No. _____

In the Supreme Court of the United States

JOEL HENRIK STONE,
Petitioner,

v.

STATE OF MONTANA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Montana

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Amendment's protection from double jeopardy attaches when the court accepts a defendant's guilty plea.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joel Henrik Stone respectfully petitions for a writ of certiorari to review the judgment of the Montana Supreme Court.

OPINIONS BELOW

The opinion of the Montana Supreme Court (Pet. App. 1a) is published at 400 P.3d 692. The relevant order of the trial court is available at Pet. App. 11a.

JURISDICTION

The judgment of the Montana Supreme Court was entered on August 8, 2017. Pet. App. 2a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in relevant part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

This case presents a recurring question of constitutional law that has divided federal and state courts: whether the Fifth Amendment's protection from double jeopardy attaches when the court accepts a defendant's guilty plea.

This Court has adopted bright-line rules to determine the point at which jeopardy attaches in jury trials (when the jury is empaneled and sworn) and nonjury trials (when the court begins to hear evidence), but it has not yet determined that point when a defendant pleads guilty. Because the overwhelming majority of convictions occur through guilty pleas,

this is an important question with broad implications for the criminal justice system.

Numerous courts and judges have recognized, in cases running back more than two decades, that there is a "longstanding circuit split about when double jeopardy protections kick in after a guilty plea," sewing "confusion [that] has filtered down to the state courts, which are likewise split on the issue." *United States v. Patterson*, 406 F.3d 1095, 1101 (9th Cir. 2005) (Kozinski, J., dissenting from denial of reh'g en banc); *see, e.g.*, *Commonwealth v. Dean-Ganek*, 960 N.E.2d 262, 269 n.11 (Mass. 2012) ("We recognize the disagreement in other jurisdictions, and within the circuit courts of the United States Court of Appeals, as to when jeopardy attaches on a guilty plea for purposes of the Double Jeopardy clause ...."); *Bally v. Kemna*, 65 F.3d 104, 108 (8th Cir. 1995) (recognizing disagreement). Five Circuits—the Second, Fifth, Sixth, Ninth, and Eleventh—and a number of states have held that jeopardy attaches when a court accepts a defendant's guilty plea. Two Circuits and other state courts of last resort, now joined by the Montana Supreme Court, have held that it does not. Other courts have merely recognized the split and assumed jeopardy attaches without deciding the issue. And at least one court, the Eighth Circuit, has taken inconsistent positions on the issue.

This Court should resolve the split and make clear that jeopardy attaches when a court accepts a defendant's guilty plea.

1. On May 24, 2013, the State of Montana filed an Information charging Stone with committing aggravated assault and partner or family member assault

against his then girlfriend. Pet. App. 3a. A month later, the State filed an amended Information making explicit that these were alternative, mutually exclusive charges. *Ibid*.[1]

Partner or family member assault in Montana is a misdemeanor carrying a maximum $1,000 fine and one-year jail sentence for a first or second time offense. Mont. Code § 45-5-206(3)(a). A third offense, however, is a felony carrying a maximum $50,000 fine and five-year jail sentence. *Ibid.*

On the advice of his counsel, Stone agreed to plead guilty to the charge of partner or family member assault. Pet. App. 3a, 26a. In exchange, the State agreed to drop the aggravated assault and tampering charges. *Id.* at 12a. All parties involved—the State, Stone's counsel, and Stone himself—apparently believed that Stone had two prior convictions for partner or family member assault, and that, as a result, he would be subject to felony penalties at sentencing. *Id.* at 12a, 26a-27a. Because of Montana's persistent felony offender statute,[2] a felony would subject Stone to a sentence between 5 and 100 years. *Id.* at 3a. The State agreed to recommend a sentence of eight years, with three years suspended. *Id.* at 12a.

During Stone's plea hearing, the court expressed some confusion about whether Stone was pleading guilty to a misdemeanor or a felony. *Id.* at 26a. Stone's counsel explained, "it does get sort of confus-

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[1] The Information also added a charge of tampering with a communication device based on Stone's having taken the victim's phone away from her, but that charge is not relevant to the double jeopardy issue.

[2] Mont. Code §§ 46-18-501, 46-18-502 (2013).

ing for my client, and I've tried to explain it on several occasions … but the action[] is a misdemeanor but what makes it a felony is two prior PFMA convictions … [b]ecause he kept asking me why we can't go and ask for a misdemeanor, and I'm saying well, that's kind of what we would be doing, but since he has two prior convictions, it wouldn't be a misdemeanor." *Id.* at 26a-27a. The court then clarified with Stone that he was pleading guilty to a felony because "[t]his one would be the third or more." *Id.* at 27a.

Stone's counsel also stated that "there's been a little struggle with Mr. Stone and I with regards to [persistent felony offender status]," but he added that the court had no choice but to sentence Stone to somewhere between five and one hundred years. *Id.* at 24a. The court agreed. *Id.* at 27a.

When Stone's counsel asked Stone whether it was in his best interest to plead guilty, he responded, "That's how I've been advised." *Id.* at 26a. Stone also acknowledged that he could not withdraw his plea if he was unhappy with the court's ultimate sentence. *Id.* at 29a. The court then accepted Stone's guilty plea "as being voluntarily made with a knowledgeable understanding and waiver of your constitutional rights to a trial," and set a date for sentencing. *Id.* at 29a-30a. Counsel for the State was silent throughout the plea hearing.

It turned out, however, that Stone did not in fact have two prior convictions for partner or family member assault. *Id.* at 3a. Stone informed the trial court of this newly discovered fact, and he argued that he should be sentenced within the misdemeanor range on the partner or family member assault

charge. *Ibid.* He also argued that double jeopardy principles precluded the State from attempting to reprosecute him on the alternative aggravated assault charge, which it had agreed to dismiss in exchange for his guilty plea. Brief Regarding Continued Prosecution of Count I, *Montana v. Stone*, No. DC-13-0395 (Dec. 2, 2013), Dkt. No. 22. In response, the State conceded that Stone did not have the requisite prior convictions, but it was unwilling to allow him to be sentenced to a misdemeanor. Response to Brief Regarding Continued Prosecution of Count I, *Montana v. Stone*, No. DC-13-0395 (Dec. 23, 2013), Dkt. No. 29. The State therefore requested that the court void the plea agreement so that the State could proceed to trial on the aggravated assault charge. *Ibid.* Stone replied that the State could not force a defendant to withdraw a guilty plea, and the court should therefore proceed to sentencing on the partner or family member assault charge. Reply to the State's Response to Defendant's Point Brief, *Montana v. Stone*, No. DC-13-0395 (Jan. 14, 2014), Dkt. No. 31.

The court voided the plea agreement and indicated that the State could go forward with the aggravated assault charge. Order, *Montana v. Stone*, No. DC-13-0395 (Feb. 5, 2014), Dkt. No. 34. It concluded that double jeopardy did not apply because Stone was not acquitted, convicted, or sentenced, and the parties were mistaken when they entered the plea agreement. *Id.* at 5. The State then filed a new charging instrument that abandoned the partner or family assault charge. Pet. App. 4a. Stone obtained new counsel and asked the court to reconsider its decision, but the court denied Stone's motion. *Ibid*.

Stone then agreed to plead guilty to aggravated assault in exchange for the State's agreement to withdraw its persistent felony offender notice and recommend a five-year sentence with the final year suspended. *Ibid*. As part of the plea agreement, Stone also agreed to waive appeal of any adverse ruling. *Ibid*.

Stone again obtained new counsel. He moved to withdraw his guilty plea and argued that he received ineffective assistance of counsel when he pleaded guilty without preserving his right to appeal the court's previous rulings on his first guilty plea. *Ibid*. The court denied his motion. *Id.* at 5a. The court sentenced Stone to five years with one year suspended. *Ibid*.

2. Stone appealed to the Montana Supreme Court, arguing that (1) the district court had no authority to vacate his first guilty plea, (2) jeopardy attached when his guilty plea was accepted by the district court, and (3) his subsequent prosecution for aggravated assault therefore violated the Double Jeopardy Clause. *Id.* at 5a-6a. The Montana Supreme Court held that Stone had waived his right to appeal the district court's decision to vacate his guilty plea, but not his double jeopardy challenge, which was jurisdictional. *Id.* at 6a-7a.

