at the trial court. Specifically, it was addressed on the first day of trial when Pein's attorney objected to allowing the evidence in:

> Two theories on the double jeopardy, I will then follow that with a 404(b) theory that would be an appropriate objection were the case, were the State to bring this evidence that they're talking about. But as made this is 46-11-503(1)(b), the former prosecution resulted in conviction. That conviction has not been set aside. It's not been reversed; it's not been vacated. That is plain language. The argument is as easy as that. Similarly, 46-11-504, the former prosecution or rather sub (1), the first prosecution resulted in a conviction, and I am paraphrasing here and the subsequent prosecution is based on defense arising out of the same transaction. This is exactly what double jeopardy is written for. Count VI involved completely, completely all evidence that arose out of the same transaction. When Mr. Pein took responsibility for Count VI, he took off the table 439 grams and all contraband seized in that search warrant. While it may prejudice the State's case, defense recognizes the State still has a very strong case with the CI buys and it is anticipating that. It does not cripple it, but it does place all of that evidence into the realm of double jeopardy.

Tr. Jury Trial, Day 1, February 6, 2024, 20:2-20.

Accordingly, Pein's argument was properly preserved for appeal and the Court need not engage in a plain error review.

IV. THE STATE RELIES UPON THE INCORRECT DATE FOR MARIJUNA BECOMING MEDICALLY LEGAL AND AS SUCH, ITS ARGUMENT FAILS.

The State argues that Pein's arguments should be ignored because it is "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."

However, marijuana was medically legal long before 2016, it first became a medically recognized substance and made legal for medical purposes in 2004 through a voter initiative, and was then replaced by a statutory framework in 2011. *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 3, 382 Mont. 256, 368 P.3d 1131; 2011 Mt. ALS 419; 2011 Mt. Laws 419; 2011 Mt. Ch. 419; 2011 Mt. SB 423.

So, at the time of Pein's arrest marijuana had been medically recognized for 12 years, when it became recreationally legal is simply another data point but is not the crux of Pein's argument relating to Schedule 1 drugs.

CONCLUSION

For the foregoing reasons and those provided in his Opening Brief, this Court should grant the relief requested by Pein and vacate Pein's sentence and conviction for Counts IV and VIII, and hold that Montana Code Annotated § 45-9-206's forfeiture mandate is facially unconstitutional.

DATED this18th day of June 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 1,286 words, excluding the Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance.

DATED this18th day of June 2025.

PEACE LAW GROUP, LLC

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CERTIFICATE OF SERVICE

I, Rufus I. Peace, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 06-18-2025:

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