No. 24-____

In the Supreme Court of the United States

STATE OF MONTANA,
Petitioner,
v.

ROBERT MURRAY GIBBONS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

AUSTIN KNUDSEN
Montana Attorney General
CHRISTIAN B. CORRIGAN
Solicitor General
PETER M. TORSTENSEN, JR.
Deputy Solicitor General
Counsel of Record
MONTANA DEPARTMENT OF JUSTICE
215 N. Sanders Street
Helena, MT 59601
peter.torstensen@mt.gov
(406) 444-2026

Counsel for Petitioner

QUESTION PRESENTED

In sentencing a defendant for his tenth conviction for driving under the influence of alcohol, the sentencing judge opted to impose a fine as part of that sentence. The applicable statute authorized fines between $5,000 and $10,000. Based on the relevant facts of the defendant's latest conviction, the judge imposed the statutory minimum fine of $5,000. But the defendant, a person of limited means, claimed that the sentencing statute was facially unconstitutional. Finding that the statute requires a sentencing judge to impose a mandatory fine in every case without "first considering constitutionally required proportionality factors, such as the nature of the financial burden and the defendant's ability to pay," Pet.App.3a, ¶2, the Montana Supreme Court agreed and held that the statute facially violates the Eighth Amendment's Excessive Fines Clause.

The question presented is:

Whether the Excessive Fines Clause requires the sentencing judge to consider a defendant's personal financial circumstances and the nature of the burden that payment of the fine will impose before imposing a mandatory fine.

STATEMENT OF RELATED PROCEEDINGS

Montana Supreme Court

State v. Gibbons, No. DA 21-0413 (Mar. 20, 2024).

Montana Nineteenth Judicial District Court, Lincoln County

State v. Gibbons, No. DC 19-119 (Apr. 29, 2021).

TABLE OF CONTENTS

Page

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Page(s)

Cases:

Constitution and Statutes:

Other Authorities:

INTRODUCTION

All mandatory minimum fines in Montana are now presumptively unconstitutional. That's a huge problem for the Montana Legislature because it has a "fundamental interest in appropriately punishing persons—rich and poor—who violate [its] criminal laws." *Bearden* v. *Georgia*, 461 U.S. 660, 669 (1983). A defendant's poverty [shouldn't] immunize[] him from punishment," *see id.*, but it does now—at least in Montana. To make matters worse, the Montana Supreme Court's efforts to protect indigent defendants weren't necessary because the Legislature's interest in enforcing its sentencing laws is adequately restrained by the Eighth Amendment's Excessive Fines Clause, which enforces a "principle of proportionality"—a condition that the fine "bear some relationship to the gravity of the offense that it is designed to punish." *United States* v. *Bajakajian*, 524 U.S. 321, 334 (1998). A fine violates that principle *only* "if it is grossly disproportional to the gravity of a defendant's offense." *See id.*

Neither the Excessive Fines Clause's text nor its history says much about the degree of proportionality required between fine and offense, so *Bajakajian* leaned on two principles when settling on a proportionality standard. *See id.* at 336. The first was that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Id.* The second was that because "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise … strict proportionality" would be inappropriate. *Id.* Relying on these principles, this Court adopted the "gross disproportionality" standard from its cruel-and-usual-

punishments cases, *see id.*, and left development of this standard to the lower federal courts.

The lower federal courts have taken up that mantle, largely coalescing around a multi-factor test that evaluates the same criteria *Bajakajian* did. Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 834 n.5 (2013) ("most state courts and federal circuit courts have hewn fairly close to the factors set out … in *Bajakajian*"). Courts consider (1) the essence of the defendant's crime and its relation to other criminal activity; (2) whether the defendant was among the persons for whom the statute was designed; (3) the maximum fine and sentence permitted by statute; and (4) the nature of the harm caused by the defendant's conduct. *See, e.g.*, *United States* v. *George*, 779 F.3d 113, 122 (2d Cir. 2015). Missing from that list: a defendant's personal financial circumstances. *Bajakajian*, 524 U.S. at 340 n.15 (defendant didn't "argue that his wealth or income are relevant to the proportionality determination or that full forfeiture would deprive him of his livelihood"). With some exceptions, most federal courts stick closely to *Bajakajian*'s four-factor inquiry.

When this Court incorporated the Excessive Fines Clause against the states, it again declined to say whether a defendant's personal financial circumstances are relevant to the proportionality inquiry. *See Timbs* v. *Indiana*, 586 U.S. 146, 151-52 (2019) (citing *Bajakajian*, 524 U.S. at 340 n.15)). Since *Timbs* and its extensive historical analysis of the Excessive Fines Clause, some state courts have held that the proportionality inquiry requires courts to consider an

individual's ability to pay a fine at the time of conviction. *See, e.g.*, *City of Seattle* v. *Long*, 493 P.3d 94, 111-13 (Wash. 2019). And they've reached that conclusion even though this Court's analysis—when it has discussed the characteristics of the offender and not just the offense—has emphasized livelihood-destroying fines, not fines that impose current financial difficulty on an offender. *See Timbs*, 586 U.S. at 151 (fines should "not be so large as to deprive [an offender] of his livelihood" (citation omitted)). The growing confusion between considering whether an offender can pay a fine or whether a fine will destroy an offender's livelihood, calls out for this Court's resolution.

In the decision below, the Montana Supreme Court joined the wrong side of a deepening split. In reaching that decision the court committed two key errors. For one, it held that Mont. Code Ann. §46-18-231(3), embodies the protections of the Excessive Fines Clause—specifically, requiring courts to consider a defendant's ability to pay a fine—and used that as a trump card to hold Mont. Code Ann. §61-8-731(3), facially unconstitutional. Why? Because it mistakenly believed that §61-8-731(3), precludes sentencing judges from considering the constitutionally required proportionality factors in every case. From that false step, it failed to conduct the proper facial analysis: considering whether a $5,000 minimum fine is grossly disproportional to the gravity of the harm caused by a fifth or subsequent DUI conviction in all or most cases. Had the court conducted *that* analysis, §61-8-731(3) would no doubt have survived Gibbons' facial challenge.

This is a deeply important case and fallout from the decision below will be severe. Every sentencing

statute imposing a mandatory minimum fine in Montana is now presumptively unconstitutional. And there's no easy way to contain the damage within Montana's borders, which leaves similar sentencing statutes in other states vulnerable to constitutional challenges. By stripping the Legislature of its prerogative to set fines and penalties to punish dangerous conduct, the court essentially adopts a strict proportionality standard—between fine, offense, and the offender's ability to pay—for excessive fines challenges and hamstrings the Legislature's ability to address societal concerns like drunk driving. The court also ignores the substantial post-imposition due process protections that safeguard defendants from incarceration for an inability to pay statutory fines without sacrificing the states' fundamental interests in enforcing their laws. The use of fines has exploded in recent years, so these thorny questions will continue to arise until this Court intervenes. Finally, this is an excellent vehicle because the federal question is squarely presented and outcome-determinative, and there are no lingering state law questions that will interfere with this Court's review of the merits of the federal question. This Court should intervene now to resolve these issues.

This Court should grant the petition and reverse the Montana Supreme Court's decision.

OPINIONS BELOW

The Montana Supreme Court opinion (Pet.App.1a-52a), is published at 545 P.3d 686 (Mont. 2024). The Montana district court's judgment and sentence (Pet.App.63a-70a) and its verdict (Pet.App.98a-99a) are unpublished.

JURISDICTION

The Montana Supreme Court entered judgment on March 20, 2024. Pet.App.1a. On May 3, 2024, Montana applied for an extension of time to petition for a writ of certiorari. Justice Kagan granted that application, extending Montana's time to file a petition to and including July 17, 2024. Montana timely filed this petition. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Mont. Code Ann. §46-18-231:

> (1)(a) … [W]henever upon a verdict of guilty or a plea of nolo contendere, an offender has been found guilty of an offense for which a felony penalty of imprisonment could be imposed, the sentencing judge may, in lieu of or in addition to a sentence of imprisonment, impose a fine only in accordance with subsection (3).
>
> * * *
>
> (3) The sentencing judge may not sentence an offender to pay a fine unless the offender is or will be able to pay the fine. In determining the amount and method of payment, the sentencing judge shall take into account the nature of the crime committed, the financial resources of the offender, and the

nature of the burden that payment of the fine will impose.

Mont. Code Ann. §61-8-731(3) (2019)[1]:

> If a person is convicted of a violation of 61-8-401 … [and has] four or more prior convictions under … 61-8-401 … and the person was, upon a prior conviction, placed in a residential alcohol treatment program under subsection (2), … the person shall be sentenced to the department of corrections for a term of not less than 13 months or more than 5 years or be fined an amount of not less than $5,000 or more than $10,000, or both.

STATEMENT OF THE CASE

1. In mid-September 2019, while "looking for a lady friend" he knew ten years earlier, Robert Gibbons stopped in Troy, Montana to get drinks at the Home Bar. Pet.App.77a; Pet.App.108a. While there, he had four rum-and-cokes, Pet.App.77a, which left him noticeably intoxicated—at least to the retired trooper, Richard Starks, who observed Gibbons leave the bar and get into his pickup truck, Pet.App.3a-4a, ¶3. Gibbons laid down in the bench of his truck, partially seated in the driver's seat but with his head and torso laying towards the passenger side. *Id.* Before falling

[1] Mont. Code Ann. §61-8-731(3) (2019) was repealed effective January 1, 2022, as part of a general revision to the DUI statutes. *See* Mont. Laws ch. 498, §44. The revised statute was recodified at Mont. Code Ann. §61-8-1008(1)(a)(i)-(ii) (2021). As relevant here, the revised statute sets the same fine range as before, but it requires the judge to impose a fine in every case.

asleep, Gibbons put his key in the ignition, but didn't turn it on. Pet.App.77a.

Starks called dispatch and reported this, and Travis Miller, the responding officer, consulted Starks when he arrived on scene. Pet.App.4a, ¶4. Miller woke Gibbons up, administered several field sobriety tests—he failed all of them—and arrested Gibbons. *Id.* At the detention center, Gibbons took a breath alcohol test and blew a 0.136. *Id.*

Gibbons was charged with driving under the influence of alcohol, Pet.App.2a, ¶1, and his first two jury trials ended in mistrials, Pet.App.4a-5a, ¶¶5,7. In the third, the jury returned a guilty verdict, finding that he was in actual physical control of his vehicle at the time of his arrest. Pet.App.5a-6a, ¶8; 8a-10a, ¶¶13-14.

2. At the sentencing hearing, Gibbons' counsel said that he planned to "ask[] the Court not to fully impose some of the fines and fees due to an inability to pay." Pet.App.74a. But he never revisited the issue.

Gibbons was the only witness to testify at his hearing. Pet.App.74a-89a. During direct examination, he reviewed his recent medical issues stemming from alcohol abuse, his efforts to stay sober following his arrest and through his three trials, and his military service history. Pet.App.78a-83a.

On cross-examination, the State's counsel said:

> **State's counsel:** "[L]ooking at your criminal history… on this Presentence Investigation Report, … you have … 15 arrests for DUI since 1986. Would you disagree with that?
>
> **Gibbons:** No, that's probably accurate.

> **State's counsel:** "Okay. And isn't it also true, sir, that this conviction … after your jury trial, is your 10th DUI conviction since 1986?
>
> **Gibbons:** So many of them I just have to assume you are right. I am not denying that.

Pet.App.84a. The State's counsel also followed up on some improvements reflected in Gibbons' latest medical records, which Gibbons attributed to his recent sobriety. Pet.App.87a-88a.

The State's and Gibbons' counsel recommended sentences at opposite ends of the spectrum. The State's counsel believed that Gibbons' extensive DUI history warranted the maximum custodial sentence (5 years), the minimum statutory fine ($5,000), and forfeiture of Gibbons' vehicles. Pet.App.90a.

Gibbons' counsel thought leniency was called for because Gibbons' conduct here—sleeping drunk in his truck rather than driving drunk—was a step in the right direction. Pet.App.91a-92a. And because Gibbons' recent sobriety stemmed from recent health scares, his counsel argued that it would be more lasting and thus supported leniency. Pet.App.92a-93a. Gibbons' counsel asked for a suspended sentence and community supervision. Pet.App.93a-94a.

When imposing the sentence, the court said that its job was to impose an "appropriate sentence" for someone in "Gibbons' situation who has ten [DUI] convictions … dating back to the mid-80s." Pet.App.95a. The court recognized Gibbons' recent success avoiding alcohol but said, "when I look through your record I see bouts of a year or two of not drinking while you are on

supervision" and then you end up right back in prison. Pet.App.96a.

Based on "the facts and circumstances of this [case]," the judge determined that it was "appropriate to sentence Mr. Gibbons to the [DOC] for five years" and to "fine him the minimum of $5,000, the statutory minimum." *Id.* He explained: "I understand what Mr. Gibbons is saying today [about not drinking anymore]. I am just not convinced that it is going to be that way for the long term, [so] I think that this is … a particularly appropriate sentence for the facts and circumstances surrounding this case." Pet.App.96a-97a.

3. Gibbons appealed. He argued that §61-8-731(3), which imposed a mandatory minimum fine of $5,000 for a fifth or subsequent DUI conviction, was facially unconstitutional. Pet.App.2a, ¶1. The Montana Supreme Court agreed, holding §61-8-731(3) facially unconstitutional because it imposes a mandatory minimum fine, which:

> prevents the trial court from considering in every case the constitutionally and statutorily required factors embodied in the prohibition against excessive fines and fees of the United States Constitution, the Montana Constitution, and in Montana statutes implemented to protect against such a constitutional violation.

Id.

Starting with §46-18-231(1)(a) and (3), which covers fines and fees imposed in all felony and misdemeanor cases, the majority explained that, when considered together, a sentencing judge may only impose a fine when the offender is able to pay and "only after

the sentencing judge considers the nature of the offense, the financial resources of the offender, and the nature of the burden the fine will impose." Pet.App.25a-26a, ¶47; *see* Pet.App.24a-25a, ¶45. This obligation, said the majority, "applies to all convictions where a fine may be imposed and makes no exceptions for statutes that establish a mandatory minimum fine." Pet.App.25a, ¶45.

Relying on this Court's decisions in *Bajakajian* and *Timbs*, the majority held that §46-18-231(3) codifies the federal constitutional protections against excessive fines. Pet.App.26a-29a, ¶¶48-50. To begin, the majority explained that *Bajakajian* articulated the Excessive Fine Clause's proportionality principle: a fine is excessive if it is "grossly disproportional to the gravity of a defendant's offense. Pet.App.26a, ¶48. Moving to *Timbs*, which held that the Fourteenth Amendment's Due Process Clause incorporated that standard against the States, *id.* ¶48, the majority claimed that *Timbs* "emphasized that an individual's ability to pay was historically an essential factor in determining a fine's excessiveness." Pet.App.26a-27a, ¶48 (noting that *Timbs* traced the right to be free of excessive fines to the Magna Carta and that it said that fines must "be proportioned to the wrong and not be so large as to deprive an offender of his livelihood" (cleaned up) (quoting 586 U.S. at 151)). Reading these cases together, the majority held that *Bajakajian* and *Timbs* require proportionality to the offense and "*to the offender and his ability to pay*." *See* Pet.App.27a-28a, ¶49.

Having established the "fundamental principles underlying §46-18-231," the majority turned to the

"mandatory minimum fine" in §61-8-731(3). Pet.App.29a, ¶51. That provision requires that an offender with more than five DUIs be sentenced to "a term of not less than 13 months or more than 5 years *or* be fined an amount of not less than $5,000 or more than $10,000, or both." *Id.* On the majority's reading, §61-8-731(3) requires a sentencing judge "in *all* instances where a fine is imposed," to impose "the full amount of the fine" without "weigh[ing] the statutorily required proportionality factors." Pet.App.30a, ¶51. This "mandatory minimum sentencing law," says the majority, "eliminate[s] judicial discretion to impose sentences below the statutory minimum." Pet.App.30a, ¶52.

Justice Shea and Justices Baker and Rice dissented. Both dissents agreed with the majority that §46-18-231(3) conflicted with §61-8-731(3), but both would resolve the conflict differently than the majority. *See* Pet.App.45a-47a, ¶¶68-72; 50a-51, ¶¶77-78; Pet.App.58a-62a, ¶¶86-87, 90.

Justice Shea faulted the majority for failing to harmonize §46-18-231(3) and §61-8-731(3) by construing §61-8-731(3) to allow judges to impose fines below the statutory minimum when §46-18-231(3)'s proportionality inquiry so required. Pet.App.47a-48a, ¶73. Yet because the Legislature's purpose and intent was to remove judicial discretion and to require judges to impose the minimum $5,000 fine, and the Legislature has exclusive authority to determine criminal offenses and penalties, the majority found that Shea's critique missed the mark because it required them to "rewrite" §61-8-731(3)'s penalty to "harmonize" it with §46-18-231(3)'s proportionality factors. Pet.App.30a-32a,

¶¶52-53. And that, said the majority, would push it beyond its constitutionally prescribed role. Pet.App.32a, ¶53.