On the merits, the Montana Supreme Court concluded that the aggravated assault charge was not barred by double jeopardy because jeopardy had never attached in the first place. *Id.* at 7a-8a. Noting that "there must be an initial determination as to whether jeopardy has attached in the first instance," the court held that jeopardy attaches only if the first

prosecution "conclude[s] with an acquittal or a conviction." *Ibid*. Relying on the Montana Code's definition of conviction, the court reasoned that a "'conviction' requires a judgment or sentence entered upon a guilty or nolo contendere plea." *Id.* at 8a (citing Mont. Code § 46-1-202(7)). Because the district court had not entered a judgment against or sentenced Stone before vacating his plea agreement, the court determined Stone had not been convicted under Montana law. *Id.* at 10a. The court therefore held that jeopardy did not attach to his guilty plea, and the Double Jeopardy Clause afforded him no protection from a second prosecution. *Ibid*.

REASONS FOR GRANTING THE PETITION

This Court has not yet determined at what point jeopardy attaches when a defendant pleads guilty. And "[i]n the absence of definitive guidance from the United States Supreme Court, federal and state courts have split on the question." *State v. Thomas*, 995 A.2d 65, 72-73 (Conn. 2010). Five Circuit Courts and a number of state courts have determined that point to be when the trial court accepts the defendant's guilty plea. Under this view, the court' acceptance and entree of an "unconditional plea of guilt" constitutes a conviction for double jeopardy purposes because "[l]ike a verdict of a jury it is conclusive." *United States v. McIntosh*, 580 F.3d 1222, 1228 (11th Cir. 2009). Two other Circuit Courts, three states, and now Montana have held that jeopardy does not attach at that point. Under this opposing view, "an acceptance of a guilty plea is legally different from a conviction based on a jury's verdict." *United States v. Santiago Soto*, 825 F.2d 616, 619 (1st Cir. 1987). Other courts have assumed, without de-

ciding, that jeopardy does or does not attach upon entry of a guilty plea. And so confused is the authority on the issue that some courts, most notably the Eighth Circuit, have issued decisions staking out different positions in the debate.

This Court should provide a clear answer to this fundamental and recurring question of criminal procedure. The division among the courts has persisted for decades, and has been repeatedly recognized by courts in published opinions. *See e.g.*, *Dean-Ganek*, 960 N.E.2d at 269 n.11; *Bally*, 65 F.3d at 108. There is no indication that it will be resolved without this Court's intervention.

The issue is an important one. The overwhelming number of criminal cases in our system are resolved by guilty plea. *Missouri v. Frye*, 566 U.S. 134, 143, (2012). Many of those guilty pleas are entered under agreements with the prosecution, *ibid.*, which may lead to disputes, vacated pleas, and attempts by the state to reprosecute. Without guidance from this Court, both the lower courts and criminal defendants entering pleas will continue to face uncertainty as to when this fundamental constitutional protection attaches. Those courts that, like the Montana Supreme Court below, refuse to apply double jeopardy protections upon acceptance of guilty pleas leave criminal defendants categorically exposed to reprosecution despite the defendant's strong finality interests—interests mirroring those of a defendant found guilty by a jury.

This case presents a good opportunity for the Court to provide guidance to the lower courts. The issue of whether double jeopardy attaches upon a guilty plea

was squarely presented and resolved below. Because the case involves a guilty plea under an agreement with the state, it frames the issue in a common and recurring context. And by making clear that a defendant who pleads guilty is in jeopardy, this Court would properly focus the constitutional inquiry on the follow-on question of whether the second prosecution ought to be barred. *See Martinez v. Illinois*, 134 S. Ct. 2070, 2075 (2014).

I. The Decision Below Deepens a Longstanding Split Over Whether The Double Jeopardy Clause Attaches Upon The Court's Acceptance Of A Guilty Plea.

1. The majority of courts to consider the issue have held that, when a defendant elects not to proceed to trial, jeopardy attaches when the court accepts the defendant's guilty plea.

a. Considering facts substantially identical to this case, the Ninth and Eleventh Circuits have held that the Double Jeopardy Clause's protections attach when a court accepts the defendant's guilty plea. The Second, Fifth, and Sixth Circuits, and a number of states, follow the same principle.

In *United States v. McIntosh*, 580 F.3d 1222 (11th Cir. 2009), McIntosh pleaded guilty to drug and firearm charges, and the district court unconditionally accepted his guilty plea. Before sentencing, the government discovered that the indictment mistakenly alleged the wrong date of the offenses. *Id.* at 1225. The government then empaneled another grand jury, which returned a second indictment against McIntosh. *Id.* at 1226. The government moved to dismiss the first indictment, and the district court granted

the motion without the defendant's consent. *Ibid.* McIntosh moved to dismiss the second indictment on double jeopardy grounds, but the court denied his motion, reasoning that jeopardy did not attach when the court accepted his guilty plea because he had not yet been convicted. *Ibid.* McIntosh then conditionally pleaded guilty to the charges in the second indictment and appealed. *Ibid.*

The Eleventh Circuit held that "[t]he acceptance of [the defendant's] unconditional plea of guilt to the first indictment constituted convictions for the drug and firearm offenses," because "[l]ike a verdict of a jury it is conclusive.... [T]he court has nothing to do but give judgment and sentence." *Id.* at 1228. Jeopardy therefore attached, and the court held that the second indictment should have been dismissed because it violated the Double Jeopardy Clause. *Ibid.* The court also rejected the government's argument that McIntosh impliedly consented to the second indictment. *Id.* at 1228-29.

Similarly, in *United States v. Patterson*, 381 F.3d 859 (9th Cir. 2004), Patterson was indicted on one count of intentionally manufacturing 100 or more marijuana plants. He entered into a plea agreement in which he agreed to plead guilty to manufacturing, but agreed to litigate the number of plants at sentencing. *Id.* at 861. After a thorough colloquy, the court accepted Patterson's guilty plea and set a date for sentencing. *Id.* at 861-82. Before the sentencing, this Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that any fact increasing the penalty for a crime beyond the statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. Because the quantity of marijuana

plants was such a fact, the government argued that the guilty plea should be set aside. *Patterson*, 381 F.3d at 862. The court vacated the guilty plea, scheduled a jury trial, and the jury found Patterson guilty of manufacturing 100 or more marijuana plants. *Ibid.* Patterson appealed on double jeopardy grounds.

The Ninth Circuit held that jeopardy attached when the district court accepted Patterson's guilty plea. *Id.* at 864-65. Although the Double Jeopardy Clause does not apply when the defendant has the plea set aside, the court noted, the district court vacated Patterson's guilty plea on the government's motion over his objection. *Id.* at 864. Thus, the Double Jeopardy Clause required the court to vacate Patterson's conviction and sentence resulting from the jury trial. *Id.* at 866. The Ninth Circuit remanded to reinstate Patterson's original guilty plea and sentence him in accordance with that plea. *Id.* at 865-66.

The Second, Fifth, and Sixth Circuits have likewise held that jeopardy attaches upon the court's acceptance of a guilty plea. *See United States v. Cambindo Valencia*, 609 F.2d 603, 637 (2d Cir. 1979) ("Of course, however, it is axiomatic of the double jeopardy clause that jeopardy attached once [the] guilty plea was accepted."); *United States v. Sanchez*, 609 F.2d 761, 762 (5th Cir. 1980) ("Jeopardy attaches with the acceptance of a guilty plea."); *Fransaw v. Lynaugh*, 810 F.2d 518, 523 n.9 (5th Cir. 1987) (noting that the "general rule" is that jeopardy attaches with the acceptance of a guilty plea and citing cases, but noting out of circuit cases to the contrary); *United States v. Ursery*, 59 F.3d 568, 572 (6th Cir. 1995), reversed on other grounds, 518 U.S. 267 (1996)

("[J]eopardy attaches to a guilty plea pursuant to a plea agreement upon the *court's acceptance* of the plea agreement.").

At least two state courts of last resort have also held that jeopardy attaches when a court accepts a guilty plea. *See, e.g.*, *State v. McAlear*, 519 N.W.2d 596, 599 (S.D. 1994) ("In the case of a plea bargain, jeopardy attaches when the court accepts the guilty plea."); *Peiffer v. State*, 88 S.W.3d 439, 444 (Mo. 2002) ("This Court adopts the rule, followed in many jurisdictions, that double jeopardy attaches to a guilty plea upon its unconditional acceptance.").

b. On the other hand, the First and Third Circuits, at least three state courts of last resort, and now the Montana Supreme Court have held that jeopardy does not attach when a court accepts a guilty plea.

In *United States v. Santiago Soto*, 825 F.2d 616 (1st Cir. 1987), Santiago pleaded guilty to obstruction of mails, a misdemeanor. Although the district court expressed some concern about Santiago's testimony that he lacked criminal intent, the court became satisfied that Santiago was pleading voluntarily and accepted his plea. *Id.* at 617. At his sentencing, Santiago complained that he was paying restitution for a crime he did not commit. *Ibid.* The district court sua sponte vacated his guilty plea and dismissed the information. *Ibid.* The government then obtained an indictment charging Santiago with two felonies, obstruction of correspondence and theft of mail matter, and Santiago was convicted by a jury. *Ibid.*

The First Circuit rejected Santiago's argument that jeopardy attached when the court accepted his plea to the misdemeanor. *Id.* at 618. Instead, the

court held that "[t]he mere acceptance of a guilty plea does not carry the same expectation of finality and tranquility that comes with a jury's verdict or with an entry of judgment and sentence." *Id.* at 620. The court based its decision on this Court's decision in *Ohio v. Johnson*, 467 U.S. 493 (1984): "Underlying *Johnson* is the proposition that an acceptance of a guilty plea is legally different from a conviction based on a jury's verdict." *Santiago Soto*, 825 F.2d at 619. Although the court noted a "potential for prosecutorial overreach in this case," it concluded that Santiago's finality interests were relatively weak, so "jeopardy did not attach when the district court accepted the guilty plea to the lesser included offense and then rejected the plea without having imposed sentence and entered judgment." *Id.* at 620.

The Third Circuit likewise rejected a defendant's argument that jeopardy attached when his guilty plea was accepted. *Gilmore v. Zimmerman*, 793 F.2d 564, 571 (3d Cir. 1986). In doing so, the court noted that the Second, Fifth, Eighth, and Ninth Circuits had taken the opposite view, but the Third Circuit found guidance from this Court's decision in *Johnson*. *Id.* at 570-71.

At least three state courts of last resort have come to the same conclusion. *See State v. Thomas*, 995 A.2d 65, 72-79 (Conn. 2010) (noting the split and that the "United States Supreme Court has yet to decide when jeopardy attaches in a case disposed of by a guilty plea," and concluding that "the acceptance of a guilty plea is legally different from a conviction based on a jury's verdict, and, therefore, [] jeopardy does not necessarily attach automatically upon the acceptance of a guilty plea as it does to an actual judgment of

conviction"); *State v. Angel*, 51 P.3d 1155, 1159 (N.M. 2002) ("We hold that jeopardy did not attach when the magistrate court accepted Defendant's no-contest plea to the misdemeanor offenses and then dismissed the charges prior to sentencing. As a result, Defendant's subsequent prosecution in district court did not implicate double jeopardy protections."); *Myers v. Frazier*, 319 S.E.2d 782, 798 (W. Va. 1984) ("We reject the idea that jeopardy attaches when a plea is accepted …. We conclude that the entry of a nolo contendere or a guilty plea pursuant to a plea bargain and the oral pronouncement of a sentence by a circuit court does not impose a double jeopardy bar where the defendant has not served any portion of the sentence.").

The Montana Supreme Court's decision below joins this side of the split. Unlike the First and Third Circuits, the Montana Supreme Court did not rely on *Johnson*. Instead, it held that jeopardy does not attach when a defendant pleads guilty until there is a conviction.

2. The confusion among the lower courts is highlighted by courts that, like the Eighth Circuit, have not clearly come to ground on the issue. In *Bally v. Kemna*, 65 F.3d 104 (8th Cir. 1995), the court stated, "we have never definitely determined when jeopardy attaches to a guilty plea," and assumed, without deciding, that jeopardy attaches upon acceptance of a plea. *Id.* at 107. The court noted, however, "that several federal courts have questioned the rationale of cases holding that jeopardy attaches upon acceptance of a guilty plea." *Ibid.* In an earlier case, however, the Eighth Circuit specifically stated that "[o]f course, jeopardy would attach when a plea of

guilty is accepted." *United States v. Bullock*, 579 F.2d 1116, 1118 (8th Cir. 1978).

3. The split on whether, and when, guilty pleas trigger double jeopardy concerns is well recognized. Circuit courts and state courts of last resort have regularly acknowledged the split in authority. *See Bally*, 65 F.3d at 107-08; *Dean-Ganek*, 960 N.E.2d at 269 n.11; *United States v. Ritsema*, 89 F.3d 392, 399 n.6 (7th Cir. 1996) (noting that the Supreme Court's decision in *Johnson* may have overruled the First Circuit's (pre-*Santiago Soto*) case holding that "jeopardy attaches to the acceptance of a guilty plea"). The disagreement is so settled that it is frequently referenced by other lower courts, and even in memorandum dispositions. *E.g.*, *Ohio v. Castro*, 13 N.E. 3d 720, 722 (Ohio Ct. App. 2014) ("There is currently a split of authority in the federal circuits on whether jeopardy automatically attaches in every case immediately upon a trial court's unconditional acceptance of a guilty plea.") (citing, *inter alia*, *Fox v. Ryan*, 462 F. App'x 730, 732 (9th Cir. 2011)). Leading commentators have noted the same division. *See* W.R. LaFave, J.H. Israel, N.J. King, & O.S. Kerr, Criminal Procedure § 25.1(d) (5th ed. 2009).

There is no indication that the split will be resolved without this Court's intervention. Indeed, despite reasoned decisions exploring the opposing views, the disagreement over the relationship between guilty pleas and double jeopardy has continued to fester. In a dissent from denial of rehearing en banc in the Ninth Circuit's *Patterson* case, Judge Kozinski described in detail the "longstanding circuit split about when double jeopardy protections kick in after a guilty plea." *United States v. Patterson*, 406

F.3d 1095, 1100-01 (9th Cir. 2005). Relying on this Court's decision in *Johnson*, he argued that the Ninth Circuit should have reconsidered its precedent and joined the First and Third Circuits. The Ninth Circuit nevertheless declined to reconsider its holding in *Patterson*. Likewise, in cases decided after *Johnson*, the Fifth, Sixth, and Eleventh Circuits have held that jeopardy attaches upon acceptance of a guilty plea.

The split across federal and state courts has been clear and persistent. This Court should therefore intervene to resolve the conflict.

II. This Case Presents An Important Issue And Is An Ideal Vehicle For Resolving That Issue.

The double jeopardy implications of a guilty plea is a fundamental and recurring question of constitutional law, and the guilty plea and reprosecution here present a good opportunity to resolve that question.

1. "The underlying idea [of the Double Jeopardy Clause], one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-88 (1957).

The question of whether these concerns apply once a guilty plea is accepted is significant both in constitutional and practical terms. A criminal

defendant who pleads guilty to charges arising from a crime has the same finality and repose interest against being prosecuted a second time for that crime as a defendant who has endured a jury trial and verdict. *See McIntosh*, 580 F.3d at 1228. Yet, under the approach followed by the Montana Supreme Court and similar-minded courts, double jeopardy protections are categorically inapplicable at the guilty plea stage. *See Santiago Soto*, 825 F.2d at 618. These courts never reach the follow-on question of whether, in a particular set of circumstances, double jeopardy should bar the state from a second prosecution. *See Martinez v. Illinois*, 134 S. Ct. 2070, 2075 (2014). Their bright-line answer is no. That approach denies criminal defendants an important protection against the authority of a state to mount a second prosecution if it decides, in hindsight, that it struck a bad deal. In that event, a criminal defendant would be "compelled to live in [the] continuing state of anxiety and insecurity" that the double jeopardy protection is intended to prevent.