Justices Rice and Baker argued that in passing §61-8-731(3) the Legislature intended to limit sentencing judges' discretion when imposing fines for DUI sentences. Pet.App.60a-61a, ¶87; *see also* Pet.App.55a, ¶84 (using a "monetary range" rather than "a singular mandatory amount is inherent authority for a judge to consider" the nature of the offense and "the financial resources of the defendant"). Because specific statutes govern when general and specific statutes conflict, they said that §61-8-731(3) should be applied so far as it conflicts with §46-18-231(3). *See* Pet.App.58a-61a, ¶¶86-87. But the majority sidestepped this conclusion by holding that §46-18-231(3) codifies the "inquiry necessary to guarantee a fine is proportional" and found §61-8-731(3) facially unconstitutional because it fails to provide that mechanism in every case. *See* Pet.App.58a-61a, ¶¶86, 88; *see also* Pet.App.32a-34a, ¶¶54-55 (praising §46-18-231(3)'s "enlightened response to the increasing punitiveness in the American … criminal justice [system]" and noting that "poor offender[s] feel[] the impact of any fine disproportionately compared to [their] wealthier counterpart[s]").

REASONS FOR GRANTING THE PETITION

Since *Bajakajian*, most federal circuit courts and many state courts refuse to consider a defendant's individual circumstances when evaluating whether a fine is excessive. But more and more states have departed from that approach, treating this Court's historical analysis of livelihood-destroying fines as evidence that the constitutional excessiveness inquiry

requires courts to consider an individual's ability to pay. *Bajakajian*'s flexible approach allows courts to tailor its inquiry to different fines, fees, forfeitures, and the like, but it doesn't permit courts to consider a defendant's current financial circumstances. *See* 524 U.S. at 334, 336 (excessiveness is "solely a proportionality determination" which "compare[s] the amount of the forfeiture to the gravity of a defendant's offense"). If it did, it would move courts closer and closer to the "strict proportionality" standard that *Bajakajian* squarely rejected. This Court should put that spark out before it becomes a fire.

The Montana Supreme Court joined the states holding that the *Bajakajian*'s excessiveness inquiry requires courts to consider an offender's ability to pay a fine, deepening the growing split. In doing so, it committed two key errors. To start, it held that §46-18-231(3) embodies the Excessive Fines Clause's protections—that is, requiring courts to consider a defendant's ability to pay a fine—and used that as a trump card to hold §61-8-731(3) facially unconstitutional because it mistakenly believed that §61-8-731(3) prevents sentencing judges from considering the required proportionality factors in every case. From there, it failed to conduct the proper facial analysis: considering whether a $5,000 minimum fine is grossly disproportional to the gravity of the harm caused by a fifth or subsequent DUI conviction in all or most cases. If it had conducted *that* analysis, §61-8-731(3) would have easily survived Gibbons' facial challenge.

This is a deeply important case. Every sentencing statute imposing a mandatory minimum fine in Montana is now presumptively unconstitutional, and if the

court's rationale leaves Montana's borders similar sentencing statutes in other states will be vulnerable to constitutional challenges. By stripping the Legislature of a valuable tool to punish dangerous conduct, the also court hamstrings the Legislature's ability to address serious problems like drunk driving. The court also ignores the due process protections that safeguard defendants without sacrificing the states' fundamental interests in enforcing their laws. Because the use of economic sanctions fines has exploded in recent years, these issues will increasingly land on this Court's doorstep. This case is an ideal vehicle to address these issues because the federal question is outcome-determinative, and there are no lingering state law questions that will interfere with this Court's review of the merits of the federal question.

This Court should grant the petition.

I. Federal circuit courts and state courts have split on the question presented, and that split will only deepen.

Federal circuit courts employ various approaches to evaluate a fine's proportionality to an offense.[2] *See* McLean, *supra* at 845-46. But most federal circuits to address the issue, and three states—Ohio, Florida, and Texas—have declined to consider an individual's

[2] The Excessive Fines Clause applies to a host of fines, forfeitures, fees, costs, and more, so long as they "serv[e] in part to punish." *See Austin* v. *United States*, 509 U.S. 602, 610 (1993). But once a reviewing court finds that the penalty at issue qualifies as a "fine," *Bajakajian*'s framework applies, even if the constitutional analysis requires some nuance based on the type of "fine" being reviewed. That nuance is less relevant here because Gibbons has raised a facial challenge, not an as-applied challenge.

current financial situation as part of that inquiry. *See, e.g.*, *United States* v. *Suarez*, 966 F.3d 376, 388 (5th Cir. 2020) ("excessiveness is determined in relation to the characteristics *of the offense, not … the offender*" (citation omitted; emphasis added)); *State* v. *O'Malley*, 206 N.E.3d 662, 675-76 (Ohio 2022) (refusing to adopt a "multifactor test that would include in the proportionality analysis considerations of a defendant's financial ability to pay [or] the extent to which the forfeiture would harm the defendant's livelihood").

A. Seven federal circuits and three state courts decline to consider an individual's current financial situation.

1. The Eleventh, Eighth, and Fifth Circuits all refuse to graft onto the excessiveness inquiry a requirement that courts consider an individual's current financial circumstances.

Starting with the Eleventh Circuit, the court held that forfeiture of the defendant's property valued at roughly $70,000 for drug sales totaling only $3,250 wasn't excessive. *United States* v. *817 N.E. 29th Drive*, 175 F.3d 1304, 1307, 1310-11 (11th Cir. 1999). The defendant also argued that the court should consider the special hardship that the forfeiture would impose on him. *Id.* at 1311. The court rejected the overture, noting that excessiveness is "determined by comparing the amount of the forfeiture to the gravity of the offense." *Id.* (citing *Bajakajian*, 524 U.S. at 334). That is, "excessiveness is determined in relation to the characteristics of the offense, not … the offender." *Id.*; *see United States* v. *Seher*, 562 F.3d 1344, 1371 (11th Cir.

2009) ("We do not take into account the impact the fine would have on an individual defendant.").[3]

The Eighth Circuit reached a similar conclusion in a case involving a $10,000 money judgment imposed on an indigent defendant convicted on drug trafficking charges. *United States* v. *Smith*, 656 F.3d 821, 825, 828 (8th Cir. 2011). Smith argued that the money judgment was excessive because he was indigent, but the court said the proper inquiry was whether "the amount of the forfeiture is grossly disproportionate to the gravity of the defendant's offense." *Id.* at 828 (quoting *Bajakajian*, 524 U.S. at 337). A "defendant's inability to satisfy a forfeiture at the time of conviction" was not "sufficient to render a forfeiture unconstitutional, nor [was] it even the correct inquiry." *Id.* (citation omitted). Why not? Because it was still possible that Smith could satisfy the judgment in the future. *Id.*

And the Fifth Circuit reached the same conclusion about a $52,042 forfeiture judgment for the defendant's "structuring" convictions under 31 U.S.C. §5313(a). *Suarez*, 966 F.3d at 379, 385-88. Suarez also argued that the judgment was excessive because she

---

[3] Judge Newsom recently argued that courts should weigh both "proportionality between a fine and offense" *and* "between a fine and an offender's ability to pay it." *See Yates* v. *Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1318 (11th Cir. 2021) (Newsom, J., concurring). Reviewing the history of the excessive fines protections, he argues that "blinding ourselves to the effect of a fine on a defendant's livelihood may well contravene the original meaning of the Excessive Fines Clause." *Id.* at 1321-23. Even so, he recognizes that this isn't part of the inquiry under current circuit precedent. *Id.* at 1323 ("the excessiveness inquiry as it stands—in this Circuit, at least—is incomplete").

could not pay it or any fine, but the court rejected her argument because she "cite[d] no authority to support her contention that her ability to pay is relevant to the proportionality inquiry." *Id.* at 388. Just the opposite, in fact, as "other circuits have held that 'excessiveness is determined in relation to the characteristics of the offense, not … the offender." *Id.* (quoting *817 N.E. 29th Drive*, 175 F.3d at 1311).

2. Both the Ninth and Seventh Circuits recently declined to incorporate an "ability to pay" factor into the excessiveness inquiry.

Starting with the Ninth Circuit, the court held that an initial civil parking fine of $63 wasn't excessive.[4] *Pimentel* v. *City of L.A.*, 974 F.3d 917, 922-25 (9th Cir. 2020). Pimentel also argued that the Excessive Fines Clause required "means-testing to assess a violator's ability to pay," which neither *Bajakajian* nor *Timbs* have addressed. *Id.* at 924-25. Noting that this was a "novel claim," the court "decline[d] Pimentel's invitation to affirmatively incorporate a means-testing requirement for claims arising under the Eighth Amendment's Excessive Fines Clause." *Id.* at 925.

Likewise, the Seventh Circuit held that a defendant's forfeiture and penalty order for failure to report earnings on a weekly unemployment benefits application wasn't excessive. *Grashoff* v. *Adams*, 65 F.4th 910, 920-21 (7th Cir. 2023); *see id.* at 921 (recognizing

---

[4] Judge Bennett noted that "there must be some ratio or amount below which the fine or penalty is unlikely to be or cannot be excessive as a matter of law" or federal courts will need to engage in individualized inquiries even when fines are unlikely to be excessive. *Id.* at 929 n.8 (Bennett, J., concurring in the judgment).

legislature's interest in deterrence and noting that the "Excessive Fines Clause does not require the state legislature to … penalize[] claimants no more than necessary"). Grashoff also argued that the excessiveness "inquiry must consider her personal financial circumstances—essentially her ability to pay." *Id.* at 921. Because the Supreme Court declined to addressed this, the Seventh Circuit declined as well. *Id.*

3. Both the Fourth and D.C. Circuits, on plain-error review, have held that *Bajakajian*'s proportionality inquiry doesn't require courts to consider the defendant's current financial circumstances. *United States* v. *Bennett*, 986 F.3d 389, 400 (4th Cir. 2021) ("[W]e have never expressly considered a defendant's means in evaluating the proportionality of a forfeiture judgment," and even if we did, "the fact that Bennett did not have sufficient assets to satisfy the forfeiture judgment is insufficient [on its own] to render the judgment unconstitutional."); *United States* v. *Bikundi*, 926 F.3d 761, 796 (D.C. Cir. 2019) ("The Excessive Fines Clause does not make obvious whether a forfeiture is excessive because a defendant is unable to pay, and '[n]either the Supreme Court nor this court has spoken' on that issue." (citation omitted)).

4. Like the Eleventh, Eighth, and Fifth Circuits, the Ohio Supreme Court refuses to consider an individual's current financial circumstances in the excessiveness inquiry. Florida and Texas appellate courts have also declined to consider an individual's financial situation even when it would appear relevant.

Starting with the Ohio Supreme Court, the court concluded that forfeiture of the defendant's vehicle for a third "operating a vehicle while intoxicated"

conviction wasn't constitutionally excessive. *O'Malley*, 206 N.E.3d at 667. And the court refused to adopt a "multifactor test that would include in the proportionality analysis considerations of a defendant's financial ability to pay [or] the extent to which the forfeiture would harm the defendant's livelihood." *Id.* at 675-76. Instead, it focused only on whether the forfeiture was "grossly disproportional to the gravity of [the] defendant's offense." *See id.*

Moving to Florida, an intermediate appellate court considered whether two mandatory fines—a $100,000 fine for an oxycodone-trafficking conviction and a $500,000 fine for a conspiracy to traffic in oxycodone conviction—were excessive. *See Gordon* v. *State*, 139 So.3d 958, 959-60 (Fla. Dist. Ct. App. 2014). The court applied the *Bajakajian* factors, *see id.* at 960-64, and even though the size of the mandatory fines pointed to excessiveness, *id.* at 962, it found that the other factors supported a finding that the fines weren't grossly disproportional to the gravity of the defendant's offenses, *id.* at 964. Missing from that inquiry (despite fines totaling $600,000): any consideration of the defendant's current financial situation.

Texas courts also routinely evaluate fines and forfeitures for excessiveness without considering a defendant's ability to pay. *See, e.g.*, *1812 Franklin St.* v. *State*, 614 S.W.3d 179, 188-89 (Tex. App. 2020) (applying *Bajakajian* factors alone to determine whether forfeiture of property was excessive); *$49,815 in U.S. Currency* v. *State*, 2023 Tex. App. LEXIS 3775, at *9-*14 (same analysis for forfeiture of $49,518 in "gambling proceeds"); *Duisberg* v. *City of Austin*, 2020 Tex. App. LEXIS 8209, at *1, *3-*11 (same analysis for

accruing civil penalties of $33,570 for violating city ordinances); *2007 Infiniti G35X Motor Vehicle* v. *State*, 2014 Tex. App. LEXIS 2789, at *2-*14 (same analysis for forfeiture of vehicle used as contraband).

Most federal circuit courts to consider the issue have declined to consider a defendant's current financial circumstances in the excessiveness inquiry. *See* McLean, *supra*, at 846 ("One area of near-consensus among the lower federal courts has, however, emerged: the large majority of lower courts … read *Bajakajian* as foreclosing an inquiry into the personal financial or economic characteristics of a defendant for purposes of an Excessive Fines Clause analysis."). Even so, with this Court's silence in *Bajakajian* and *Timbs* over whether courts can or must consider the characteristics of an offender in the excessiveness inquiry, confusion has grown. And some courts have opted to resolve that open question themselves.

B. Two federal circuits and four state courts have split on whether courts can consider an offender's individual circumstances.

Both the First and Second Circuit consider the individual circumstances of the offender, either as part of *Bajakajian*'s excessiveness inquiry (Second Circuit) or as an independent inquiry (First Circuit). And in Washington, Colorado, California, and Minnesota, courts consider an individual's current financial condition in *Bajakajian*'s excessiveness inquiry.

1. The First and Second Circuits both consider whether a fine will destroy a defendant's livelihood. But both circuits treat this as different from considering a defendant's *present* financial circumstances, like

his or her ability to pay a fine. Judge Newsom cast doubt on this distinction in his concurring opinion in *Yates*, *see* 21 F.4th at 1320-21 (Newsom, J., concurring) (arguing that if "an assumption underlying our decision in *817 N.E. 29th Drive* was that *Bajakajian* positively foreclosed the possibility of considering an offender's characteristics in evaluating the excessiveness of a fine, we may have gotten that much wrong"), but either way, both circuits consider the circumstances of the offender and not just the offense.

Starting with the First Circuit, the court considered whether a $3,068,000 money judgment for a defendant's role as a "mule" in a marijuana distribution conspiracy was unconstitutionally excessive. *United States* v. *Levesque*, 546 F.3d 78, 79 (1st Cir. 2008). The court agreed with the district court's use of the *Bajakajian* factors, *id.* at 83, but it held that the district court also needed to "consider whether forfeiture would deprive the defendant of his or her livelihood"[5] and thus remanded on that issue, *see id.* at 83-85. The "notion that a fine should not be so large that it deprives a defendant of her livelihood, the court explained, is "deeply rooted" in the Eighth Amendment's history. *Id.* at 83-84; *see id.* at 84 ("[I]n no case could the offender be pushed absolutely to the wall: his means of livelihood must be saved to him." (alteration added) (quoting W. McKechnie, *Magna Carta* 287 (2d

[5] On this point, *Levesque* recognized it was "at odds with the Eleventh Circuit, which has stated that 'we do not take into account the personal impact of a forfeiture on the specific defendant in determining whether the forfeiture violates the Eighth Amendment.'" *Id.* at 83 n.4 (quoting *United States* v. *Dicter*, 198 F.3d 1284, 1292 n.11 (11th Cir. 1999)).

ed. 1914))). But the court insisted that this inquiry wasn't about determining whether a defendant could pay a fine at the time of conviction. *See id.* at 85. Instead, as the First Circuit clarified three years later, it was an inquiry into whether the defendant's "post-incarceration livelihood would be imperiled by the [fine or] forfeiture." *See United States* v. *Fogg*, 666 F.3d 13, 19 (1st Cir. 2011).

Like the First Circuit, the Second Circuit permits courts to consider whether a fine will destroy a defendant's livelihood, but not the individual's personal circumstances. *United States* v. *Viloski*, 814 F.3d 104, 111-12 (2d Cir. 2016). In *Viloski*, the court considered whether defendant's $1,273,285.50 criminal forfeiture order for his convictions for participating in a kickback scheme was unconstitutionally excessive. *Id.* at 107. While noting that it used the "*Bajakajian* factors" for its excessiveness inquiry, the court said that the "principal question in this appeal" was whether those factors were exhaustive. *Id.* at 110. That led it to consider one factor *Bajakajian* had reserved judgment on—whether a fine would "deprive a wrongdoer of his livelihood." *Id.* at 111 (quoting *Bajakajian*, 524 U.S. at 335). It held that courts could consider whether a fine would "deprive the defendant of his livelihood, *i.e.*, his 'future ability to earn a living.'" *Id.* at 111 (quoting *Levesque*, 546 F.3d at 85). Yet the court held that this is part of the proportionality inquiry, not a separate inquiry. *Id.* It emphasized that asking whether a "forfeiture would destroy a defendant's *future* livelihood is different from considering as a discrete factor a defendant's *present* personal circumstances." *Id.* at 112 ("hostility to livelihood-destroying fines is deeply

rooted in our constitutional tradition," but "consideration of personal circumstances is not").