This problem carries systemic and practical significance because guilty pleas and plea-bargaining have become the prevailing means of disposing of criminal cases. As this Court has recognized, jury trials have given way in our system to guilty pleas as plea bargains have become "central to the administration of the criminal justice system." *Frye*, 566 U.S. at 143. In *Frye*, this Court noted that guilty pleas account for 97% of federal convictions and 94% of state convictions. *Ibid.* Because those figures remain true today,[3] the application of the Double

[3] https://www.bjs.gov/index.cfm?ty=tp&tid=23#data_collections

Jeopardy Clause to the guilty plea process is arguably an even more important question than its application to the trial process. And the fact that the question presented has been raised so frequently, across both federal and state systems, for a sustained period of time confirms it is worthy of this Court's attention.

2. This case presents an ideal vehicle for resolving this critical threshold question in the double jeopardy analysis. The question presented was litigated at both the trial and appellate court levels. While there were other arguments raised by the parties as well, the Montana Supreme Court's decision cleared that underbrush by making its ruling plain and simple: "Jeopardy never attached to Stone's guilty plea, and therefore did not preclude the State from prosecuting him for aggravated assault." Pet App. 10a. The operative facts here, which involve a guilty plea entered under an agreement with the state, are commonplace and recurring. So too are the circumstances that led the court to vacate the plea and allow a second prosecution: a purported mistake in the charging instrument or the parties' assumptions about the legal implications of the guilty plea. *See, e.g.*, *United States v. McIntosh*, 580 F.3d 1222 (11th Cir. 2009); *United States v. Patterson*, 381 F.3d 859 (9th Cir. 2004).

III. The Montana Supreme Court's Decision Is Incorrect.

In determining that defendants who plead guilty have no protection from double jeopardy until the court imposes judgment or sentence, the Montana Supreme Court's decision failed to consider this

Court's precedents and elided the clause's core constitutional concerns.

1. The Double Jeopardy Clause of the Fifth Amendment, applied to the states through the Fourteenth Amendment, *Benton v. Maryland*, 395 U.S. 784 (1969), provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

"The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187-88 (1957). The clause "embodies two vitally important interests. The first is the 'deeply ingrained' principle that 'the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'" *Yeager v. United States*, 557 U.S. 110, 117–18 (2009) (quoting *Green*, 355 U.S. at 187-88). "The second interest is the preservation of 'the finality of judgments.'" *Ibid.*

"As an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, the courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of 'attachment of jeopardy.'" *Serfass v. United States*, 420 U.S. 377, 388 (1975).

Rather than apply a functional approach to determine that point, this Court has instead adopted bright-line rules. *Martinez*, 134 S. Ct. at 2075 (explaining that this Court "explicitly reject[ed] a functional approach to the question whether jeopardy has attached," and has instead "consistently treated [the issue] as a bright-line rule"). In a jury trial, jeopardy attaches when a jury is empaneled and sworn; in a nonjury trial, it attaches when the court begins to hear evidence. *Id.*; *Serfass*, 420 U.S. at 388. Although this Court has not determined the point at which jeopardy attaches when a defendant pleads guilty, in *Ricketts v. Adamson*, 483 U.S. 1, 8 (1987), it "assume[d] that jeopardy attached at least when respondent was sentenced … on his plea of guilty."

In a case that does not go to trial because the defendant pleads guilty, the point most analogous to empaneling the jury or beginning to hear evidence is the point at which the court accepts the defendant's guilty plea. It is at that point that the defendant waives his right to trial, admits his guilt, "is subjected to the hazards of … conviction," *Serfass*, 420 U.S. at 391, and the state has been given "one full and fair opportunity to convict those who have violated its laws," *Johnson*, 467 U.S. at 502. Indeed, for Sixth Amendment purposes, a plea of guilty "is itself a conviction. Like a verdict of a jury it is conclusive…. [T]he court has nothing to do but give judgment and sentence." *Kercheval v. United States*, 274 U.S. 220, 223 (1927). Just as jeopardy does not attach only upon judgment and sentencing after trial, neither does it attach only upon judgment and sentencing after a guilty plea.

To hold otherwise would undermine the finality that comes with a defendant's guilty plea and the court's acceptance of that plea as knowing and voluntary. It would also open the door to "prosecutorial overreach[]," *Johnson*, 467 U.S. at 501, and subject the defendant to potential further "embarrassment, expense and ordeal," *Yeager*, 557 U.S. at 117. It would "compel[] him to live in a continuing state of anxiety and insecurity," *ibid.*, because the state could at any time before judgment and sentencing convince the court over the defendant's objection to vacate the plea, and obtain a new opportunity to use its resources, power, and the defendant's plea to harass the defendant or enhance the charges.

The Montana Supreme Court failed to adhere to these precedents, and instead held that a guilty plea is categorically insufficient for jeopardy to attach. That legal error put it on the wrong side of the deep split on this question.

2. The First and Third Circuits (and Judge Kozinski of the Ninth Circuit in dissent) have relied on this Court's decision in *Ohio v. Johnson* to determine that jeopardy does not attach when a court accepts a defendant's guilty plea. But *Johnson* did not resolve the question at all.

In *Johnson*, the defendant was charged in a single indictment with murder, involuntary manslaughter, aggravated robbery, and grand theft. 467 U.S. at 495. Over the State's objection, the trial court allowed the defendant to plead guilty to only the lesser offenses (involuntary manslaughter and grand theft) at his arraignment, and sentenced him

immediately. *Id.* at 496. The defendant then moved to dismiss the more serious charges on double jeopardy grounds, and the court granted his motion. *Ibid.* This Court held that, where the defendant "offered only to resolve part of the charges against him, while the state objected to disposing of any of the counts against [the defendant] without a trial," the defendant could not "use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges." *Id.* at 501-02. Ending the prosecution, the Court reasoned, "would deny the State its right to one full and fair opportunity to convict those who have violated its laws." *Ibid.*

Johnson did not determine the relevant question here: the point at which jeopardy attaches when a defendant pleads guilty. Instead, *Johnson* skipped over that threshold question and analyzed the distinct question whether, if jeopardy attached, the proceeding ended in such a manner that would bar the defendant's retrial. *See Martinez*, 134 S. Ct. at 2075. While some courts have found guidance in *Johnson* to answer the relevant questions here, others have not. Even after *Johnson*, courts have continued to determine that jeopardy attaches on the court's acceptance of a guilty plea, and that the prosecution cannot bring a second set of charges simply because it made a mistake the first time or did not like the resulting sentence. *United States v. McIntosh*, 580 F.3d 1222 (11th Cir. 2009); *United States v. Patterson*, 381 F.3d 859 (9th Cir. 2004).

Even *Johnson*'s answer to the question of whether double jeopardy, having attached, should bar reprosecution does not resolve Stone's double

jeopardy challenge. The *Johnson* court rejected the defendant's challenge because he did not have an agreement with the State covering all of his charges, and instead convinced the court over the State's objection to accept a guilty plea as to only some of the charges. In contrast, Stone came to an agreement with the State as to all of the charges in the information, the court accepted his guilty plea without objection from the State, and the State convinced the court to vacate the plea over *Stone's* objection and brought another information. *See Bally*, 65 F.3d at 109 ("We also realize that *Ohio v. Johnson* is distinguishable. As the district court pointed out, in that case the state charged the defendant in a single indictment and objected to acceptance of guilty pleas, whereas Bally was charged in two indictments and the state did not object to acceptance of his plea."). The State therefore had its "one full and fair opportunity" to bring charges against and convict Stone, and it sought a second chance after it realized the first try did not carry the sentence that it wanted.

The Court should therefore step in to answer this open question that has divided federal and state courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 6, 2017

APPENDIX

DA 16-0340

IN THE SUPREME COURT OF THE STATE OF MONTANA

2017 MT 189

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOEL HENRIK STONE,

Defendant and Appellant.

APPEAL FROM: District Court of the Thirteenth Judicial District, In and For the County of Yellowstone, Cause No. DC 13-0395 Honorable Gregory R. Todd, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Craig Shannon, Attorney at Law, Missoula, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Tammy A. Hinderman, Assistant Attorney General, Helena, Montana

Scott Twito, Yellowstone County Attorney, Julie Mees, Deputy County Attorney, Billings, Montana

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Submitted on Briefs: June 7, 2017

Decided: August 8, 2017

Filed:

Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Joel Henrik Stone (Stone) appeals the District Court's order vacating his guilty plea to felony partner or family member assault and his subsequent prosecution for aggravated assault. We affirm.

¶2 We restate the issues on appeal as follows:

Issue One: Did the District Court err by vacating Stone's guilty plea?

Issue Two: Was Stone twice put in jeopardy for the same offense?

FACTUAL AND PROCEDURAL BACKGROUND

¶3 On May 24, 2013, the State filed an Information charging Stone with aggravated assault and partner or family member assault (PFMA). The State later filed an amended Information charging Stone with the same offenses in the alternative, and added a misdemeanor tampering charge. On September 30, 2013, after a thorough colloquy Stone unconditionally pled guilty to felony PFMA. Stone admitted to two prior PFMA convictions, to the facts establishing the elements of PFMA, and stated he understood he was pleading guilty to a felony. The plea agreement included a designation of Stone as a persistent felony offender. In the hearing, the District Court accepted Stone's guilty plea as knowing and voluntary.

¶4 Prior to sentencing, the parties informed the District Court that Stone, in fact, did not have two prior PFMA convictions. Stone contented that he must be sentenced in accordance with the crime of PFMA as a misdemeanor. The State moved to vacate the guilty plea based on mutual mistake. The District Court agreed with the State, vacated the guilty plea, and allowed the State to amend the Information. The

District Court determined Stone was not being subjected to double jeopardy nor were his due process rights violated.

¶5 The State filed a Second Amended Information charging Stone with aggravated assault and tampering. After obtaining new counsel, Stone moved the District Court to reconsider its decision to allow the prosecution to proceed, alleging there was no mutual mistake, but instead the State's unilateral mistake was insufficient to vacate the plea agreement. The District Court denied his motion.

¶6 On June 8, 2015, Stone signed a written plea agreement with the State; he agreed to plead guilty to aggravated assault in exchange for the State's withdrawal of its persistent felony offender notice and recommendation for a five-year sentence. The agreement specifically provided Stone waived his right to appeal any "previous adverse legal ruling" in his case. At the change of plea hearing, the District Court conducted a thorough colloquy; Stone provided a factual basis for the elements of the crime and entered his guilty plea. The District Court accepted his plea and set a sentencing hearing date.

¶7 On February 2, 2016, Stone, through another new attorney, filed a motion to withdraw his guilty plea challenging the voluntariness of the plea and asserted the waiver was the result of ineffective assistance of counsel. On February 24, 2016, the District Court issued a *Gillham*[1] order, requiring

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[1] Based on *In re Gillham*, 216 Mont. 279, 282, 704 P.2d 1019, 1021 (1985). If a convicted person files a post-conviction petition alleging, in whole or in part, ineffective assistance of counsel, the Court may order the attorney to respond to the allegations. The order protects the attorney from charges of discipline or malpractice claims for revealing necessary confidential information from representing the convicted person.

Stone's previous attorney to respond to the allegations. Stone's previous attorneys and the State responded. Subsequently, the District Court denied Stone's motion to withdraw his plea, finding counsel was not ineffective and that Stone knowingly and voluntarily waived his right to an appeal as part of the plea agreement.

¶8 At the March 28, 2016 sentencing hearing, Stone asserted he was not guilty of aggravated assault and claimed he had pled guilty believing he would serve no jail time. The District Court sentenced Stone to the Montana Department of Corrections for five years with one year suspended. Stone appeals.

STANDARD OF REVIEW

¶9 A ruling on a motion to dismiss in a criminal proceeding is a question of law, which we review de novo. *State v. Burns*, 2011 MT 167, ¶ 17, 361 Mont. 191, 256 P.3d 944. A district court's conclusion as to whether sufficient evidence exists to convict is ultimately an analysis and application of the law to the facts, and as such is properly reviewed de novo. State v. Gunderson, 2010 MT 166, ¶ 58, 357 Mont. 142, 237 P.3d 74.

¶10 A district court's denial of a motion to dismiss criminal charges on double jeopardy grounds presents a question of law, which we review for correctness. *State v. Cates*, 2009 MT 94, ¶ 22, 350 Mont. 38, 204 P.3d 1224 (citing *State v. Maki*, 2008 MT 379, ¶ 9, 347 Mont. 24, 196 P.3d 1281).

DISCUSSION

¶11 Issue One: Did the District Court err by vacating Stone's guilty plea?

¶12 Stone argues the District Court erred when it vacated his initial guilty plea to PFMA. He argues

the court had no authority to so. The State argues Stone waived his right to appeal the District Court's decision to vacate his guilty plea to PFMA in his later plea agreement for aggravated assault.

¶13 Montana's long standing jurisprudence holds that "where a defendant voluntarily and knowingly pleads guilty to an offense, the plea constitutes a waiver of all non-jurisdictional defects and defenses, including claims of constitutional rights violations which occurred prior to the plea." *State v. Lindsey*, 2011 MT 46, ¶ 19, 359 Mont. 362, 249 P.3d 491; *State v. Pavey*, 2010 MT 104, ¶ 11, 356 Mont. 248, 231 P.3d 1104; *State v. Kelsch*, 2008 MT 339, ¶ 8, 346 Mont. 260, 194 P.3d 670; *State v. Rytky*, 2006 MT 134, ¶ 7, 332 Mont. 364, 137 P.3d 530; *State v. Gordon*, 1999 MT 169, ¶ 23, 295 Mont. 183, 983 P.2d 377; *State v. Turcotte*, 164 Mont. 426, 524 P.2d 787 (1974). A defendant may only attack the voluntary and intelligent character of the guilty plea and may not raise independent claims relating to prior deprivations of constitutional rights. *Gordon*, ¶ 23; *State v. Wheeler*, 285 Mont. 400, 402, 948 P.2d 698, 699 (1997).

¶14 Here, in the June 8, 2015 plea agreement, Stone explicitly waived "the right to appeal any finding of guilt or previous adverse legal ruling." Stone's plea agreement was indeed a waiver that he entered into voluntarily and knowingly. The guilty plea has precluded his right to appeal this issue.

¶15 Issue Two: Was Stone twice put in jeopardy for the same offense?

¶16 As discussed above, by pleading guilty a defendant waives his right to appeal. However, the waiver applies to "non-jurisdictional defects and defenses." In Montana, a guilty plea does not waive a

double jeopardy argument on appeal. *State v. Cech*, 2007 MT 184, ¶¶ 9-10, 338 Mont. 330, 167 P.3d 389; *Stilson v. State*, 278 Mont. 20, 22, 924 P.2d 238, 239 (1996). The State concedes Stone has not waived his right to appeal this issue. Stone has not waived his right to bring this appeal based on double jeopardy.

¶17 Stone argues the State's subsequent prosecution for aggravated assault after the District Court vacated his guilty plea to PFMA violated his constitutional due process right to be free from twice being put in jeopardy for the same offense, and that jeopardy attached when his guilty plea was accepted by the District Court. The State asserts jeopardy never attached.

¶18 The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The clause applies to the states through the Fourteenth Amendment. *State v. Duncan*, 2012 MT 241, ¶ 6, 366 Mont. 443, 291 P.3d 106 (citing *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 2062 (1969)). Montana's Constitution establishes similar double jeopardy protections, stating, "No person shall be again put in jeopardy for the same offense previously tried in any jurisdiction." Mont. Const. art. II, § 25.

¶19 Before a question of double jeopardy arises, there must be an initial determination as to whether jeopardy has attached in the first instance. *Keating v. Sherlock*, 278 Mont. 218, 223, 924 P.2d 1297, 1300 (1996). The State argues Stone's guilty plea was not a conviction or acquittal and therefore jeopardy did not attach. Stone insists jeopardy attached when the District Court accepted his guilty plea. We are not

convinced.