2. Even though Washington is only the latest state to join the ability-to-pay side of the split, the Washington Supreme Court recounts the Excessive Fines Clause's extensive history and the developing body of scholarship, so it warrants a closer look.

As relevant here, it considered whether a $547.12 fee for a parking violation and impoundment fees, imposed on a man living in his truck, was unconstitutionally excessive. *Long*, 493 P.3d at 99. While applying the so-called "*Bajakajian* factors," the court said "[c]ritical to the present case is whether this proportionality inquiry can or should include consideration of a person's ability to pay." *Id.* at 111. It concluded that "the history of the Eighth Amendment suggests it [should]." *Id.* So unlike the First and Second Circuits, *Long* held that courts should consider a defendant's *current* ability to pay. *Id.* at 114. It's important to see how it got there.

Reviewing historical laws and current scholarship—largely what this Court reviewed in *Timbs*—the court determined that the "weight of history and the reasoning of the Supreme Court demonstrate that excessiveness [also] concerns … consideration of an offender's circumstances." *Id.* at 113; *see id.* at 111 ("The Magna Carta … limited the government's power to impose penalties by … forbidding penalties so large as to deprive [a person] of his livelihood. English freeman could be amerced only in such as to save to him his contenement, a merchant his merchandise, and a serf his wainage." (citations and quotation marks omitted)); *id.* at 112 (observing that many state and federal

courts and legal scholars have "conclude[d] that the history of the clause and the reasoning of the Supreme Court strongly suggest that considering ability to pay is constitutionally required"). Beyond the history reviewed above, the court found two other factors supported an ability-to-pay inquiry: "the homelessness crisis and the use of fines to fund the criminal justice system." *Id.* at 113. So the court found that "[t]he *central tenet* of the excessive fines clause is to protect individuals against fines so oppressive as to deprive them of their livelihood." *Id.* at 114. In light of all this, *Long* held that courts "should also consider a person's ability to pay" as part of the excessiveness inquiry. *Id.*

Moving to the Colorado Supreme Court, the court considered whether a daily fine imposed on a corporation for noncompliance with Colorado workers' compensation laws was unconstitutionally excessive. *Colo. Dep't of Lab. & Emp.* v. *Dami Hosp., LLC*, 442 P.3d 94, 96 (Colo. 2019). *Dami* formally adopted *Bajakajian*'s "gross disproportionality" test for determining whether regulatory fines were unconstitutionally excessive. *Id.* at 101. And in *Timbs*, the court saw "persuasive [historical] evidence that a fine that is more than a person can pay may be 'excessive' within the meaning of the Eighth Amendment." *Id.* So it held that the excessiveness inquiry should consider an individual or entity's ability to pay. *Id.* at 102 ("A fine that would bankrupt a person or put a company out of business would be a substantially more onerous fine than one that did not.").[6]

---

[6] *Dami*'s explanation raises some questions. It suggests it may have meant to consider whether a fine would destroy one's livelihood and not whether a person or entity could afford to pay the

California and Minnesota both consider a defendant's ability to pay as part of the excessiveness inquiry. *See, e.g.*, *People ex rel. Lockyer* v. *R.J. Reynolds Tobacco Co.*, 37 Cal. 4th 707, 728 (2005) (holding that proportionality includes consideration of "the defendant's ability to pay"); *People* v. *Cowan*, 47 Cal. App. 5th 32, 47-48 (Ct. App. 2020) ("ability to pay" is part of the "excessive fines calculus under both the federal and state Constitutions"); *State* v. *Rewitzer*, 617 N.W.2d 407, 415 (Minn. 2000) (concluding that "these fines and surcharges create an undue hardship for [defendant]"); *State* v. *Madden*, 910 N.W.2d 744, 749 (Minn. Ct. App. 2018) (reviewing economic impact the fine would have on defendant and finding that it wasn't "grossly disproportional to the fine imposed").

Both *Levesque* and *Viloski* treat the inquiries into livelihood-destroying fines and a defendant's current ability to pay as analytically distinct. *Levesque*, 546 F.3d at 85; *Viloski*, 814 F.3d at 112. Perhaps they are. Yet whether an ability-to-pay inquiry and a destruction-of-livelihood inquiry can be so easily disentangled on the ground is less than clear. The recent decisions in Washington and Colorado suggest that distinguishing the two may not be so easy. *Long*, 493 P.3d at 114 (finding that courts should "consider a person's ability to pay" because "[t]he *central tenet* of the excessive fines clause is to protect individuals against fines so oppressive as to deprive them of their livelihood"); *Dami*, 442 P.3d at 101-02 (finding that court's should consider an individual or entity's ability

---

fine at the time the fine was assessed. *Id.* If so, *Dami*'s analysis looks more like *Levesque*'s or *Viloski*'s "destruction of livelihood" analysis than an "ability to pay" analysis.

to pay because fines "that would bankrupt a person or put a company out of business" are more likely excessive under the Eighth Amendment). Given this Court's silence on the issue in *Bajakajian* and *Timbs*, as well as the growing confusion about whether *Bajakajian*'s excessiveness inquiry requires courts to consider a defendant's ability to pay a fine, or whether a fine will destroy his livelihood, or neither, this Court's guidance is sorely needed.

II. The Montana Supreme Court's decision is wrong, and it deepens a growing split.

In the decision below, the Montana Supreme Court joined the states holding that the Excessive Fines Clause's proportionality inquiry requires courts to consider an offender's financial circumstances, deepening a growing split.

1. In reaching that decision the court held that §46-18-231(3), a general sentencing statute, codified the protections of the Eighth Amendment's Excessive Fines Clause because it required sentencing judges to consider a fine's proportionality to an offense and to "the offender and his ability to pay." Pet.App.27a-28a, ¶49; *see* Pet.App.28a-29a, ¶50; *see also State* v. *Ber Lee Yang*, 452 P.3d 897 (Mont. 2019) (claiming that the requirements of the Excessive Fines Clause's excessiveness inquiry are built into §46-18-231(3)). And it reached this conclusion even though this Court has twice declined to address whether a defendant's financial situation is relevant to the excessive inquiry and when most federal circuit courts refuse to consider it. Even in *Viloski*, the court attempts to reconcile its destruction-of-livelihood analysis with an offense-focused proportionality inquiry. 814 F.3d at 111-12

(explaining that its approach "heed[s] the Supreme Court's instruction that the test for excessiveness … involves *solely* a proportionality determination" and doesn't consider "a defendant's *present* personal circumstances, including … financial situation" (citation and quotation marks omitted)). State courts may experiment with their own constitutions, but they may not impose their preferred reading on federal constitutional provisions without a clear basis for doing so. *See Kansas* v. *Carr*, 577 U.S. 108, 118 (2016) ("[S]tate courts may experiment all they want with their own constitutions," "[b]ut what a state court cannot do is experiment with our Federal Constitution and expect to elude this Court's review so long as victory goes to the criminal defendant.").

2. Even on its own terms, the Montana Supreme Court's decision piles error on top of error. To begin, the court found that §46-18-231(3) codified the Excessive Fine Clause's protections, and because it requires sentencing judges to consider defendants' financial circumstances in every case, §61-8-731(3) was facially invalid because it prevents sentencing judges from considering that criterion in every case—specifically, whenever a defendant cannot afford the $5,000 minimum fine. *See* Pet.App.32a-33a, ¶54. But that's wrong as matter of law and fact.

Nothing in either §46-18-231(3) or §61-8-731(3) forbids a sentencing judge from engaging in *Bajakajian*'s constitutional proportionality inquiry—nor could any such state statute survive scrutiny. Indeed, the district court in *Bajakajian* reviewed a federal statute that directed sentencing judges to impose full forfeiture, but the court still conducted an excessiveness

inquiry and found that full forfeiture would violate the Excessive Fines Clause. 524 U.S. at 326. The district court in *Bajakajian* rejected these self-imposed restraints; the Montana Supreme Court should have too.

Even so, the court's description of how §46-18-231(3) and §61-8-731(3) operate together is wrong. Put simply, §46-18-231(3) requires sentencing judges to consider an individual's ability to pay a fine and the burden on the defendant that paying the fine imposes, and a sentencing judge imposing a fine under §61-8-731(3) must consider those factors before imposing a fine. The sentencing judge must do this in every case. So far, so good. If the court finds that the defendant can afford a fine greater than $5,000, it imposes a fine within the statutory range. *See* Pet.App.55a, ¶84 (Rice, J., concurring in part and dissenting in part) ("The Legislature's provision of a monetary range in contrast to a singular mandatory amount is inherent discretion for a judge to consider the circumstances of the offense and the financial resources of the defendant when imposing the fine[.]"). If not, then it imposes the $5,000 statutory minimum. While the latter scenario raises an as-applied excessive fines issue, it isn't the case that the statute forbids the sentencing judge from conducting the required inquiry in every case—quite the opposite, in fact.

Yet these two mistakes infected the Montana Supreme Court's facial analysis. Like the federal courts, Montana evaluates facial challenges under two similar standards. *Moody* v. *NetChoice, LLC*, 2024 U.S. LEXIS 2884, at *22 ("plaintiff cannot succeed on a facial challenge unless he 'establish[es] that no set of circumstances exists under which the [law] would be

valid,' or he shows that the law lacks a 'plainly legitimate sweep.'" (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987); *Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 449 (2008))); *Mont. Cannabis Indus. Ass'n* v. *State*, 368 P.3d 1131, 1138 (Mont. 2016) (same). Under either standard, the court should have asked whether a $5,000 fine is grossly disproportional to the gravity of the harm caused by a fifth or subsequent DUI conviction in all or most cases. That fine would no doubt be constitutional in most cases. Indeed, the court's facial analysis requires the assumption that all or nearly all repeat DUI offenders cannot afford to pay a $5,000 fine. But as a matter of common sense, there is no reason to believe that's true. *Cf. Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 63 (2004) ("[T]here is no canon against using common sense[.]" (citation omitted)).

From that paper-thin foundation, the court held §61-8-731(3) facially unconstitutional. Because that decision was profoundly wrong and will substantially limit the Legislature's ability to craft fines and punishments to deter criminal conduct, this Court review is urgently needed.

III. The question presented is important, and this is an excellent vehicle to resolve it.

1. The question presented here is deeply important. Fallout from the court's decision will be severe in Montana: every statute imposing a mandatory minimum fine is now presumptively unconstitutional. Consider a sampling of Montana sentencing statutes that impose mandatory minimum fines. *See, e.g.*, §45-5-706, MCA (aggravated sex trafficking) (mandatory fine of $400,000); §45-8-116, MCA (funeral picketing)

("not less than $250 and not more than $1,000); §45-8-340, MCA (possession of sawed-off firearm) ("shall be fined not less than $200 or more than $500); §45-6-327, MCA (illegal branding or altering or obscuring of brand) ("not less than $5,000 or more than $50,000); §45-5-206, MCA (third or subsequent conviction for partner or family member assault) ("shall be fined not less than $500 and not more than $50,000). None of these are safe after the court's decision below.

Nor is there any guarantee that the damage can be contained within Montana's borders. Minnesota courts, for example, appear to employ a similar standard. In *Madden*, the court held that a statute imposing a mandatory minimum fine of $9,000 for third-degree criminal sexual conduct wasn't facially unconstitutional because Minnesota had another statutory mechanism that allowed the judge to impose a fine below the statutory minimum. 910 N.W.2d 746-47. In other words, it wasn't a true mandatory minimum fine. The upshot: if it were, it would be facially unconstitutional. *Id.* at 747 (because district court could reduce the fine to $50, statute didn't "establish a mandatory minimum fine in violation of the Excessive Fines Clause[]"). If other states endorse this rationale, mandatory minimum fines will be cast aside and state legislatures will be stripped of another important criminal sentencing tool.

That's no small problem. To take just one example, dozens of states use similar sentencing statutes for DUI convictions. *See, e.g.*, Ala. Code §32-5A-191(h) (2024) (fourth or subsequent offense) ("fine of not less than … $4,100 … nor more than …$10,100" (cleaned up)); Alaska Stat. §28.05.030(b)(1)(F) (2024) (fourth or

subsequent offense) ("fine of not less than $7,000); Conn. Gen. Stat. §14-227a(g)(3)(A) (2024) (third or subsequent offense within ten years) ("fined not less than [$2,000] or more than [$8,000]"); Iowa Code §321J.2(5)(b) (2024) (third or subsequent offense) ("minimum fine of [$3,125] and a maximum fine of [$9,375]"); Mass. Gen. Laws, ch. 90, §24(1)(a)(1) (2024) (ninth or subsequent offense) ("fine of not less than $2,000 nor more than $50,000"); Miss. Code Ann. §63-11-30(2)(d) (2024) (fourth or subsequent offense) ("fined not less than [$3,000] nor more than [$10,000]").[7] If their supreme courts begin to endorse this rationale, more and more of these sentencing statutes will suffer the same ignominious fate. This Court should intervene before it gets that far.

2. The court's decision hamstrings the Legislature's ability to calibrate and deter dangerous activities like drunk driving. While the court pays lip service to *Bajakajian*'s "gross disproportionality" standard, which considers proportionality to the gravity of a defendant's offense, Pet.App.26a, ¶48, that principle is lost in the court's final analysis. Indeed, the court fails to even mention that the statutory fine range challenged here applies to offenders with *five or more DUI convictions*—and this wasn't just Gibbons' fifth

[7] *See also, e.g.*, Fla. Stat. §316.193(2)(b)(3) (2024) (fourth or subsequent conviction) (fine "not less than $2,000"); Haw. Rev. Stat. §291E-61(b)(2)(e) (2024) (second offense within ten years of a prior offense) ("fine of no less than $1,000 and no more than $3,000); Nev. Rev. Stat. §484C.400.1(c)(1)(II) (2023) (third conviction within seven years) ("[f]ine the person not less than $2,000 nor more than $5,000"); Va. Code Ann. §18.2-270(C)(3) (2024) (fourth or subsequent conviction) ("mandatory minimum fine of $1,000").

conviction, it was his *tenth*. Even so, it's beyond dispute that drunk driving causes profound danger for other drivers, pedestrians, and society at large. That danger is particularly acute in Montana, which consistently has a high percentage of fatal accidents caused by drunk driving. Pet.App.56a, ¶84 (Rice, concurring in part and dissenting in part) ("appropriate that the Legislature would calibrate attendant penalties to deter and punish such dangerous behaviors, particularly when Montana leads the nation in percentage of fatal accidents caused by drunk driving"); *see* NHTSA, *2021 Traffic Safety Facts: Alcohol-Impaired Driving*, at 9-10 (June 2023) (leading nation in percentage of fatal accidents caused by drunk driving); NHTSA, *2022 Traffic Safety Facts: Alcohol-Impaired Driving*, at 9-10 (June 2024) (exceeding national average in percentage of fatal accidents caused by drunk driving). There should be little surprise that the Legislature found it necessary to set higher penalties to deter this conduct.

The court instead focuses on proportionality between the fine and an offender's ability to pay. In the process, it inverts the two principles that buttressed *Bajakajian*'s decision to adopt the "gross disproportionality" standard: legislative deference and judicial humility. 524 U.S. at 336 ("Both of these principles counsel against requiring strict proportionality[.]"). Rather than deferring to the Legislature's decision to set penalties for DUI convictions and to impose some limits on sentencing judges' discretion, the court instead stripped the Legislature of a vital tool in the

fight against drunk driving.[8] By forbidding the Legislature from limiting judicial discretion when imposing fines, the court in function if not in form requires strict proportionality between a fine and an offender's ability to pay—the very same "strict proportionality" standard this Court rejected in *Bajakajian*. 524 U.S. at 336

3. The use of economic sanctions has exploded in recent years. Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. Rev. 2, 5 (2018) ("Economic sanctions are imposed for violations as minor as jaywalking and as serious as homicide, and can range from a few dollars to millions."). After *Timbs*, courts have extended the Excessive Fines Clause's reach even to civil fines and administrative fees. *See, e.g.*, *Pimentel*, 974 F.3d at 922 (extending "*Bajakajian*'s four-factor analysis to govern municipal fines"). And given the Clause's expanding reach, it's more and more likely that this question will continue to knock on this Court's door. This is the ideal case to answer it.