¶20 This Court applies a three-part test to determine whether jeopardy has attached. *State v. Cline*, 2013 MT 188, ¶ 9, 371 Mont. 18, 305 P.3d 55; *Cech*, ¶ 13; *State v. Gazda*, 2003 MT 350, ¶ 12, 318 Mont. 516, 82 P.3d 20. All three factors must be met. *Cline*, ¶ 9. In order to bar a subsequent prosecution, a defendant's conduct must constitute an offense within the jurisdiction of the court where the first prosecution occurred and within the jurisdiction of the court where the subsequent prosecution is pursued; the first prosecution must conclude with an acquittal or a conviction; and the subsequent prosecution must be based on an offense arising out of the same transaction. *Cech*, ¶ 13.

¶21 In Montana, a "conviction" requires a judgment or sentence entered upon a guilty or nolo contendere plea. Section 46-1-202(7), MCA; *Peterson v. State*, 2017 MT 165, ¶ 9, 388 Mont. 122. In construing a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Section 1-2-101, MCA; *State v. Mainwaring*, 2007 MT 14, ¶ 15, 335 Mont. 322, 151 P.3d 53. In order for there to be a conviction based on a guilty plea, a judgment or sentence must be imposed. *State v. Tomaskie*, 2007 MT 103, ¶ 12, 337 Mont. 130, 157 P.3d 691.

¶22 Stone cites *Kercheval v. United States*, 274 U.S. 220, 223, 47 S. Ct. 582, 583 (1927) for the proposition that "a plea of guilty . . . is itself a conviction. More is not required." In *Kercheval*, a defendant pled guilty and was sentenced. 274 U.S. at 221, 47 S. Ct. at 582. Afterwards, the court allowed him to withdraw his guilty plea, based on his allegation that he was

induced to plead guilty by the prosecutor's promises. In the subsequent prosecution, the previous guilty plea was used as evidence and the defendant was found guilty and sentenced. *Kercheval*, 274 U.S. at 222, 47 S. Ct. at 582. The Defendant appealed. The Supreme Court determined that, when used as evidence, a prior guilty plea is tantamount to a conviction; it is conclusive evidence of guilt. *Kercheval*, 274 U.S. at 224, 47 S. Ct. at 583. *Kercheval* does not hold that a guilty plea is a conviction.

¶23 Moreover, the prohibition against double jeopardy is based on deeply ingrained constitutional policies designed to protect a defendant by ensuring finality of prosecution and the protection against the State's attempts to relitigate facts underlying a prior acquittal and from attempts to secure additional punishment after a prior conviction and sentence. *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 2225 (1977); *State v. Weatherell*, 2010 MT 37, ¶ 9, 355 Mont. 230, 225 P.3d 1256; *State v. Carney*, 219 Mont. 412, 416, 714 P.2d 532, 535 (1986).

¶24 Here, Stone had no interest in the finality of a guilty plea to misdemeanor PFMA because he was not charged with that offense, he did not plead guilty to that charge, and he did not agree to be, and could not have reasonably expected to be sentenced to a misdemeanor when he entered his guilty plea. "It is elementary that a party cannot be charged with one offense and convicted of another independent offense." *State v. Sieff*, 54 Mont. 165, 168, 168 P. 524 (1917). The State charged Stone with felony PFMA. However, no felony PFMA occurred despite Stone's admission to two previous PFMA convictions and his admission to the factual basis for the charges. Stone's prosecution for aggravated assault, after a vacated

guilty plea to a non-existent crime, did not place Stone in jeopardy twice for the same conduct.

¶25 The District Court did not enter a judgment or sentence Stone. Stone had no interest in the finality of a guilty plea for a crime that did not occur. The Montana statute requires a judgment or sentence to be imposed before a guilty plea may qualify as a conviction for purposes of double jeopardy. Jeopardy did not attach to Stone's guilty plea, as he had not been convicted of a crime per Montana statute. Section 46-1-202(7), MCA. The State's prosecution of Stone for aggravated assault did not compromise the protections against double jeopardy.

CONCLUSION

¶26 The District Court correctly vacated the guilty plea. Jeopardy never attached to Stone's guilty plea, and therefore did not preclude the State from prosecuting him for aggravated assault.

¶27 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ MICHAEL E WHEAT

/S/ BETH BAKER

/S/ LAURIE McKINNON

/S/ DIRK M. SANDEFUR

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

STATE OF MONTANA,

Plaintiff,

vs.

JOEL HENRICK STONE,

Defendant.

Cause No. DC 13-0395

Judge Gregory R. Todd

ORDER

This matter comes before the court on a Point Brief filed by Defendant Joel Henrick Stone (hereafter "Stone"). Stone filed his brief on December 2, 2013 regarding the continued prosecution of Count I (Aggravated Assault). Plaintiff, State of Montana (hereafter "State") filed a response on December 23, 2013 and Stone filed a reply on January 13, 2014. Stone is represented by Jeffrey G. Michael and the State is represented by Deputy County Attorney Julie Mees.

BACKGROUND

On May 24, 2013, the Court granted leave to file an information charging Stone with Count I: Aggravated Assault (Felony) and Count II: Partner or Family Member Assault [PFMA] (Felony). Stone appeared before the Court on June 3, 2013 and pled not guilty. On June 25, 2013, the state served an amended information, charging Stone with Count I: Aggravated Assault (Felony); in the alternative to

Count I: Count II: PFMA (Felony); and Count Ill: Criminal Destruction of or Tampering with a Communication Device [Tampering] (Misdemeanor). On September 30, 2013 Stone signed a plea agreement and waiver of rights whereby the State agreed to dismiss the Aggravated Assault and Tampering charges, in exchange for Stone's guilty plea to the PFMA.

On September 30, 2013, a change of plea hearing was held and Stone appeared a before the court, with Michaels, to enter a guilty plea on the charge of PFMA (Felony). The State recommended Stone be sentenced as' a PFO to eight years with the Department of Corrections, with three years suspended. Stone argued for less, essentially a sentence of five years to the Department of Corrections. The State had already filed its Notice of Intent to Have Defendant Designated a Persistent Felony Offender (PFO) and Stone had not challenged the designation. At this time, a thorough colloquy addressing Stone's intention to enter a guilty plea was conducted by this court. Stone admitted he had a prior relationship with the victim and caused her bodily injury. Hrg. Trans. 5:7-8 (Sept. 30, 2013). Stone also admitted that he had "at least two prior PFMAs." *Id.* 6:13-15. Finally, Judge Baugh clarified with Stone that he had two PFMA convictions and he would be sentenced as a PFO. *Id.* 10:7-7-19.

After the change of plea hearing, defense counsel informed the State that Stone believed he did not have the requisite two PFMA convictions. Upon further investigation by the State and defense counsel, it was determined that Stone only had one prior PFMA conviction in 1996. Therefore, the proposed sentence that Stone be sentenced as a PFO to eight years with the Department of Corrections,

with three years suspended was unlawful and both parties relied on this incorrect information in negotiating the plea agreement.

DISCUSSION

A plea agreement is a contract between the State and a defendant and is subject to contract law standards. *State v. Shepard,* 2010 MT 20, ¶ 14, 355 Mont. 114, 225 P.3d 1217 (citing *State v. Rardon,* 2002 MT 345, ¶ 18,313 Mont. 321, 61 P.3d 132); 5 *State v. Hill,* 2009 MT 134, ¶ 49, 350 Mont. 296, 207 P.3d 307. There is no requirement for a written acknowledgement of rights form, or a written plea agreement. "Oral plea bargain agreements are subject to contract law standards and are valid and binding." *State v. Skroch,* 267 Mont. 349, 355, 883 P.sd 1256, 1260 (1994)) overruled on other grounds by *State v. Deser/y,* 2008 MT 242, 344 Mont. 468, 188 P.3d 1057) (overruled on other grounds by *State v. Brinson,* 2009 MT 200, 351 Mont. 136,210 P.3d 164) (citations omitted).

In *Deserly,* the Supreme Court stated, “There can be no plea bargain to an illegal sentence. Even when a defendant, prosecutor, and court agree on a sentence, the court cannot give the sentence effect if it is not authorized by law. Thus, when a defendant has entered a plea bargain contemplating an illegal sentence, the defendant is generally entitled to withdraw the guilty plea. Because the plea bargain is based on a promise the trial court lacks authority to fulfill, and the defendant was induced to plead guilty by that promise, plea withdrawal is necessary to return the parties to their initial positions." *Deserly,* ¶ 16.