4. Focusing the inquiry on ability-to-pay considerations ignores the existing due process protections that safeguard defendants from "the use of incarceration" and other "penalties in response to the failure to

---

[8] The majority refers to the "primacy of the legislature" and declares that reviewing courts "should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes." Pet.App.28a, ¶50 (quoting *Solem* v. *Helm*, 463 U.S. 277, 290 (1983)). But this "substantial deference," it seems, was reserved for its favored statute, §46-18-231(3), and not its disfavored one, §61-8-731(3).

pay fines." Colgan, *supra*, at 9. In *Bearden*, for example, this Court held that revoking a defendant's probation for failure to pay statutory fines and restitution without first determining that the failure was willful, and not based on poverty, violated the Equal Protection and Due Process Clauses. 461 U.S. at 672-73; *accord Tate* v. *Short*, 401 U.S. 395 (1971); *Williams* v. *Illinois*, 399 U.S. 235 (1970). These protections shield defendants' from unwarranted incarceration without sacrificing the states' fundamental interests in enforcing their laws. *See Bearden*, 461 U.S. at 669 ("The State, of course, has a fundamental interest in appropriately punishing persons—rich and poor—who violate its criminal laws."); *Tate*, 401 U.S. at 399 ("The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction." (citation omitted)). But rather than recognize the availability of these post-fine protections, the Montana Supreme Court relied on them to find that courts must consider a defendant's ability to pay *before* imposing a fine. *See* Pet.App.27a-28a, ¶49.

5. This is an excellent vehicle to address the question presented. The legal issue was properly preserved and squarely presented in the Montana Supreme Court's published opinion, which held that §46-18-231(3) codified the protections of the Eighth Amendment's Excessive Fines Clause. *See, e.g.*, Pet.App.29a ¶50. That is, before imposing a fine, sentencing judges must consider the "financial resources of the offender, and the nature of the burden that payment of the fine

will impose." Pet.App.25a-26a, ¶25. Gibbons failed to press the issue before the sentencing judge, so he could not pursue an as-applied challenge on appeal. *See State* v. *Coleman*, 431 P.3d 26, 28 (Mont. 2018) ("we will not address as-applied challenges to sentencing conditions raised for the first time on appeal"). But facial challenges can be raised for the first time on appeal, *see id.* ("we address facial challenges to sentencing statutes even if they are raised for the first time on appeal"), and the parties fully briefed Gibbons' facial challenge before the Montana Supreme Court, *see* Pet.App.111a-154a (excerpts from appellate briefs before Montana Supreme Court).

The question presented is also outcome-determinative, as a finding that courts need not consider a defendant's ability to pay would strip §46-18-231(3) of any constitutional weight and would require reversal of the Montana Supreme Court's decision. Nor are there any lingering state law questions that could jeopardize this Court's ability to reach the merits of the federal question.

CONCLUSION

For these reasons, this Court should grant the petition and reverse the decision of the Montana Supreme Court.

Respectfully submitted,

AUSTIN KNUDSEN
Montana Attorney General
CHRISTIAN B. CORRIGAN
Solicitor General
PETER M. TORSTENSEN, JR.
Deputy Solicitor General
Counsel of Record
MONTANA DEPARTMENT OF JUSTICE
215 N. Sanders Street
Helena, MT 59601
peter.torstensen@mt.gov
(406) 444-2026

Counsel for Petitioner

JULY 2024

APPENDIX

TABLE OF APPENDICES

Page

Table of Appendices

Appendix A — Opinion of the Supreme Court of the State Of Montana, filed March 20, 2024

DA 21-0413

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 63

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT MURRAY GIBBONS,

Defendant and Appellant.

APPEAL FROM: District Court of the Nineteenth Judicial District, In and For the County of Lincoln, Cause No. DC-19-119. Honorable Matthew J. Cuffe, Presiding Judge.

Submitted on Briefs: September 20, 2023
Decided March 20, 2024

Filed:

/s/
Clerk

Appendix A

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 A jury found Robert Murray Gibbons (Gibbons) guilty of driving under the influence, fifth or subsequent offense on April 29, 2021. At sentencing, Gibbons received a five-year commitment to the Department of Corrections (DOC), and a $5,000 fine pursuant to § 61-8-731(3), MCA (2019). Gibbons appeals his conviction, arguing that the District Court gave the jury an incorrect instruction defining actual physical control and prejudiced his substantial rights by allowing the State to argue on rebuttal that Gibbons could have introduced photographic evidence produced during discovery or, in the alternative, that his counsel was ineffective for failing to introduce the photographs. Additionally, Gibbons challenges the sentencing statute, which imposed a mandatory minimum $5,000 fine, as facially unconstitutional.

¶2 We restate the issues as follows:

1. *Whether the District Court properly instructed the jury to consider, as part of the totality of the circumstances, that Gibbons need not be conscious to be in actual physical control of his vehicle.*

2. *Whether the State's rebuttal argument that Gibbons could have introduced photographic evidence equally available to him during discovery, and his counsel's failure to introduce the*

photographs at trial, violated Gibbons's substantive due process rights or his right to effective assistance of counsel.

3. *Whether § 61-8-731(3), MCA (2019), which imposes a mandatory minimum $5,000 fine without regard to a defendant's ability to pay, is facially unconstitutional.*

We affirm Gibbons's DUI conviction, but we reverse the $5,000 fine. We hold that § 61-8-731(3), MCA, is facially unconstitutional because it requires imposition of a mandatory fine in every case without a trial court first considering constitutionally required proportionality factors, such as the nature of the financial burden and the defendant's ability to pay. A statutorily mandated minimum fine prevents the trial court from considering in every case constitutionally and statutorily required factors embodied in the prohibition against excessive fines and fees of the United States Constitution, the Montana Constitution, and in Montana statutes implemented to protect against such a constitutional violation. We remand this case to the District Court for recalculation of Gibbons's fine consistent with this Opinion.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 On June 19, 2019, Gibbons drove his truck into Troy, parked on Yaak Avenue, and walked into the Home Bar, where he drank four rum and cokes. Richard Starks (Starks), a retired law-enforcement officer, was having

dinner and a beer at the Home Bar and watched Gibbons, who appeared intoxicated, leaving the bar. Starks then followed Gibbons and watched him get into the driver's side of his truck. After Gibbons leaned over in the front seat, Starks called dispatch and reported a person was under the influence of alcohol and in his vehicle. Starks walked over to Gibbons's truck and took two pictures of him, one of which showed the key in the ignition, turned to the "on" position. Gibbons's feet rested in the driver's side footwell, with his rear end in the driver's seat and his body lying sideways along the bench seat, one arm folded under his head for support. The engine was not running.

¶4 Officer Travis Miller (Miller) responded to the call from dispatch and spoke briefly with Starks, who showed Miller the pictures on his phone. Miller then approached Gibbons's vehicle and saw him lying sideways on the bench seat with his head toward the passenger seat. Miller knocked on the window and woke him up. When Miller asked Gibbons if he was sleeping and if he had been drinking, Gibbons responded affirmatively. Gibbons told Miller, "I can't drive." Miller administered several standard field sobriety tests, all of which indicated that Gibbons was impaired, and arrested Gibbons for driving under the influence. At the Lincoln County Detention Center, Gibbons agreed to take a breath alcohol test; it measured .136.

¶5 Gibbons's first jury trial on February 13, 2020, ended in mistrial after defense counsel objected to the State's questions during voir dire. At the second trial, Gibbons disputed he was in "actual physical control" of

his vehicle, arguing that he never drove the vehicle and, as evidenced by his sleeping position in the cab, did not intend to drive it.

¶6 The State introduced into evidence the photographs Starks took of Gibbons in the front seat of the truck. Gibbons's counsel cross-examined Starks about the photographs and suggested that Gibbons's position in the vehicle evidenced his intention to sleep rather than drive, emphasizing that the picture showed Gibbons's arm folded under his head "for a pillow." During cross-examination of Miller and discussion of whether Gibbons was in actual physical control, defense counsel asked that Starks's photographs be published to the jury "so that any more questions can be maybe illuminated by them actually seeing the photos . . . ." Throughout the second trial, both defense counsel and the State questioned witnesses as to the significance of Gibbons's position on the seat and their opinion of whether this showed Gibbons was in actual physical control of the vehicle.

¶7 At the close of the trial, the District Court instructed the members of the jury that they "shall consider the following factors, including but not limited to . . . 5) that the Defendant need not be conscious to be in actual physical control." The jury became hopelessly deadlocked, and the District Court declared a mistrial.

¶8 At the third trial, defense counsel's opening argument focused again on the concept of actual physical control and analogized Gibbons's decision to sleep to the actions of a passenger. Counsel said during opening

statements that the jury "should get a picture, actually, of exactly where [Gibbons] was, and I think that picture is going to show [the jury] that he's laying across the front seat of his vehicle." The State called Starks as a witness, but it did not discuss or introduce the photographs Starks took of Gibbons. During cross-examination, counsel asked about the pictures and how they depicted Gibbons in the vehicle. Starks confirmed that he had taken two photographs of Gibbons lying in the cab of the pickup. When asked where Gibbons's hands were located in the picture, Starks replied that he could not recall. Defense counsel could not find the photographs and was unable to introduce them into evidence during cross-examination. In a sidebar discussion regarding counsel's mention of Starks's prior testimony, defense counsel expressed surprise that the State decided not to introduce the pictures.

¶9 During Miller's testimony, the State introduced a short segment of the officer's body camera footage as a demonstrative exhibit of his initial contact with Gibbons. The recording showed Gibbons lying down in the truck and sitting up in the driver's seat when he heard Miller knock. Miller also testified as to specific aspects of Gibbons's position and confirmed that in the photograph, one of Gibbons's hands was resting under his head like a pillow.

¶10 Before closing statements, the State moved to preclude argument about the photographs because it would suggest that the State improperly withheld evidence and encourage the jury to speculate about what the pictures might have shown. Defense counsel argued

that preventing mention of the photographs would shift the burden of proof to Gibbons and that pointing out the State's decision not to introduce photographs taken by its own witness was "absolutely fair game" to demonstrate that the State had not met its burden of proof. The District Court ruled that the parties could not describe what was in the pictures because they were not in evidence, but the defense could argue that the State did not introduce them and discuss the witnesses' testimony about them. However, if the defense chose to do so, the State could respond that Gibbons also had access to the photographs and opportunity to present them.

¶11 During closing, Gibbons's counsel argued that the facts of Gibbons's case did not amount to actual physical control:

> [W]here in the vehicle was the Defendant located? Starks took photos of the Defendant, photos from the other side. He said, I can't remember exactly where his hands are. I guess they could have been up underneath his head, but I don't know.
>
> The State's had those photos. Officer Miller testified, I saw them in the last month. They didn't bring them in even after I asked about them.
>
> It's their burden to prove their case. I'm not going to bring in evidence. That's not my burden. We talked about the burden of proof

> and that it's entirely at [the State's] table. You know, for them to have clear photos of exactly this Defendant's position, where exactly his head was, they're not going to bring that in. Instead, they're just going to get up here and argue, he was in the driver's seat.
>
> Well, is that really intellectually honest when you've got someone -- clearly, even in the video we saw that the officer raps on the window. The defendant gets up. We don't know exactly where his butt is. We know where the head is. His head isn't in the driver's seat. His shoulders ain't in the driver's seat. The driver's seat ain't that wide for you to be laying down completely in the driver's seat.

¶12 In rebuttal, the State responded that the defense had been provided with the photographs over a year ago and could have presented them if defense counsel "truly believed" they were helpful to Gibbons's case. The State further referenced the jury instruction that witness testimony alone is sufficient to establish a fact, such as Gibbons's position in the truck. The prosecutor concluded by posing a rhetorical question similar to the defense's, asking the jury to consider "who is being intellectually dishonest here."

¶13 The District Court issued a jury instruction resembling the one issued in the second trial, using some of the example factors listed in *State v. Sommers*, 2014 MT 315, 377 Mont. 203, 339 P.3d 65, for actual physical control:

Appendix A

> The Defendant is "in actual physical control" of a motor vehicle if the individual is not a passenger, and is in a position to cause the vehicle to move, or control the vehicle's movement in some manner or direction. The jury shall consider the totality of the circumstances including, but not limited to, [the] following factors:
>
> (1) where in the vehicle the defendant was located;
>
> (2) whether the ignition key was in the vehicle, and where the key was located;
>
> (3) whether the engine was running;
>
> (4) where the vehicle was parked and how it got there; and
>
> (5) that the Defendant need not be conscious to be in actual physical control.

¶14 Gibbons objected that the fifth factor, "the Defendant need not be conscious[,]" relied on case law with inapposite factual scenarios in which the defendants had driven a vehicle while impaired and subsequently passed out or fell asleep. Because the State did not allege that Gibbons had driven the truck, the defense argued that this factor did not apply. Ultimately, the District Court kept the instruction because the language, taken from *Sommers*, identified consciousness as "one of the factors

to be considered in [the jury's] review of the totality of the circumstances." The jury returned a guilty verdict.

¶15 The Presentence Investigation Report (PSI) indicated Gibbons had been enrolled in several alcohol treatment programs under supervised release with varying degrees of success. Gibbons was unhoused and "currently camping," as he lived in the camper attached to his truck and drove it often to different locations. In the winter months, Gibbons typically drove his truck and camper to Arizona and visited his sister. Gibbons had a total monthly income of approximately $1,431 from a small pension payment of $130 and social security income of $1,300. He was $9,000 in debt.

¶16 At the outset of the sentencing hearing, the judge asked if any of the terms of supervision in the PSI did not relate to Gibbons or would be unreasonable as applied to him. Defense counsel responded, "I don't believe so, I think we would be asking the Court to not fully impose some of the fines and fees due to an inability to pay, but that's all." During the sentencing hearing, the District Court did not ask Gibbons about his ability to pay a monetary penalty, and Gibbons's testimony at the hearing did not address his financial circumstances.

¶17 The State asked for a five-year commitment to the DOC, a $5,000 fine, and forfeiture of Gibbons's vehicles. Defense counsel objected to the State's request for vehicle forfeiture and recommended only a five-year suspended sentence. The District Court ultimately sentenced Gibbons to a five-year commitment to the DOC and, under

§ 61-8-731(3), MCA, fined him what the sentencing judge characterized as "the minimum of $5,000, the statutory minimum." It declined to impose any other financial penalties, including vehicle forfeiture.

STANDARDS OF REVIEW

¶18 We review a district court's ruling on jury instructions for abuse of discretion. *State v. Christiansen*, 2010 MT 197, ¶ 7, 357 Mont. 379, 239 P.3d 949 (citing *State v. Archambault*, 2007 MT 26, ¶ 25, 336 Mont. 6, 152 P.3d 698). Our review focuses on whether the instructions, considered as a whole, fully and fairly instruct the jury on the applicable law. *Sommers*, ¶ 14. A district court has broad discretion to formulate jury instructions, and for the error to be reversible, the instructions must prejudicially affect the defendant's substantial rights. *State v. Hudson*, 2005 MT 142, ¶ 10, 327 Mont. 286, 114 P.3d 210 (citing *State v. Goulet*, 283 Mont 38, 41, 938 P.2d 1330, 1332 (1997)). This Court will not find prejudice where "the jury instructions in their entirety state the applicable law of the case." *State v. Iverson*, 2018 MT 27, ¶ 10, 390 Mont. 260, 411 P.3d 1284 (internal citations omitted).

¶19 This Court generally reviews a district court's evidentiary ruling for abuse of discretion. *State v. Hudon*, 2019 MT 31, ¶ 16, 394 Mont. 226, 434 P.3d 273. However, "[t]o the extent the court's ruling is based on a . . . constitutional right, our review is de novo." *Hudon*, ¶ 16 (quoting *State v. Given*, 2015 MT 273, ¶ 23, 381 Mont. 115, 359 P.3d 90). Record-based claims of ineffective assistance of counsel present mixed questions of law and fact that

we review de novo. *State v. Kirn*, 2023 MT 98, ¶ 17, 412 Mont. 309, 530 P.3d 1 (internal citations omitted).

¶20 "We review criminal sentences for legality." *State v. Yang*, 2019 MT 266, ¶ 8, 397 Mont. 486, 452 P.3d 897 (citing *State v. Coleman*, 2018 MT 290, ¶ 4, 393 Mont. 375, 431 P.3d 26). A claim that a criminal sentence violates a constitutional provision is reviewed de novo. *Yang*, ¶ 8.

DISCUSSION

¶21 *Issue One: Whether the District Court properly instructed the jury to consider, as part of the totality of the circumstances, that Gibbons need not be conscious to be in actual physical control of his vehicle.*

¶22 Since 1955, Montana's DUI statute has prohibited having "actual physical control" of a vehicle while intoxicated. *Sommers*, ¶ 20 (citing 1955 Mont. Laws ch. 263 (34th Legislative Assembly, Senate Bill 59), enacted as § 32-2142(1)(a), RMC (1947)). The "actual physical control" language works as a prophylactic measure "based on the policy of deterring intoxicated people from assuming physical control of a vehicle, *even if they never actually drive*." *Sommers*, ¶ 20 (quoting *Larson v. State*, No. A-10461, 2010 Alas. App. LEXIS 106, 2010 WL 3611440, 2 (Alaska App. Sept. 15, 2010)) (emphasis added). Exerting actual physical control of a vehicle while under the influence of alcohol, an act no less criminal than *driving* while intoxicated, is nonetheless highly fact-dependent and does not lend itself to bright-line determinations. *See*

Christiansen, ¶ 10 (reversing a defendant's DUI conviction due to a confusing jury instruction on actual physical control).

¶23 In *Sommers*, we recognized that actual physical control is a "fact-intensive inquiry which may require consideration of a wide variety of circumstances." *Sommers*, ¶ 33. Thus, this Court adopted a totality-of-the-circumstances test so that juries could consider a variety of "difficult-to-foresee situations which may nonetheless support a determination that the defendant was in actual physical control of the vehicle." *Sommers*, ¶¶ 33-34. As a result, we have discouraged stand-alone use of statements taken out of context from other inapposite cases and instead invited courts to include various factors tailored to each situation for the jury's consideration of the totality of the circumstances. *Sommers*, ¶¶ 28, 35. Among these is the fact, grounded in Montana case law and legislative history, that a defendant "need not be conscious to be in actual physical control." *Sommers*, ¶ 35 (internal citations omitted).

¶24 Like in *Sommers*, the State did not allege that Gibbons drove while intoxicated but instead presented evidence that Gibbons was in "actual physical control" of the truck in violation of § 61-8-401(1)(a), MCA (2019). The jury instruction we held to be unlawful in *Sommers* stated, without exception, "[i]t *does not matter* that the vehicle is incapable of moving." *Sommers*, ¶ 18 (emphasis added). This instruction removed a key aspect of Sommers's defense from the jury's consideration: the fact that his vehicle was completely disabled and incapable of moving

when the defendant entered it to stay warm while awaiting a ride home.

¶25 In contrast, the instruction offered here told the jury to consider the totality of the circumstances, one factor of which was that Gibbons *need not* be conscious to be in actual physical control. Not only was this given as one of several factors under the overarching instruction that the jury should consider all the circumstances, not limited to the list presented, but also, Gibbons's instruction did not have the same preclusive effect of the instruction in *Sommers*. There, the instruction prevented jurors from considering at all the fact that Sommers's vehicle was incapable of movement, as opposed to the permissive statement in Gibbons's instruction that the defendant *need not* be conscious to be in actual physical control. The instruction thus allowed the jury to find that Gibbons had actual physical control despite the fact that he was asleep, but it did not require the jury to do so or prevent the jury from considering Gibbons's defense.

¶26 This Court has determined that the purpose of the phrase "actual physical control" is to "prevent DUI at its inception" and to allow drunk drivers to be apprehended before they harm others. *Sommers*, ¶ 20 (citing 92 A.L.R. 6th 295, § 7 (2014) (collecting cases)). Gibbons contends that the consciousness instruction applies only when defendants first drove a vehicle while intoxicated, wrecked or parked it, and then passed out or fell asleep, and therefore, the instruction was confusing and inaccurate in his case. *See State v. Taylor*, 203 Mont. 284, 661 P.2d 33 (1983) (defendant did not relinquish actual physical control when he mired the vehicle in a borrow pit while

intoxicated and then fell asleep); *State v. Ruona*, 133 Mont 243, 321 P.2d 615 (1958) (defendant drove the vehicle while intoxicated and was apprehended after parking it and falling asleep). However, Gibbons's argument does not take into account the purpose of the statute's "actual physical control" language, which focuses on preventing and deterring drunk driving before it occurs.

¶27 Furthermore, the actual physical control inquiry focuses not on the defendant's *intent* to drive (DUI is a strict liability offense), *Hudson*, ¶ 15, but on the defendant's *ability* to control the vehicle's movement: "one could have 'actual physical control' while merely parking or standing still so long as one was keeping the car in restraint or in position to regulate its movements." *Ruona*, 133 Mont. at 248, 321 P.2d at 618. Most aptly, we have analogized that "[j]ust as a motorist remains in a position to regulate a vehicle while asleep behind its steering wheel, so does he remain in a position to regulate a vehicle while asleep behind the steering wheel of a vehicle stuck in a borrow pit." *Taylor*, 203 Mont. at 287, 661 P.2d at 34. Naturally, the reverse is also true: a motorist sleeping behind the wheel who has *not* already wrecked his vehicle while intoxicated is just as much in control of the vehicle as one who has.

¶28 The facts in *Robison* are illustrative. Robison was found alone, admittedly intoxicated, asleep or passed out in the front seat of a vehicle, with the lights on and engine running. *State v. Robison*, 281 Mont. 64, 65, 931 P.2d 706, 707 (1997). Robison contended that from the waist up, his body was "occupying the passenger's seat with his legs sprawled on the driver's side" and that another witness had driven the vehicle, not the defendant. *Robison*, 281

Mont. at 65, 931 P.2d at 707. The problem in *Robison* was not that a jury could never have found the defendant guilty under these circumstances. In fact, *Robison* clarified many times that a jury could have found the defendant guilty of DUI if it "disbeliev[ed] Robison's and Rutledge's testimony that Rutledge, not Robison, was *at all times* the driver of the automobile." *Robison*, 281 Mont. at 68, 931 P.2d at 708 (emphasis added). Rather, the problem lay in the incorrect jury instruction that any person "physically inside an operational motor vehicle with the potential to operate or drive that motor vehicle . . ." met the definition of actual physical control. *Robison*, 281 Mont. at 66, 931 P.2d at 707. We held that the instruction impermissibly broadened the definition of actual physical control to include passengers: those who are *not* in a position to exercise "dominion, directing influence or regulation of the vehicle." *Robison*, 281 Mont. at 67, 931 P.2d at 708.

¶29 Gibbons, on the other hand, does not allege that a different person had control of the vehicle. It is uncontested that Gibbons was alone, intoxicated, and asleep in his truck, where he himself put the key in the ignition and turned it to the "on" position. It is uncontested that his legs were in the driver's side footwell of the truck, with his rear end in the driver's seat. Nothing in the instructions prevented the jury from considering all the facts presented at trial, including Gibbons's argument that his sleeping position indicated he had no intention to use the vehicle to drive and thus was not exercising actual physical control. Had the instruction indicated "it did not matter" that Gibbons was unconscious, like the instruction in *Sommers*, the jury would have been prevented from considering the facts most central to Gibbons's defense.

But, the instruction accurately stated that a defendant can be unconscious and still retain actual physical control, without limiting the jury's evaluation of all the factual circumstances.

¶30 Gibbons argues that this Court has never upheld a DUI conviction where it was not alleged that the defendant actually drove the vehicle under the influence. This does not change the fact that a defendant undoubtedly can be guilty of DUI for merely exercising "actual physical control" under the plain terms of the statute, and he need not drive the vehicle anywhere in order for the jury to find him so. Instructing the jury that Gibbons need not be conscious to have actual physical control aligns with the preventative purpose of the statute's language, the definition of actual physical control in Montana's case law, the totality of the circumstances approach we adopted in *Sommers*, and the specific facts of Gibbons's case. The instruction did not mislead the jury, misstate the law, or prejudice Gibbons's ability to mount a complete defense.

¶31 *Issue Two: Whether the State's rebuttal argument that Gibbons could have introduced photographic evidence equally available to him during discovery, and his counsel's failure to introduce the photographs at trial, violated Gibbons's substantive due process rights or his right to effective assistance of counsel.*

¶32 Gibbons argues that the District Court's decision to allow the State's rebuttal argument about the photographs violated numerous constitutional rights, including his right to due process, to the presumption of innocence, to

a complete defense, and to a fundamentally fair trial by an impartial jury. The crux of Gibbons's argument, however, is that the State's comments shifted the burden of proof by requiring Gibbons to produce evidence of his innocence. Alternatively, Gibbons argues that defense counsel's failure to introduce the photographs into evidence violated his right to effective assistance of counsel. The State contends, and we agree, that responding to Gibbons's overt statement that the State improperly withheld the photographs from the jury does not undermine the presumption of innocence. Furthermore, even if both arguments are true, Gibbons suffered no prejudice as a result.

¶33 Criminal defendants are guaranteed substantive due process rights to a fair trial, including the presumption of innocence, protection against self-incrimination, and the requirement that the State prove every element of a charged offense. U.S. Const. amend. XIV; Mont. Const. art. II, § 17 (Montana due process clause); *State v. Miller*, 2022 MT 92, ¶ 21, 408 Mont. 316, 510 P.3d 17 (internal citations omitted); *In re Winship*, 397 U.S. 358, 363-64, 90 S. Ct. 1068, 1072-73, 25 L. Ed. 2d 368 (1970). A defendant's fundamental due process rights "implicate a number of highly nuanced restrictions on the otherwise broad latitude that prosecutors have in eliciting and commenting on the evidence" in a criminal trial. *Miller*, ¶ 22. However, a prosecutor may properly comment on the "nature, quality, or effect of the evidence in relation to the applicable law and the prosecutor's burden of proof." *Miller*, ¶ 22 (internal citations omitted).

¶34 When a prosecutor's conduct deprives the defendant of a fair and impartial trial, the conviction is subject to reversal. *State v. Wellknown*, 2022 MT 95, ¶ 22, 408 Mont. 411, 510 P.3d 84 (internal citations omitted). "We review alleged improper statements during a closing argument in the context of the entire argument; we do not presume prejudice from the alleged misconduct, and the burden is on the defendant to show the argument violated his substantial rights." *Wellknown*, ¶ 22 (quoting *State v. Smith*, 2021 MT 148, ¶ 42, 404 Mont. 245, 488 P.3d 531 (internal citations omitted)). We have found a prosecutor's closing remarks to be improper when "repeated use of burden of proof language . . . in reference to what the defendant could have done" risks diminishing the State's burden of proof in the minds of the jurors. *Wellknown*, ¶ 24 (quoting *State v. Favel*, 2015 MT 336, ¶ 26, 381 Mont. 472, 362 P.3d 1126).

¶35 Criminal defendants have the right to effective assistance of counsel guaranteed by the U.S. and Montana Constitutions. U.S. Const. amends. VI and XIV; Mont. Const. art. II, § 24. "This Court evaluates claims of ineffective assistance of counsel using the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)." *State v. Gieser*, 2011 MT 2, ¶ 9, 359 Mont. 95, 248 P.3d 300. A defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced him. *State v. McAlister*, 2016 MT 14, ¶ 7, 382 Mont. 129, 365 P.3d 1062 (internal citations omitted).

¶36 In *State v. Hudon*, this Court held that a district court's decision to limit the defense's closing argument that the State presented incomplete evidence did not unlawfully shift the burden of proof. *Hudon*, ¶ 26. There, the defendant sought to "'accuse[] or suggest' the prosecution had failed to provide evidence in discovery." *Hudon*, ¶ 26. The evidence in question included detailed blood test results, employee credentials, and lab workers' notes from the defendant's blood alcohol testing, which were accessible to both the State and the defense. Though the subject of incomplete evidence was "a generally appropriate subject for argument," the district court had already established that no discovery violation occurred. *Hudon*, ¶ 26. Thus, we held that the defense's rhetorical question asking the jury to consider why the State did not provide more detailed evidence constituted "continued efforts, despite the ruling, to establish or imply the prosecution was hiding something, when in reality the defense had failed to obtain the additional evidence it desired." *Hudon*, ¶ 26.

¶37 Here, unlike in *Hudon*, the District Court allowed the defense to argue that the photographs showed the State had not met its burden of proof but warned that the prosecutor could respond that the defense had the same access to the evidence. The defense then accused the State of intellectual dishonesty for its decision not to introduce the photographs. The argument that the State had not met its burden of proof was, indeed, "absolutely fair game" for the defense in closing, but the State may also respond that it has met its burden of proof without violating a defendant's due process rights. The State was not obligated to introduce photographic evidence equally

available to the defense, particularly when the detailed testimony and cross-examination of two witnesses and visual evidence from Miller's body camera footage established Gibbons's position in the vehicle at the time of the incident. The District Court did not prevent Gibbons from arguing in closing that the State's decision not to present the photographs as evidence meant it had not met its burden of proof. Gibbons's counsel made exactly this argument but further accused the State of intellectual dishonesty. In kind, the State responded that the evidence they provided met the burden of proof and that Gibbons had equal access to the photographs, which was proper rebuttal to the accusation of dishonesty.

¶38 These statements are far from the "repeated use" of burden shifting language found in *Wellknown* and *Favel*, both of which held that the State may not imply that defendants must prove their own innocence. *Wellknown*, ¶ 23 (the State's closing remarks that the defendant "*chose not to show the officers that he was not under the influence*" improperly shifted the burden of proof) (emphasis in original); *Favel*, ¶ 26 ("[T]he comments complained of in this case—that Favel could have 'proven her innocence' by submitting to a breath test—have the potential to blur the distinction between a defendant's state of mind and the State's burden of proof."). None of the prosecution's statements implied that Gibbons's failure to introduce the photographs meant he was guilty, nor did they otherwise force Gibbons to prove his own innocence.

¶39 Even if the State's remarks had somehow shifted the burden of proof, the evidence against Gibbons was largely uncontested. Gibbons conceded that he was

sleeping in the front seat because he was too intoxicated to drive. His defense relied entirely on the idea that he entered the vehicle only with the intention of sleeping and that as a result, he was not exercising actual physical control. The State's own witnesses offered testimony that Gibbons was using his arm "like a pillow." The prosecutor's closing remarks are therefore unlikely to have improperly influenced the jury.

¶40 Gibbons's ineffective assistance argument fails for much the same reason: he cannot show that his counsel's failure to introduce the photographs prejudiced his defense. Prejudice occurs only when the defendant can show a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Gieser*, ¶ 14 (citing *Strickland*, 466 U.S. at 703, 104 S. Ct. at 2072). "A defendant must do more than just show that the alleged errors of a trial counsel had some conceivable effect on the outcome of the proceeding." *State v. Dineen*, 2020 MT 193, ¶ 25, 400 Mont. 461, 469 P.3d 122 (internal citations omitted).

¶41 Gibbons argues the deadlocked jury at his second trial shows that the pictures were critical to his defense. However, we can find no appreciable difference between the admitted evidence of Gibbons's position provided by witness testimony and video footage and that of the two unadmitted photographs. In fact, Gibbons's counsel and Officer Miller characterized the pictures as "maybe just a slightly different angle" of what the jury saw from Miller's body camera video. Miller also confirmed during direct and cross-examination that Gibbons was lying down with his feet in the driver's side footwell, rear end in the

driver's seat, and head and torso on the bench seat toward the passenger side. Miller testified to the defense's key fact that Gibbons's arm was resting underneath his head when he approached the vehicle and that the photographs also showed his hand under his head "like a pillow." Thus, the defense was able to utilize this description and make a similar closing argument about Gibbons's intention to sleep. Essentially, the State and Gibbons agreed entirely on his physical position in the truck but disagreed about whether this position indicated he had actual physical control.

¶42 Even if failing to find and introduce the photographs rose to the level of unconstitutionally deficient performance on the part of defense counsel, Gibbons cannot show a reasonable probability that introducing the photographs would have changed the outcome of his trial. The testimony and video evidence provided to the jury allowed the defense to describe in detail how each aspect of Gibbons's physical position weighed against finding that he had actual physical control. The jury convicted Gibbons nonetheless, and we cannot find that admitting the photographs would have altered this outcome.

¶43 *Issue Three: Whether § 61-8-731(3), MCA (2019), which imposes a mandatory minimum $5,000 fine without regard to a defendant's ability to pay, is facially unconstitutional.*

¶44 Gibbons appeals the fine imposed by the District Court and argues that in every instance in which the sentencing court fines a defendant under § 61-8-731(3), MCA (2019), the $5,000 minimum--when it is imposed in

violation of § 46-18-231(3), MCA, without consideration of the offender's resources, the nature of the crime committed, and the nature of the burden created by the fine--violates both § 46-18-231(3), MCA, and the right to be free from excessive fines embodied in the U.S. Const. amend. VIII and Mont. Const. art. II, § 22.

¶45 We begin with the two statutes at issue, and some general rules of statutory construction. Sections 46-18-231(1)(a) and (3), MCA, address the imposition of fines and fees in all felony and misdemeanor cases. Section 46-18-231(1)(a), MCA, provides:

> Except as provided in subsection (1)(b), *whenever*, upon a verdict of guilty or a plea of guilty or nolo contendere, an offender has been found guilty of an offense for which a felony penalty of imprisonment could be imposed, the sentencing judge may, in lieu of or in addition to a sentence of imprisonment, impose a fine *only* in accordance with subsection (3). (Emphasis added.)

Subsection (3) of 46-18-231, MCA, instructs that:

> The sentencing judge *may not sentence an offender to pay a fine unless the offender is or will be able to pay the fine and interest.* In determining the amount and method of payment, the sentencing judge *shall* take into account the nature of the crime committed, the financial resources of the offender, and the

> nature of the burden that payment of the fine and interest will impose. (Emphasis added.)

Section 46-18-231, MCA, thus, clearly and plainly requires that a sentencing judge, "whenever" an offender has been found guilty of a felony or misdemeanor, may "only" impose a fine when the offender is able to pay and "shall" consider the offender's resources and the nature of the burden payment of the fine will impose. Notably, § 46-18-231, MCA, applies to all convictions where a fine may be imposed and makes no exceptions for statutes that establish a minimum mandatory fine.