Parties to a contract must consent to enter into the contract. "The requisite consent must be given freely,

and consent cannot be given freely when it is based on mistake. Either mistake of fact or mistake of law will preclude freely given consent." *Gamble v. Sears,* 2007 MT 131, ¶ 25, 337 Mont. 354, 160 P.3d 537. Mont Code Ann. § 28-2-409 defines mistake of fact: "a mistake of fact not caused by the neglect of a legal duty on the part of the person making the mistake" and consisting in "an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or belief in the present existence of a thing material to the contract which does not exist or in the past existence of such a thing which has not existed." *Gamble*, ¶ 25. The Supreme Court held, "Pursuant to these rules, it is well established that a [contract] must be rescinded if, when the parties entered into it, they were mutually mistaken regarding a fact that was material to the agreement." *Id*., ¶ 26 (citations omitted). A material fact is "a vital fact upon which [the parties] based their bargain." *Id*., ¶ 27. A mutual mistake regarding a material fact is a "mistake so substantial and fundamental as to defeat the object of the parties in making the contract." *Id*. (citations omitted).

In the present case, the plea agreement was negotiated based on a mutual mistake by the State and defense counsel for Stone. Both parties relied on the information that Stone had at least two prior PFMA convictions making the current PFMA charge a felony. Stone signed the waiver of rights and plea agreement indicating that he was pleading to a felony PFMA and repeatedly indicated at the change of plea hearing that he had at least two prior PFMAs. As the plea agreement is subject to contract law standards, the mutual mistake will result in the contract being rescinded.

Stone argues that if the contract is rescinded, the

State cannot remove the alternative charging and Stone may only be charged with Count II PFMA (misdemeanor) and Count Ill Tampering. The court may permit an information to be amended as to form at any time before a verdict or finding is issued if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced. Mont. Code Ann. § 46-11-205(3). Stone mischaracterizes the statute in his brief by stating "An amendment to form is allowed at any time *prior to a plea of guilty* or verdict as long as no additional offenses or different offenses are added." (Def. Point Brief p.4) There has been no verdict or finding issued in this matter. Further, Stone's guilty plea is invalid based on the mutual mistake of the parties. The plea agreement is therefore rescinded, the parties return to the status quo ante, and the State may amend the information as to form charging Stone with Count I: Aggravated Assault.

I. Double Jeopardy and Due Process

Stone argues that continuing to prosecute him for Count I (Aggravated Assault) when he has plead to the alternative Count II (Partner or Family Member Assault), would be double jeopardy in violation of Stone's constitutional rights and Mont. Code Ann. § 46-11-410. The court finds that double jeopardy does not apply to Stone's situation. "Double jeopardy protects a criminal defendant from second prosecution for the same offense after an acquittal, a second prosecution for the same offense after conviction, or multiple punishments for the same offense." *State v. Beavers*, 1999 MT 260, ¶ 45, 296 Mont. 340, 987 P.2d 371 (citing *State v. Chasse*, 240 Mont. 341, 343, 783 P.2d 1370, 1371 (1989)). *See also State v. Matt*, 245 Mont. 208, 799 P.2d 1085 (1990). Stone has not been acquitted of any charge, he has

not been convicted of any charge, and he has not been sentenced for any charge. None of the requisite factors implicating double jeopardy apply to Stone's situation. Stone agreed to plead guilty to a felony PFMA charge that was negotiated based on incorrect information. This mutual mistake resulting in a void plea agreement will preclude any argument that the State made Counts I and II the "same offense" for double jeopardy purposes.

Stone further argues that his due process rights were violated by not receiving notice of the specific charge. Stone was notified of Count I Aggravated Assault at his initial appearance on May 24, 2013. Stone also had notice of the charge on June 25, 2013 when the State filed an Amended Information and Affidavit. The court finds that Stone had notice of the Aggravated Assault charge and his due process rights have not been violated.

CONCLUSION

Stone's due process rights have not been violated and he is not subject to double jeopardy based on the State's continued prosecution of Count I: Aggravated Assault. The State and Stone entered into a plea agreement under mutual mistake rendering the plea agreement void. The parties are therefore returned to their original positions and the State may amend the information as to form charging Stone with Count I: Aggravated Assault.

IT IS HEREBY ORDERED that Defendant's Point Brief Regarding Continued Prosecution of Count I is **DENIED.**

DATED AND ORDERED this 5th day of February,

2014.

Gregory R. Todd, District Court Judge
DC 13-0395

cc. Julie Mees, Attorney for State
Jeffrey G. Michael, Attorney for Defendant

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT

YELLOWSTONE COUNTY

STATE OF MONTANA,

PLAINTIFF,

vs.

JOEL HENRIK STONE,

DEFENDANT.

CAUSE NO. DC 13-295

Taken at the Yellowstone County Courthouse

Billings, Montana

Monday, September 30, 2013

CHANGE OF PLEA

Before the Honorable G. Todd Baugh

Thirteenth Judicial District Judge

A P P E A R A N C E S

FOR THE PLAINTIFF:

INGRID ROSENQUIST, Deputy County Attorney, 217 North 27th, Room 701, P.O. Box 35025, Billings, Montana 59107.

FOR THE DEFENDANT:

JEFFREY G. MICHAEL, ESQ., Attorney at Law, 301 North 27th, Suite 330, Billings, Montana 59101.

MONDAY, SEPTEMBER 30, 2013

THE COURT: DC 13-395, State versus Joel Henrik Stone.

MR. MICHAEL: Good morning, Judge.

THE COURT: Good morning.

MR. MICHAEL: Judge, this is the time and place set for change of plea on Mr. Stone. Judge, according to the Information, Mr. Stone was charged with an aggravated assault, and in the alternative, a partner or family member assault. We're prepared today to plead to the partner or family member assault.

THE COURT: Joel Henrik Stone, is that your true name?

THE DEFENDANT: Yes.

THE COURT: Mr. Stone, your attorney tells me that you want to change your plea to Count II. What about Count III?

MR. MICHAEL: Judge, it's to be dismissed.

THE COURT: That one is dismissed or will be?

MR. MICHAEL: Will be dismissed, Judge.

THE COURT: Okay. You understand you don't have to change your plea?

THE DEFENDANT: Yes.

THE COURT: You're entitled to a trial, if you want a trial, and I believe trial is scheduled for October the 2nd.

THE DEFENDANT: Yes.

THE COURT: Now, if you change your plea, you'll be giving up your right to a trial.

THE DEFENDANT: Yes.

THE COURT: You understand that?

THE DEFENDANT: Yes.

THE COURT: Now, in a trial, it would be a jury trial. Citizens of this county would be selected to sit in judgment of your case. You would participate in the selection of the jury. In a felony criminal case, the jury verdict has to be unanimous. Thus, all 12 of them would have to agree.

Further, in a trial, before they could agree on a verdict of guilty, there would have to be proof of your guilt, proof beyond a reasonable doubt. It's the State's burden to furnish that proof. You don't have to prove you're not guilty. You don't have to prove anything at all. In fact, you don't even have to testify in a trial, if you don't want to, and that fact can't be held against you at trial.

Further, in a trial you get to present witnesses in your own behalf and to confront and cross-examine any witnesses that the State presents against you. In terms of your own witnesses, their attendance at trial can even be compelled, if we can find them.

If you plead guilty, you give up all these rights associated with a trial, you relieve the State of its burden to prove its case beyond a reasonable doubt, you take from a jury any possibility that they could find you not guilty or guilty of only some lesser offense and there won't be a trial. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Okay. I'll let you withdraw your previous plea. That leaves you charged by Information on Count II with having committed the offense of partner or family member assault, felony, alleged to have occurred in Yellowstone County, Montana, on or about April 14, 2013. Court would ask how you plead: Guilty, not guilty, *nolo contendere*?

THE DEFENDANT: Guilty, Your Honor.

THE COURT: Okay. Your attorney has handed me a document entitled Acknowledgment of

Waiver of Rights by Plea of Guilty. It appears to be signed by you today. Have you and your attorney discussed this change of plea prior to today?

THE DEFENDANT: Yes.

THE COURT: Do you think you've had enough time to think about it?

THE DEFENDANT: Yes.