¶46 Consistent with the Legislature's judgment that a fine not be imposed on an offender unable to pay, the Legislature has also established the exact same requirements before a sentencing judge may impose costs. While a defendant may be required to pay costs in a felony or misdemeanor case, "[t]he court may not sentence a defendant to pay costs unless the defendant is or will be able to pay them." Section 46-18-232, MCA. "In determining the amount and method of payment of costs, the court shall take into account the financial resources of the defendant, the future ability of the defendant to pay costs, and the nature of the burden that payment of costs will impose." Section 46-18-232, MCA.

¶47 These statutes yield a consistent rule: a sentencing court is authorized to order a fine or cost only if the offender has the ability to pay and only after the sentencing judge considers the nature of the offense, the financial resources of the offender, and the nature of the

burden the fine will impose. "Statutory construction is a 'holistic endeavor' and must account for the statute's text, language, structure, and object." *State v. Heath*, 2004 MT 126, ¶ 24, 321 Mont. 280, 90 P.3d 426 (citations omitted). "Our purpose in construing a statute is to ascertain the legislative intent and give effect to the legislative will." *Heath*, ¶ 24. Further, our inquiry must begin with the words of the statutes themselves. "The legislative intent is to be ascertained, in the first instance, from the plain meaning, of the words used." *Western Energy Co. v. Dept. of Revenue*, 1999 MT 289, ¶ 11, 297 Mont. 55, 990 P.2d 767. Here, the text, language, structure, and object of § 46-18-231, MCA, is clear and giving effect to legislative intent is straightforward. The Legislature, through § 46-18-231, MCA, intended that the imposition of a fine be proportionate to the financial resources of an offender.

¶48 The principal of proportionality forms the touchstone to the consideration of a fine's excessiveness. *United States v. Bajakajian*, 524 U.S. 321, 333-34, 118 S. Ct. 2028, 2036, 141 L. Ed. 2d 314 (1998); *State v. Wilkes*, 2021 MT 27, ¶ 26, 403 Mont. 180, 480 P.3d 823. A fine violates the federal Excessive Fines Clause if it is "grossly disproportional to the gravity of a defendant's offense." *Bajakajian*, 542 U.S. at 334, 118 S. Ct. at 2036. The federal constitutional prohibition against excessive fines has been incorporated against the states within the Due Process Clause of the Fourteenth Amendment in the United States Supreme Court's *Timbs* decision. *Timbs v. Indiana*, 586 U.S. , 139 S. Ct. 682, 686-87, 203 L. Ed. 2d 11 (2019). In examining the deeply rooted tradition behind the Excessive Fines Clause, the Supreme

Court emphasized that an individual's ability to pay was historically an essential factor in determining a fine's excessiveness. *Timbs*, 139 S. Ct. at 687-89. Tracing this right back to the Magna Carta, the Supreme Court noted that economic punishment must "'be proportioned to the wrong' and 'not be so large as to deprive [an offender] of his livelihood.'" *Timbs*, 139 S. Ct. at 687-88 (internal citations omitted). This concept endured through Colonial-era creation of state constitutions and eventually the United States Constitution, but abuses continued in the form of excessive fines designed to "subjugate newly freed slaves and maintain the prewar racial hierarchy. . . . When newly freed slaves were unable to pay imposed fines, States often demanded involuntary labor instead." *Timbs*, 139 S. Ct. at 688-89.

¶49 The Excessive Fines Clause has provided "a constant shield throughout Anglo-American history" designed to protect other constitutional rights, guarding against the government's use of fines to chill the speech of political enemies, to coerce involuntary labor by imposing a penalty unpayable by the offender, and to generate government revenue from unjust punishments. *Timbs*, 139 S. Ct. at 689. This concept is reflected in other Supreme Court decisions requiring courts to conduct an ability-to-pay inquiry before revoking an offender's probation for failure to pay a fine, *Bearden v. Georgia*, 461 U.S. 660, 672, 103 S. Ct. 2064, 2072-73, 76 L. Ed. 2d 221 (1983); before issuing a warrant for failure to pay, *Turner v. Rogers*, 564 U.S. 431, 449, 131 S. Ct. 2507, 2520, 180 L. Ed. 2d 452 (2011); and before automatically suspending an offender's driver's license for failure to pay, *Bell v.*

Burson, 402 U.S. 535, 539, 91 S. Ct. 1586, 1589, 29 L. Ed. 2d 90 (1971); *cf. Mackey v. Montrym*, 443 U.S. 1, 13-17, 99 S. Ct. 2612, 2618-20, 61 L. Ed. 2d 321 (1979) (upholding suspension of driver's license when procedural protections lowered risk of erroneous deprivation). Thus, analysis of proportionality extends not only to the fine's excessiveness in relation to the offense, but also the fine's excessiveness in relation to the offender and his ability to pay.[1]

¶50 Although federal law provides little other guidance in determining a fine's proportionality, the United States Supreme Court has emphasized the primacy of the legislature. *Solem v. Helm*, 463 U.S. 277, 290, 103 S. Ct. 3001, 3009, 77 L. Ed. 2d 637 (1983) ("Reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes . . . ."). Montana's constitution includes the right to be free from excessive fines among those enumerated

1. Other states have chosen to require an ability-to-pay inquiry in the analysis of a fine's excessiveness based on the Supreme Court's reasoning in *Timbs*, even without a clear legislative expression of proportionality like Montana's § 46-18-231(3), MCA. *See, e.g., Colo. Dep't of Lab. and Emp. v. Dami Hosp., LLC*, 2019 CO 47M, ¶¶ 30-31, 442 P.3d 94 (adopting an ability-to-pay element of proportionality review based on the Supreme Court's historical inquiry in *Timbs* and the concept of proportionality itself); *City of Seattle v. Long*, 198 Wn.2d 136, 493 P.3d 94, 113 (Wash. 2021) ("The weight of history and the reasoning of the Supreme Court demonstrate that excessiveness concerns more than just an offense itself; it also includes consideration of an offender's circumstances. The central tenet of the excessive fines clause is to protect individuals against fines so oppressive as to deprive them of their livelihood.").

in our Declaration of Rights, which are considered significant components of liberty and trigger the highest level of protection by the courts. Mont. Const. art. II, § 22 ("Excessive bail shall not be required, or excessive fines imposed, or cruel and unusual punishments inflicted."); *State v. Tapson*, 2001 MT 292, ¶ 15, 307 Mont. 428, 41 P.3d 305. Thus, the Montana Legislature has effectuated these federal and state constitutional protections against excessive fines by codifying the inquiry necessary to guarantee that a fine is proportional in § 46-18-231, MCA. This statute evinces the Legislature's intention to include the offender's financial circumstances in the evaluation of a fine's proportionality, consistent with the Anglo-American history of the Excessive Fines Clause as a protection against fines imposed "without 'any Regard to the Nature of the Offences, or the Ability of the Persons.'" *Timbs*, 139 S. Ct. at 694, 203 L. Ed. 2d at 23, (Thomas, J., concurring) (citing Journals of the House of Commons 698 (Dec. 23, 1680)).

¶51 With these fundamental principles underlying § 46-18-231, MCA, noted, in addition to our observation of its plain language and text, we turn to the mandatory minimum fine the Legislature established in § 61-8-731(3), MCA (2019). Section 61-8-731(3), MCA (2019), requires that a fifth or subsequent DUI offender be sentenced to "a term of not less than 13 months or more than 5 years *or* be fined an amount of not less than $5,000 or more than $10,000, *or* both." (Emphasis added.)[2] Though in

2. It is worth noting that § 61-8-731(3), MCA (2019), which punishes a fifth or subsequent DUI offense, in allowing the sentencing court to choose between a supervisory sentence, or a $5,000 fine, or

some cases a sentencing judge may choose to forego a fine in favor of incarceration under the disjunctive terms of the statute, in *all* instances where a fine is imposed, the statute requires imposition of the full amount of the fine; that is, a judge cannot weigh the statutorily required proportionality factors and must impose the full $5,000 fine every time a fine is imposed. Here, the problem is in the mandatory nature of the minimum fine contained in § 61-8-731(3), MCA (2019), and the inability of a sentencing court to consider other sentencing statutes prescribed by the Legislature that codify constitutional proportionality principles.

¶52 Mandatory minimum sentencing laws eliminate judicial discretion to impose sentences below the statutory minimum. In his Dissent, ¶ 76, Justice Shea faults the Court for "not attempt[ing] to harmonize the provisions

---

both, is *less* punitive than the punishment for a fourth or subsequent DUI in § 61-8-731(1), MCA (2019), which requires both a supervisory term *and* a minimum $5,000 fine. Accordingly, the Legislature amended the statute in 2021 to correct the discrepancy, making the punishment for fourth and fifth or subsequent conviction both incarceration and a fine. Section 61-8-1008(2), MCA (2021) (A person convicted of DUI who has four or more prior convictions "shall be punished by a fine of not less than $5,000 or more than $10,000, *and* by imprisonment in the state prison for a term of not more than 10 years.") (Emphasis added); § 61-8-1008(3), MCA (2021); Hearing on HB 115 before the Senate Judiciary Committee, 67th Legislature, 09:12:10-09:12:32 (Mar. 11, 2021) (testimony of proponent Cory Swanson, Montana County Attorneys' Association) ("Not only is it ironic that under current law, your sentence for a tenth DUI is the same as your sentence for a fifth DUI, but, under current law, a sentence for five through ten is actually less serious than your sentence for fourth DUI.").

of § 46-18-231, MCA, with § 61-8-731, MCA, to give effect to each statute . . . ." Justice Shea would "harmonize" the statutes by writing in a penalty that the legislature did not provide. Section 61-8-731, MCA, provides a "mandatory minimum," thus denoting that the fine is both "mandatory" and a "minimum." However, it was the Legislature's purpose and intent to *remove judicial discretion* and require imposition of a minimum $5,000 fine. And it is only the Legislature that has the authority to determine the offense and the penalty. As early as 1893, this Court recognized the role of the Legislature in defining a crime and establishing its penalty.

> It is the legislature, not the court, which is to define a crime, and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. This is true. But this is not a new independent rule, which subverts the old. It is a modification of the ancient maxim, and amounts to this: that, though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is

> no ambiguity in the words, there is no room for construction.

State v. Hayes, 13 Mont. 116, 120, 32 P. 415 (1893). Hence, "[t]he sentencing authority of a court exists solely by virtue of a statutory grant of power and therefore cannot be exercised in any manner not specifically authorized." *State v. Lenihan*, 184 Mont. 338, 342, 602 P.2d 997, 1000 (1979).

¶53 Justice Shea would fashion his own penalty that authorizes a court to impose a fine in an amount less than what the Legislature clearly intended and mandated. In the construction of a statute, however, 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. Justice Shea's "harmonizing" of a statute that removes judicial discretion with a statute that requires judicial discretion leads to the Dissent's untenable result of altering a legislatively mandated penalty. This Court is without the authority to establish an offense and set its penalty, and we may not rewrite a statute to "harmonize" it with another to avoid a constitutional analysis. Our role is limited to determining whether the legislatively mandated fine is constitutional.

¶54 Mandatory minimum fines can produce punishment that is disproportionate and unjust when the offender's ability to pay is not considered. Justices Rice and Baker, in their Dissent, maintain that the imposition of fines on persons lacking financial resources to pay

them nonetheless conceivably advances public safety. They assume that the Legislature, when establishing a mandatory minimum fine, intended to forgo ability to pay considerations that it prescribed in § 46-18-231, MCA. Rice & Baker, JJ., Dissent, ¶¶ 85-86. However, § 46-18-231, MCA, initially enacted in 1981, is an enlightened response to the increasing punitiveness in the American approach to criminal justice, an acknowledgment that imposition of mandatory fines on impoverished defendants are unlikely to reduce future crime, and a recognition that the impact of mandatory minimum fines is disproportionate on families of poor defendants and minority communities, particularly those of color.

¶55 A poor offender feels the impact of any fine disproportionately compared to his wealthier counterpart. An indigent defendant who remains criminally obligated to pay the same fine, *but cannot pay it*, risks getting caught in an endless cycle of escalating debt, incarceration, and longer periods of entanglement with the justice system. Mandatory minimum fines thus disproportionately impact minority communities and people of color. Moreover, the collateral consequences of imposing disproportionate fines on an offender's family, who often pay their loved one's financial obligation, ensures that the reach of the criminal justice system and its punishment extends beyond the offender. Oftentimes, the symbiotic harm from mandatory minimum fines affects the women in an offender's family--the mother, wife, or sister pays the fine for their loved one and there is less money for food, clothing, and shelter. An indigent defendant must continue to worry about a revocation, incarceration, and a longer

period of involvement with the justice system if he has no resources to pay the fine. A mandatory minimum penalty transfers sentencing discretion, like that embodied in § 46-18-231, MCA, from the judge and *requires* a particular sentence be imposed. A sentencing judge cannot consider when imposing a mandatory fine whether a defendant will be able to pay for necessities, adequately feed and take care of children and other family obligations, purchase necessary medication, maintain housing, and the like. Here, Gibbons is 77 years old, homeless, in poor health, unemployed, receiving $1,300 in social security, and is $9,000 in debt. The District Court could not consider Gibbons's circumstances because it recognized it was mandated to impose a minimum $5,000 fine.

¶56 When the public expresses fear of victimization and a belief that criminals are not receiving a harsh enough punishment, there is a tendency to respond in kind with new crimes and stiffer penalties, including increasing mandatory minimum fines. See Rice & Baker, JJ., Dissent, ¶ 84. The enactment of a mandatory minimum penalty does not involve "any careful consideration" of the ultimate effects, Chief Justice Rehnquist once noted. William H. Rehnquist, *Luncheon Address (June 18, 1993)*, in U.S. Sent'g Comm'n, Drugs and Violence in America 283, 287 (1993). By their very nature, a mandatory minimum allows no discretion for the sentencing judge to impose anything but the mandatory fine. This is in direct opposition to the requirements of § 46-18-231, MCA, which codifies that the proportionality analysis required by the Montana and federal constitutions must include--not only a proportionality to the offense which the Legislature has determined when establishing the

penalty for an offense--a proportionality *to the offender* as well. Thus, Montana's legislature had the foresight to impose a statutory *offender* proportionality analysis. Contrary to Justices Rice & Baker's assertion in their Dissent, ¶ 85, this Court does not need to rely on *Timbs* to require an inquiry into a defendant's resources and ability to pay because the Legislature itself has determined that before imposing a fine, the inquiry must include a proportionality consideration of the offenders' ability to pay. Accordingly, § 61-8-731(3), MCA, (requiring a mandatory minimum fine) is irreconcilable with § 46-18-231, MCA, (requiring the sentencing judge consider the offender's ability to pay). This is true particularly because the purpose of the Legislature in enacting a statute with a mandatory minimum fine is to remove sentencing discretion from the judge.[3] Moreover, in contrast to § 61-8-731(3), MCA, only § 46-18-231, MCA, is tethered to an important fundamental right grounded in the Excessive Fines Clauses of the Montana and federal constitutions. We therefore must consider whether § 61-8-731(3), MCA, can be applied consistent with the constitution and the purpose underlying § 46-18-231, MCA.

¶57 We do not have to plow new territory to resolve the issue raised. Our decision and reasoning in *State v. Yang*, 2019 MT 266, 397 Mont. 486, 452 P.3d 897, is persuasive.

---

3. As an example of how §§ 46-18-231 and 61-8-731, MCA, could operate inconsistently, suppose an ability to pay analysis resulted in a court determining that a defendant could not afford $5,000, but could afford, for example, $300. Under such a scenario, no fine at all could be imposed because $300 is not authorized by statute, even though the clear purpose and intent of the legislature under § 61-8-731, MCA, was to impose an enhanced financial penalty for felony DUIs.

Justices Rice and Baker emphasize in their Dissent, ¶ 83, that the Court in *Yang* contrasted § 61-8-731(3), MCA, to the market fine statute at issue in *Yang*, thus suggesting that *Yang* is not persuasive. In *Yang*, the statute at issue, § 45-9-130(1), MCA, had no limit on the mandatory 35%-market-value fine that must be imposed, and we noted its distinction from other statutes which provided a range for fines that included a mandatory minimum. *Yang*, ¶ 23. In *Yang*, we did not address a mandatory *minimum* fine statute as here; rather we simply noted the distinction and did not address constitutional proportionality requirements of mandatory minimum fines. Our distinction recognized the Legislature's authority to prescribe sentences and establish penalties, and that a mandatory minimum fine was different from the statute at issue in *Yang*. *Yang* articulated the principle, in the context of the statute there at issue, that a sentencing judge may not be prevented from considering an offender's ability to pay a fine without offending constitutional proportionality considerations and § 46-18-231, MCA. The question of whether the statute here at issue, requiring a mandatory *minimum*, is facially unconstitutional given Montana's statutory and constitutional protections against the imposition of disproportionate fines was not before the Court in *Yang*, where there was no mandatory minimum fine. We contrasted the statute in *Yang* to the statute here only to clarify that we were not opining as to the constitutionality of mandatory *minimum* fines. Here, the issue pertains to a statute that contains both a mandatory minimum and maximum. While much of our reasoning in *Yang* controls here, Justices Rice and Baker's Dissent, ¶¶ 82-83, is misguided when it concludes that an

observation made by the Court in *Yang* as to mandatory minimum fines is controlling here.

¶58 In *Yang*, Yang argued the mandatory requirement that a 35%-market-fine be imposed in every drug possession conviction--without consideration of an offender's resources, the nature of the crime committed, and the burden the required fine would have on the offender--violated Yang's constitutional right against excessive fines. *Yang*, ¶ 9. We held that when a sentencing statute containing a mandatory fine requirement prevents the trial court from considering proportionality factors before imposing a fine, the statute is facially unconstitutional. *Yang*, ¶¶ 18-19, 28. We made the following observations about the 35%-market-value fine at issue in *Yang*, which also aptly describe the mandatory minimum fine at issue here:

> The statute's 'shall' language makes the fine non-discretionary--a court *must* impose the fine upon a person found to have possessed or stored dangerous drugs. [The 35% market-value fine] removes any ability of the trial court, through its mandatory nature, of protecting against an excessive fine. Accordingly, it is inconsequential that in *some* situations--following consideration of the nature of the crime committed, the financial resources of the offender, and the nature of the burden of payment of the fine-- imposition of the 35%-market-value fine is not excessive. What is consequential, however, and which

> occurs in *every* case as a result of the mandatory nature of the fine, is the inability of the trial court to even consider whether the fine is excessive. Here, the important distinction is that in *all* situations a trial court is precluded from considering the factors the Montana legislature has expressly mandated be considered when it enacted § 46-18-231(3), MCA, to ensure that fines are not excessive as guaranteed in both the United States Constitution and Montana's Constitution.

Yang, ¶ 18 (emphasis in original).

¶59 In *Yang* we explained that a facial constitutional challenge arises when the *statute* upon which the district court based the penalty, in all cases, imposes an unconstitutional sentence. An as-applied constitutional challenge alleges that the particular *sentence* imposed upon the defendant is illegal but concedes that the sentencing statute is constitutional. *Yang*, ¶ 11. In *Yang*, we determined that the sentencing statute was facially unconstitutional when it assessed a mandatory fine at 35% of the market value of the drugs in every case and when the mandatory nature of the fine did not permit the sentencing judge from considering proportionality factors. *Yang*, ¶ 18. Yang's appeal challenged the sentencing *statute*, even though in *some* cases the 35%-market-value fine might be considered proportional, because "in *all* situations a trial court is precluded from considering the factors the Montana legislature has expressly mandated be considered . . . to ensure that fines are not excessive . . . ." *Yang*, ¶ 18 (emphasis in original). This Court explained:

> [The 35% market-value fine] is facially unconstitutional to the extent it requires a sentencing judge to impose a mandatory fine without ever permitting the judge to consider whether the fine is excessive. No set of circumstances exist under which [the mandatory fine statute] is valid--the statute is unconstitutional in all of its applications because it completely prohibits a district court from considering whether the 35%-market-value fine is grossly disproportionate to the offense committed.

Yang, ¶ 23.

¶60 Here, Gibbons challenges the constitutionality of the *statute*, not his particular sentence under an otherwise constitutional statute. Gibbons challenges the mandatory fine that must be imposed without consideration of proportionality factors, just as Yang did. Our analysis and holding in *Yang* are conclusive. Thus, like *Yang's* 35%-market-value fine, the mandatory minimum $5,000 fine required by the sentencing statute, every time it is imposed, prevents a judge from considering constitutional and statutorily mandated factors and is, therefore, facially unconstitutional.

¶61 The State attempts to rephrase Gibbons's argument as a question of statutory interpretation and argues that because the statute allowed the sentencing court to impose a prison sentence rather than a fine, the challenge is as-applied and thus not subject to review. However, under the challenged statute, a sentencing court

must impose at least a $5,000 fine, or it may impose a prison sentence with no fine at all. When it does impose a fine, it cannot inquire as to the defendant's ability to pay before doing so, bypassing the constitutional cornerstone of proportionality. Furthermore, if the sentencing court were to conduct an ability-to-pay inquiry, find that an offender is indigent, and thus choose not to impose any fine under the disjunctive "or" language of § 61-8-731(3), MCA, the sentencing court would then be *required* to impose a period of incarceration instead. Far from remedying the constitutional deficiency, as the State argues, this application of the ability-to-pay inquiry runs afoul of the basic prohibition against incarcerating an offender solely for his poverty. *Bearden*, 461 U.S. at 671, 103 S. Ct. at 2072; *Tate v. Short*, 401 U.S. 395, 397-98, 91 S. Ct. 668, 670-71, 28 L. Ed. 2d 130 (1971). In contrast to *Tate*, which held unconstitutional the automatic conversion of a *fine-only* offense to a prison sentence for indigent defendants, we do not opine on whether § 61-8-731(3) presents the same constitutional defect. We merely point out that the statute's disjunctive language allowing the sentencing court to forego a fine and instead impose a penalty of incarceration is not the constitutional equivalent of a proportionality inquiry, nor does it convert Gibbons's argument to an as-applied challenge or question of statutory interpretation.

¶62 Stare decisis is an important policy and plays a significant role in our case law. It protects those who have taken action in reliance on a past decision and reduces the incentive for challenging existing precedent, thus saving parties and courts the time and expense of endless litigation. It fosters reliance on judicial decisions and

contributes to the actual and perceived integrity of the judicial process. *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 2609, 115 L. Ed. 2d 720 (1991). Adhering to precedent "is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 52 S. Ct. 443, 447, 76 L. Ed. 815, 1932 C.B. 265, 1932-1 C.B. 265 (1932) (Brandeis, J., dissenting). However, it has long been recognized that stare decisis is not an inexorable command; rather, it "is a principle of policy and not a mechanical formula of adherence to the latest decision . . . ," *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S. Ct. 444, 451, 84 L. Ed. 604, 1940-1 C.B. 223 (1940), and it is "weakest when we interpret the Constitution . . . ." *Agostini v. Felton*, 521 U.S. 203, 235, 117 S. Ct. 1997, 2016, 138 L. Ed. 2d 391 (1997). When it comes to interpretation of our Constitution, we place a high value on getting it right, because citizens must live with a bad decision unless we correct our mistake. *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 456, 135 S. Ct. 2401, 2409, 192 L. Ed. 2d 463 (2015). Thus, when governing decisions are badly reasoned or insufficiently reasoned, we are not constrained to follow precedent.

¶63 In *State v. Mingus*, 2004 MT 24, 319 Mont. 349, 84 P.3d 658, this Court, addressing the interplay between § 61-8-731, MCA, and § 46-18-231, MCA, summarily concluded in a single paragraph that "[w]hen a fine is statutorily mandated, the court has no discretion as to whether to impose the fine, irrespective of the defendant's ability to pay." *Mingus*, ¶ 15. In *Mingus*, this Court did not consider the *constitutional* implications of imposing a

fine upon a defendant who lacked the financial resources and ability to pay the fine. Over the past twenty years, *Mingus* was not challenged (under the policy of stare decisis) until recently after this Court's precedent began to evolve. Here, for the first time, we have been presented with the question of whether a mandatory fine violates constitutional proportionality requirements embedded in the prohibition against excessive fines and fees of the United States Constitution, the Montana Constitution, and in Montana statutes implemented to protect against such a constitutional violation. It is plain that if we place emphasis on the orderly administration of justice rather than on a blind adherence to unreasoned precedent, *Mingus* must be overruled. It is true that Montana defendants who are poor, as well as their families who often bear the burden of their loved one's financial obligations, have paid a disproportionate penalty in comparison to their wealthier counterparts for the past two decades. That is, however, no justification for this Court to continue to allow impoverished persons in our justice system to be disproportionately impacted in violation of their constitutional rights. No interest could be furthered by such a rigid application of stare decisis, nor such an interest superior to a system of justice based on considered application of our constitution.

¶64 "Article II, Section 22, of the Montana Constitution requires that the sentencing judge be able to consider 'the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine will impose' before ordering the offender to pay [a statutorily mandated fine]." *Yang*, ¶ 24 (quoting

§ 46-18-231(3), MCA). Because, in every case, a sentencing judge imposing *any* fine under § 61-8-731(3), MCA, cannot consider these factors before doing so, we hold that the statute is facially unconstitutional and violated Gibbons's right to be free from excessive fines. *Mingus* is clearly inconsistent with constitutional proportionality requirements and the requirement in § 46-18-231, MCA, that the offender's resources and the nature of the burden created by the fine be considered prior to imposition of a fine--a requirement we have concluded is rooted in the Excessive Fines and Fees Clauses of the Montana and federal constitutions. Accordingly, we overrule *Mingus* to the extent it prevents a court from considering an offender's ability to pay prior to imposing any fine.

CONCLUSION

¶65 The jury instructions provided by the District Court fully and fairly instructed the jury as to the applicable law of the case. Furthermore, the District Court did not abuse its discretion when it allowed the State to rebut the defense's closing argument that the State acted dishonestly when it decided not to introduce photographic evidence.

¶66 Section 61-8-731(3), MCA, is facially unconstitutional to the extent that whenever the sentencing judge imposes a fine, the statute does not allow the judge to consider, before imposing the $5,000 mandatory minimum, the proportionality factors protecting an offender from excessive fines.

¶67 Affirmed in part, reversed in part, and remanded for further proceedings.

/s/ LAURIE McKINNON

We Concur:

/s/ MIKE McGRATH
/s/ INGRID GUSTAFSON
/s/ DIRK M. SANDEFUR

Justice James Jeremiah Shea, concurring in part and dissenting in part.

¶68 I concur with the Court's resolution of Issues One and Two. I also agree with the Court's conclusion that a plain language reading of § 46-18-231, MCA, requires that a sentencing judge may only impose a fine when the offender is able to pay, that it requires the sentencing judge to consider the offender's resources and the nature of the burden payment of the fine will impose, and that § 46-18-231, MCA, unambiguously applies to all convictions where a fine may be imposed, without exception for statutes that include a mandatory minimum fine. Opinion, ¶ 45. But because § 46-18-231, MCA, *statutorily* requires a sentencing judge to consider a defendant's ability to pay before imposing any fine—irrespective of whether or not the fine is mandatory—I would decline to address Gibbons's constitutional challenge. We have repeatedly held that "courts should avoid constitutional issues whenever possible." *State v. Russell*, 2008 MT 417, ¶ 19, 347 Mont. 301, 198 P.3d 271 (quoting *In re S.H.*, 2003 MT 366, ¶ 18, 319 Mont. 90, 86 P.3d 1027). Since this issue can be resolved by applying the mandatory plain language of § 46-18-231, MCA, consistently with the mandatory plain language of § 61-8-731(3), MCA, it can, and should, be decided by harmonizing both statutes, as we are required to do, without resorting to consideration of Gibbons's constitutional challenge.

¶69 I submit that both the Court's holding and Justice Rice's dissent suffer from the same statutory misconstruction, while ironically reaching opposite conclusions. The Court abrogates the mandatory fine

provision of § 61-8-731(3), MCA, by holding it to be facially unconstitutional in violation of the excessive fines provisions of the U.S. and Montana Constitutions, as codified by § 46-18-231(3), MCA. Conversely, Justice Rice would abrogate the mandatory proportionality considerations of § 46-18-231(3), MCA, by holding it is trumped by § 61-8-731(3), MCA.

¶70 "[T]he rules of statutory construction require us to reconcile statutes if it is possible to do so in a manner consistent with legislative intent." *Ross v. City of Great Falls*, 1998 MT 276, ¶ 19, 291 Mont. 377, 967 P.2d 1103. While it is true that "where a specific statute conflicts with a general statute, the specific controls over the general to the extent of any inconsistency," *Gallatin Saddle & Harness Club v. White*, 246 Mont. 273, 276, 805 P.2d 1299, 1301 (1990), "this Court must harmonize statutes relating to the same subject, as much as possible, giving effect to each." *Oster v. Valley County*, 2006 MT 180, ¶ 17, 333 Mont. 76, 140 P.3d 1079 (citation omitted). Neither the Court, nor Justice Rice, attempt to harmonize these two mandatory statutes. Instead, both jump to the conclusion that they cannot be harmonized, with the result being the Court's nullification of the mandatory fine in § 61-8-731(3), MCA, and Justice Rice's nullification of the mandatory provisions of § 46-18-231(3), MCA, as it pertains to statutes that include mandatory fines, notwithstanding the absence of any language that would exclude those statutes from its mandatory provisions.

¶71 Beginning with the Court's analysis, it correctly notes that § 46-18-231, MCA, "clearly and plainly requires" that "whenever" an offender has been found guilty of a

felony or misdemeanor, the sentencing court may "only" impose a fine when the offender is able to pay, and "shall" consider the offender's resources and the nature of the burden payment of the fine will impose. Opinion, ¶ 45. The Court correctly notes that "§ 46-18-231, MCA, applies to all convictions where a fine may be imposed and makes no exceptions for statutes that establish a minimum mandatory fine." Opinion, ¶ 45. Finally, the Court correctly notes that by enacting § 46-18-231, MCA, "the Montana Legislature has effectuated [the] federal and state constitutional protections against excessive fines by codifying the inquiry necessary to guarantee that a fine is proportional," and that the "statute evinces the Legislature's intention to include the offender's financial circumstances in the evaluation of a fine's proportionality . . . ." Opinion, ¶ 50.

¶72 Where the Court's analysis goes awry is that after correctly concluding that the plain language of § 46-18-231, MCA, "makes no exceptions for statutes that establish a minimum mandatory fine," Opinion, ¶ 45, the Court concludes that "the problem [with] the mandatory nature of the minimum fine contained in § 61-8-731(3), MCA (2019), [is] the inability of a sentencing court to consider other sentencing statutes prescribed by the Legislature that codify constitutional proportionality principles." Opinion, ¶ 51. But that problem is remedied by harmonizing § 61-8-731(3), MCA, with § 46-18-231, MCA, giving effect to each statute. *Oster*, ¶ 17 (citation omitted).

¶73 Section 61-8-731(3), MCA, provides a sentencing range for a fifth or subsequent DUI conviction that includes a mandatory minimum fine, should the sentencing

court choose to impose one. But § 46-18-231(3), MCA, also applies to fines imposed for all felonies and misdemeanors, including fifth offense DUIs, and it requires that the sentencing court "may not sentence an offender to pay a fine unless the offender is or will be able to pay the fine and interest[,]" and that "the sentencing judge shall take into account the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine and interest will impose." Harmonizing these two statutes as much as possible in an effort to give effect to each of them, as we are constrained to do, leads to the following process at sentencing: as required by § 46-18-231(3), MCA, the sentencing court "*shall* take into account the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine and interest will impose." Within the context of that mandatory assessment, the sentencing court shall consider whether the defendant is financially able to pay the minimum fine prescribed by § 61-8-731(3), MCA. If the defendant is financially able to pay the mandatory minimum fine, then § 61-8-731(3), MCA, requires the sentencing court to impose a fine within the range prescribed by the statute. However, if the sentencing court determines that the defendant is unable to pay the mandatory minimum fine, then § 46-18-231(3), MCA, allows the sentencing court to impose a fine only to the extent the defendant "is or will be able to pay the fine."

¶74 While I agree with Justice Rice's rejection of Gibbons's constitutional challenge to § 61-8-731(3), MCA, I disagree with his analysis that would vitiate

the mandatory provisions of § 46-18-231(3), MCA, as it pertains to mandatory fines. Although noting that both statutes are of equal dignity, Justice Rice would elevate the provisions of § 61-8-731(3), MCA, over the provisions of § 46-18-231(3), MCA, because § 61-8-731(3), MCA, is specific to DUI offenses, whereas § 46-18-231(3), MCA, applies to all crimes. Rice Dissent, ¶ 86. Justice Rice correctly notes that a specific statute will control over the provisions of an inconsistent general statute, but that does not preclude our obligation to harmonize statutes relating to the same subject matter, as much as possible, to give effect to each. *Oster* ¶ 17 (citation omitted). Because it is possible to harmonize the two statutes in this case, I would not invalidate the mandatory provisions of § 46-18-231(3), MCA, as they pertain to minimum fines.[4]

¶75 In harmonizing these statutes, it is necessary to address this Court's holding in *Mingus*. Both Gibbons and the State discuss *Mingus* at length in their briefs within the context of Gibbons's constitutional challenge. Gibbons argues that our holding in *Mingus*, as it pertains to the application of § 46-18-231, MCA, to statutorily mandated fines is manifestly wrong. The State disagrees.