THE COURT: Okay. This Acknowledgment of Waiver of Rights by Plea of Guilty, did you read it before you signed it?

THE DEFENDANT: I have read it in the past, yes.

THE COURT: Do you want a chance to read it again today?

THE DEFENDANT: I'm all right, thank you.

THE COURT: Did you discuss it with your attorney?

THE DEFENDANT: Yes.

THE COURT: Do you have any trouble reading or understanding the English language?

THE DEFENDANT: No.

THE COURT: Are you satisfied with the services and advice given in this matter by Mr. Michael, your attorney?

THE DEFENDANT: Yes.

THE COURT: Okay. You'll need to tell me briefly what happened, what did you do?

MR. MICHAEL: Mr. Stone, on or about April 14th, 2013, you got in a fight with T.C.; is that correct?

THE DEFENDANT: Yes.

MR. MICHAEL: And you had had a prior relationship with T.C.; is that correct?

THE DEFENDANT: Yes.

MR. MICHAEL: And at that time you caused her bodily injury; is that correct?

THE DEFENDANT: Yes.

MR. MICHAEL: And you believe that you've had at least two prior PFMAs?

THE DEFENDANT: Yes.

MR. MICHAEL: And you knew this was against the law?

THE DEFENDANT: Yes.

MR. MICHAEL: And it happened in Yellowstone County, Montana; is that correct?

THE DEFENDANT: Yes.

MR. MICHAEL: Mr. Stone, a couple of things. You also realize that they have filed a persistent felony offender against you; is that correct?

THE DEFENDANT: Yes.
MR. MICHAEL: And, Judge, there's been a little struggle with Mr. Stone and I with regards to that, but you understand that the PFO has been filed as a result of your federal felony; is that correct?
THE DEFENDANT: Yes.
MR. MICHAEL: And you understand that, based upon a persistent felony offender, that the Court has no choice but to sentence you somewhere between five and a hundred years; is that correct?
THE DEFENDANT: Yes.
MR. MICHAEL: And -- but you also understand that our plea agreement calls for, in essence, a net five DOC and I can argue for a little bit less?
THE DEFENDANT: Yes.
MR. MICHAEL: And that that does leave you eligible for community-based placement if you're screened and accepted into a program?
THE DEFENDANT: Yes.
MR. MICHAEL: One other thing, Joel, is we had also talked about -- and I think it's important -- we had also talked about the possibility of a self-defense here; is that correct?
THE DEFENDANT: Yes.

MR. MICHAEL: And I have explained to you that, based upon the way this case was charged, that if you went to trial, the State would present facts of the aggravated DUI; and, in essence -- or not DUI, excuse me, the aggravated assault; and, in fact, that we would then basically be asking the Court to find you guilty of a partner or family member assault, which would be a misdemeanor; is that correct?

THE DEFENDANT: Yes.

MR. MICHAEL: But the basis of the misdemeanor is the fact that you have, you believe, two prior convictions?

THE DEFENDANT: Yes.

MR. MICHAEL: So that kind of puts us in a quandary, would you agree?

THE DEFENDANT: Yes.

MR. MICHAEL: So in other words, if we went to trial, we would have to be asking for an acquittal and not a misdemeanor as a lesser-included offense because you have two prior misdemeanor assaults; is that correct?

THE DEFENDANT: Yes.

MR. MICHAEL: So you understand that, in fact, you are today pleading to a misdemeanor action

that, based upon two prior convictions, makes it a felony; is that correct?

THE DEFENDANT: Yes.

MR. MICHAEL: And you kind of understand what the problem with that is if we go to trial on that?

THE DEFENDANT: Yes.

MR. MICHAEL: So you think it is in your best interest -- and you are fact guilty of this misdemeanor, and it's in your best interest to plead guilty here today, knowing that you have two prior partner or family member assaults?

THE DEFENDANT: That's how I've been advised.

MR. MICHAEL: Okay. So, Judge, I think it's just important, because it does get sort of confusing for my client, and I've tried to explain it on several occasions.

THE COURT: I'm not sure I understand. Now, are you telling me that the charge -- well, the charge says partner or family member assault, felony.

MR. MICHAEL: Judge, but the actions is a misdemeanor but what makes it a felony is two prior PFMA convictions.

THE COURT: Okay. But it's --
MR. MICHAEL: Because he kept asking me why we can't go and ask for a misdemeanor, and I'm saying well, that's kind of what we would be doing, but since he has two prior convictions, it wouldn't be a misdemeanor.
THE COURT: And that's right. What you're pleading to is partner or family member assault, felony, because it's the third one, or at least third -- three or more. This one would be the third or more.
Now, your attorney mentions, as well, that this is a -- the State has filed notice to have this case sentenced as a persistent felony offender, which would mean that the sentence is going to be, at a minimum, five years, and at a maximum, a hundred years. Do you understand that?
MR. MICHAEL: Yes.
THE DEFENDANT: Yes.
THE COURT: Okay. Anything about that prospect make you want to change your mind about pleading guilty?
(Whereupon, discussion was held off the record between Mr. Michael and the Defendant.)
THE COURT: I'm a little concerned about

this waiver of rights thing. It says he's pleading to -- oh, I see, partner or family member assault, felony. It's listed as a felony.

MR. MICHAEL: It is, Judge.

THE COURT: Okay. And that's five to a hundred years. Okay. That's what he signed off on. Have any promises been made to you to get you to make this plea?

MR. MICHAEL: You can tell him the State's offer --

THE DEFENDANT: Yeah, there's been a State's offer.

THE COURT: Okay. I know there's an offer of whatever they've offered to do. But other than saying this is what they would offer, has anybody promised you any money or a -- that you're going to get some sort of special deal when it comes to sentencing?

THE DEFENDANT: No.

THE COURT: Has anybody made threats against you to make you change your plea?

THE DEFENDANT: No.

THE COURT: And you understand that when it comes time for sentencing, your attorney makes some recommendations, as well may the State's

attorney. Do you understand the Court's not bound by those recommendations?
THE DEFENDANT: Yes.
THE COURT: Do you understand that if the Court does not sentence in accordance with the recommendations, you don't get to change your mind, you don't get to withdraw your guilty plea?
THE DEFENDANT: Yes, Your Honor.
THE COURT: Anything about that prospect make you want to change your mind about pleading guilty?
THE DEFENDANT: No. No, sir.
THE COURT: Okay. You appear to me to be sober at this point, is that true?
THE DEFENDANT: Yes.
THE COURT: My further observation would be that you're not under the influence of drugs or medications and that you don't seem to be suffering from any disabilities that affect your reasoning powers this morning. Are my observations correct?
THE DEFENDANT: Yes.
THE COURT: Counsel agree?
MR. MICHAEL: I agree.
THE COURT: Very well. I'll accept your plea, then, as being voluntarily made with a

knowledgeable understanding and waiver of your constitutional rights to a trial. Let's get a presentence report and set sentencing for?

MS. ROSENQUIST: December 3rd, Your Honor.

THE COURT: December 3. And it looks like you're in custody. I assume there's a release order in place. As long as you're in custody, the probation office will make an appointment with you at the jail to complete your part of the presentence report. If you should be released prior to that point in time, you will need to immediately make an appointment with the probation office for completion of your part of the presentence report. Failure to get your part of the report done -- I mean, if you're in jail, we just keep you in jail; but if you're not in jail, we'll put you back in jail. So if you get out before that report is done, or your part of it is done, make sure you get your part done. Any questions?

THE DEFENDANT: No, sir.

THE COURT: Defendant is remanded.

MR. MICHAEL: Thank you, Judge.

(Whereupon, the proceedings duly ended.)

CERTIFICATE

STATE OF MONTANA ss.
County of Yellowstone

I, Sharon L. Gaughan, RDR, CRR, Official Court Reporter for the State of Montana, residing in Billings, Montana, do hereby certify:

That I was duly authorized to and did report the proceedings;

I further certify that the foregoing 13 pages of this transcript represent a true and accurate transcription of my stenotype notes.

DATED this, the 10th day of June, 2016.

/s/ Sharon L. Gaughan
Sharon L. Gaughan, RDR, CRR
Official Court Reporter and
Notary Public, State of
Montana. Residing in
Billings, Montana. My
Commission expires: 4-12-18