---

4. Justice Rice acknowledges in his dissent on this issue that there could be cases where the imposition of a fine within a mandatory statutory range may be excessive as applied to a particular defendant, which could provide the basis for an as-applied constitutional challenge during sentencing. Rice Dissent, ¶ 88. The application of the mandatory proportionality considerations of § 46-18-231, MCA, would likely obviate the need for even an as-applied constitutional challenge.

¶76 In *Mingus*, the defendant argued that the District Court erred by not inquiring into his ability to pay, as required by § 46-18-231, MCA, before imposing a mandatory minimum fine pursuant to § 61-8-731, MCA. *Mingus*, ¶ 12. This Court rejected Mingus's argument. After noting that § 46-18-231(3), MCA, provides that a "sentencing judge may not sentence an offender to pay a fine unless the offender is or will be able to pay the fine," and that "[i]n determining the amount and method of payment, the sentencing judge shall take into account the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine will impose," we summarily held: "This statutory provision does not apply to mandatory fines. When a fine is statutorily mandated, the court has no discretion as to whether to impose the fine, irrespective of the defendant's ability to pay." *Mingus*, ¶ 15. In arriving at this summary holding, we did not attempt to harmonize the provisions of § 46-18-231, MCA, with § 61-8-731, MCA, to give effect to each statute, consistent with legislative intent, nor did we offer any explanation as to how and why, despite the plain language of § 46-18-231, MCA, applying to *all* felonies and misdemeanors, without exception, we inserted an exception for mandatory fines.

¶77 In the construction of 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. In *Mingus*, this Court inserted an exception for mandatory fines into § 46-18-231, MCA. In doing so, we abrogated the mandatory provisions of § 46-18-231,

MCA. Because these statutes can be reconciled, I would hold *Mingus* is manifestly wrong. In that regard, rather than providing a basis to find the mandatory fine in § 61-8-731, MCA, unconstitutional, as Gibbons argues, I would hold that the statute is constitutional in this case precisely because the Legislature has provided a *statutory* method for a sentencing court to consider a defendant's ability to pay and to ensure that the fine is proportional.

¶78 When interpreting a statute, "it is the duty of this Court to avoid an unconstitutional interpretation if possible." *Brown v. Gianforte*, 2021 MT 149, ¶ 32, 404 Mont. 269, 488 P.3d 548 (quoting *Hernandez v. Bd. of Cty. Comm'rs*, 2008 MT 251, ¶ 15, 345 Mont. 1, 189 P.3d 638). When read in conjunction with the mandatory proportionality considerations of § 46-18-231(3), MCA, § 61-8-731, MCA, can be interpreted constitutionally. Following our directive to "avoid constitutional issues whenever possible," *Russell*, ¶ 19, I would decide this issue on that basis and decline to consider Gibbons's constitutional challenge to § 61-8-731, MCA. Accordingly, I would remand this matter to the District Court for a determination of Gibbons's ability to pay pursuant to § 46-18-231, MCA. Contingent upon that determination, I would instruct the District Court to impose a fine pursuant to the provisions of § 61-8-731, MCA.

/s/ JAMES JEREMIAH SHEA

Justice Jim Rice, concurring in part and dissenting in part.

¶79 Regarding Issue 3, the Court overturns 20 years of precedent that distinguished mandatory statutory fines from discretionary fines in order to assign a new interpretation to § 61-8-731(3), MCA (2019), so that it may strike down the new interpretation as unconstitutional. I would not do any of those things. Further, in my view, the authorities cited by the Court do not support its determination that § 61-8-731(3), MCA (2019), a statute utilized for 27 years, is facially invalid under either the U.S. or Montana Constitutions. I do not believe the Court is here compelled to exercise the power of judicial review to declare the statute unconstitutional, and thus, I would refrain from doing so. I therefore dissent from Issue 3. I concur in the other issues.

¶80 "A statute is presumptively constitutional . . . . The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action." *Duane C. Kohoutek, Inc. v. State*, 2018 MT 123, ¶ 14, 391 Mont. 345, 417 P.3d 1105 (internal citations omitted). The necessity for these parameters governing the exercise of judicial review by the judiciary, which must "incontestably" be "beyond comparison the weakest of the three departments of power," *The Federalist* No. 78, 496 (Robert Scigliano ed., Random House, Inc. 2000), merits a fuller discussion on another day, but the many expressed reasons include that judicial review can have a "tendency over time seriously to weaken the democratic process." Alexander M. Bickel, *The Least Dangerous Branch* 21 (1962). This is because:

> the exercise of [the power of judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors. The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.

Plyler v. Doe, 457 U.S. 202, 253, n.15, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982) (Burger, C.J., O'Connor, White, Rehnquist, JJ., dissenting) (bracketing in original) (internal quotations omitted) (quoting James B. Thayer, *John Marshall*, 106-07 (1901)).

¶81 In order to prevail on a facial constitutional challenge to a statute, a plaintiff is burdened with demonstrating that "no set of circumstances exists under which the [challenged sections] would be valid, i.e., that the law is unconstitutional in all of its applications." *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131 (brackets in original) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 1190, 170 L. Ed. 2d 151 (2008)). The Court professes adherence to these principles and, therefore, upon their application, I would conclude it is possible in this case to uphold § 61-8-731(3), MCA (2019), against a facial constitutional challenge, and would affirm.

¶82 The Court holds that § 61-8-731(3), MCA (2019),[5] violates Section 22 of the Montana Constitution. Opinion, ¶ 60. The Court reasons that because § 61-8-731(3), MCA (2019), imposes a "mandatory" fine, the statute is facially unconstitutional because it does not set forth an express mechanism for consideration of a defendant's financial circumstances. The Court's decision thus goes beyond the holding in *Yang* and effectively declares that any fine, even within a given range, is facially unconstitutional if it does not contain such an express mechanism. In my view, the extent of the Court's holding is not supported by the federal and state authorities cited by the Court and is unnecessarily overbroad.

¶83 First, § 61-8-731(3), MCA (2019), is significantly different than § 45-9-130(1), MCA, the statute invalidated in *Yang*. Section 45-9-130(1), MCA, imposed a fine based upon a percentage, that being 35%, of the fair market value of drugs illegally possessed by the convicted defendant. *Yang*, ¶ 9. The Court faulted § 45-9-130(1), MCA, for having "no [upper] limit," which would leave a sentencing judge unable to cap the fine. *Yang*, ¶ 23. In doing so, the Court contrasted the statute there with § 61-8-731(3), MCA (2019)—the very statute before the Court today:

> [Section] 45-9-130(1), MCA, mandates a sentencing judge to fine an offender 35% of the drugs' fair market value, thus not

5. Section 61-8-731(3), MCA (2019), applied in this case, was repealed effective January 1, 2022, as part of a general revision to the DUI statutes. *See* 2021 Mont. Laws ch. 498, § 44. The content was recodified at § 61-8-1008 (3), MCA (2021).

> permitting the judge to take any additional circumstances into account when sentencing an offender. *Unlike other mandatory fines which are "provided by [the] law for the offense," § 46-18-201(3)(a), MCA, such as the minimum fine of $5,000 and the maximum fine of $10,000 for driving under the influence of alcohol or drugs, § 61-8-731(1)(a)(iii), (b)(ii), MCA*, there is no limit on the mandatory 35%-market-value fine.

Yang, ¶ 23 (emphasis added). The Court's reasoning on this point is thus inconsistent with *Yang*.

¶84 Despite the reasoning employed in *Yang*, the Court concludes that § 61-8-731(3), MCA (2019), is unconstitutional as well. Since its enactment in 1997, § 61-8-731(3), MCA (2019), has provided not only an upper limit but also a range for fine amounts, and thus grants discretion to sentencing judges to determine what the fine should be within this range, currently between a minimum of $5,000 and a maximum of $10,000. The original fine range, adopted in 1997, was $1,000 to $10,000 and, notably, the upper limit has not been increased over that time. *See* § 61-8-731(1)(c), MCA (1997). The Legislature's provision of a monetary range in contrast to a singular mandatory amount is inherent authority for a judge to consider the circumstances of the offense and the financial resources of the defendant when imposing the fine, reflecting proportionality. The Court acknowledges, in theory, that the principle of proportionality is the touchstone of a court's consideration of the Excessive Fine Clause, Opinion, ¶ 48,

and that fines are not to be "grossly disproportional to the gravity of a defendant's offense." *Bajakajian*, 542 U.S. at 334, 118 S. Ct. at 2036. But this critical principle seems to be lost in the Court's final analysis, which reflects no acknowledgment that the statutory fine range challenged here is applicable to offenders who have, by their actions, caused profound danger for other drivers, pedestrians, and society at large—their *fifth or subsequent* DUI. The safety of the public is thus at stake, making the "gravity of [the] defendant's offense" significantly high. *Bajakajian*, 542 U.S. at 334, 118 S. Ct. at 2036. It is very appropriate in this circumstance that the Legislature would calibrate attendant penalties to deter and punish such dangerous behaviors, particularly when Montana leads the nation in percentage of fatal accidents caused by drunk driving, *see* NHTSA, *2021 Traffic Safety Facts: Alcohol-Impaired Driving* (June 2023), https://perma.cc/C2JC-UJFF. Other state legislatures have imposed similar fines. *See, e.g.*, 75 Pa. Cons. Stat. § 3804(a)(3) (imposing a mandatory minimum of $500 and maximum of $5,000 for third or subsequent DUI offense); R.I. Gen. Laws § 31-27-2(d)(2)(i) (imposing a mandatory fine for a second DUI in a five-year period); 625 Ill. Comp. Stat. 5/11-501(d)(2)(B) (imposing a mandatory fine for third time offenders of aggravated DUI).

¶85 The Court leans heavily on the Supreme Court's ruling in *Timbs v. Indiana* to reason that a statute is unconstitutional under the Eighth Amendment if it lacks an express mechanism to inquire into a defendant's financial resources. Opinion, ¶¶ 48-50. I disagree with this assessment of *Timbs*. There, the Supreme Court's

holding simply applied the Eighth Amendment's Excessive Fines Clause to the states via the Fourteenth Amendment. *Timbs*, 139 S. Ct. at 686-87. While the *Timbs* Court indeed recognized that protections against excessive fines were deeply rooted in this nation's history and traditions, about that point there is no dispute. *See Timbs*, 139 S. Ct. at 691 (Gorsuch, J., concurring) (noting there is "no serious doubt that the Fourteenth Amendment requires the States to respect the freedom from excessive fines enshrined in the Eighth Amendment."). But the Court here further maintains that the *Timbs* Court also "emphasized that an individual's ability to pay was historically an essential factor in determining a fine's excessiveness," Opinion, ¶ 48, an assertion that is overstated; the quote the Court here cites from Blackstone, 4 W. Blackstone, *Commentaries on the Laws of England* 372 (1769), that "no man shall have a larger amercement imposed upon him than his circumstances or personal estate will bear . . . ," was actually made by the *Timbs* Court to support its position that "economic sanctions be *proportioned* to the wrong." *Timbs*, 139 S. Ct. at 688 (emphasis added). Far from "emphasiz[ing]" that the ability-to-pay analysis "was historically an essential factor," Opinion, ¶ 48, the *Timbs* Court's citation to Blackstone was followed by an explanation that its own precedent had never found that a person's income or wealth were relevant considerations in judging the excessiveness of a fine. *See Timbs*, 139 S. Ct. at 688 (citing *Bajakajian*, 524 U.S. at 340, n.15, 118 S. Ct. at 2028). This remains the general law today, before and after *Timbs*. *See, e.g., United States v. Beecroft*, 825 F.3d 991, 997 n.5 (9th Cir. 2016) (rejecting argument that the Court must consider financial hardship placed on

the defendant); *United States v. Carlyle*, 712 Fed. Appx. 862, 864 (11th Cir. 2017) ("The impact of the fine on the individual defendant is not considered, and it is strongly presumed that the forfeiture is constitutional if the forfeiture amount is within the range of fines prescribed by Congress."); *United States v. Bikundi*, 926 F.3d 761, 796, 441 U.S. App. D.C. 293 (D.C. Cir. 2019) ("The Excessive Fines Clause does not make obvious whether a forfeiture is excessive because a defendant is unable to pay, and '[n]either the Supreme Court nor this court has spoken' on that issue.") (citation omitted).

¶86 The Court here also supports its conclusion by tethering it to § 46-18-231(3), MCA, the general sentencing statute, which states that "[t]he sentencing judge may not sentence an offender to pay a fine unless the offender is or will be able to pay the fine" and therefore "shall take into account the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine will impose." The Court concludes that § 46-18-231(3), MCA, "codif[ies] the inquiry necessary to guarantee a fine is proportional," apparently holding this statute is itself universal and exclusive. However, in *State v. Mingus*, 2004 MT 24, 319 Mont. 349, 84 P.3d 658, the Court, *en banc* and unanimously, held that there is a distinction between discretionary fines governed by § 61-8-731(3), MCA, and mandatory fines:

> In cases involving discretionary fines, when a defendant "has been found guilty of an offense for which a felony penalty of imprisonment could be imposed, the sentencing judge

> *may*, in lieu of or in addition to a sentence of imprisonment, impose a fine only in accordance with subsection (3)." Section 46-18-231(1)(a), MCA (emphasis added). Section 46-18-231(3), MCA, states that a "sentencing judge may not sentence an offender to pay a fine unless the offender is or will be able to pay the fine. In determining the amount and method of payment, the sentencing judge shall take into account the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine will impose." *This statutory provision does not apply to mandatory fines. When a fine is statutorily mandated, the court has no discretion as to whether to impose the fine, irrespective of the defendant's ability to pay.*

Mingus, ¶ 15 (emphasis added). The Court reasons that *Mingus* is now "clearly inconsistent" with § 46-18-231, MCA, and overturns it, thus discarding our precedential distinction between discretionary and mandatory fines. Opinion, ¶ 64. In my view, our decision in *Mingus* is not inconsistent with the statute and should not be overruled. The Legislature, pursuant to its primacy, which the Court acknowledges, Opinion, ¶ 50, has enacted both, and "[w]hen a general statute and a specific statute are inconsistent, the specific statute governs, so that a specific legislative directive will control over an inconsistent general provision." *Mosley v. Am. Express Fin. Advisors, Inc.*, 2010 MT 78, ¶ 20, 356 Mont. 27, 230 P.3d 479; *see also*

Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17, 21, 133 S. Ct. 500, 504, 184 L. Ed. 2d 328 (2012) (explaining that "the ancient interpretive principle that the specific governs the general" applies to provisions of "equivalent dignity"). Section 46-18-231(3), MCA, is a general sentencing statute that directs a judge to consider "the financial resources of the offender," amongst other factors. Section 61-8-731(3), MCA (2019), is a specific statute providing a sentencing range for a specific offense, a fifth or subsequent DUI offense. Because both statutes were laws enacted pursuant to the powers of the Montana Legislature, they are of equal dignity, and the specific statute should be applied above the general.

¶87 Justice Shea's concurrence takes the position that § 46-18-231(3), MCA, and § 61-8-731(3), MCA (2019), can be harmonized. Concurrence, ¶ 68. Under this harmonization, however, the defendant would be subject to the minimum fine under § 61-8-731(3), MCA (2019), only if a sentencing court determines the defendant has the current ability to pay it. In other words, the fine would be "mandatory" only if it is also ruled to be affordable, and thus, this attempt at reconciliation succeeds only by eliminating the mandatory nature of the fine. Harmonization cannot undermine the clear purpose of § 61-8-731(3), MCA (2019), as well as our holding that distinguishes mandatory fines from discretionary fines. *Mingus*, ¶ 15. Both statutes can instead be properly harmonized—and their natural reading preserved—by following our precedent and applying our interpretational statutes. Such a review renders § 61-8-731(3), MCA (2019) to be a narrower and specific exception to the otherwise governing rule

that Montana courts consider a defendant's financial circumstances when imposing fines.

¶88 At bottom, the Court holds that all such statutes, providing a range of fines, for any offense, are necessarily facially unconstitutional if an express mechanism for assessing financial circumstances is not provided. To do so, it overrules longstanding precedent and strikes down a long-used statute. "Stare decisis is a fundamental doctrine that reflects this Court's concerns for stability, predictability, and equal treatment." *State v. Wolf*, 2020 MT 24, ¶ 21, 398 Mont. 403, 457 P.3d 218 (citing *Formicove, Inc. v. Burlington N., Inc.*, 207 Mont. 189, 194, 673 P.2d 469, 472 (1983)). We adhere to the doctrine so that, "above all, citizens may have some assurance that important legal principles involving their highest interests shall not be changed from day to day." *Wolf*, ¶ 21. I agree that there could be cases where the imposition of a fine within such a statutory range may be excessive as applied to a particular defendant, who may raise this constitutional issue during the sentencing phase. But I disagree that the statute is unconstitutional in all cases.

¶89 Striking down a statute that has been utilized in our court system for 27 years on the ground it is facially unconstitutional is a disruption to the judiciary and also our democracy. *See United States v. Davis*, 139 S. Ct. 2319, 2337, 204 L. Ed. 2d 757, (2019) ("A decision to strike down a 33-year-old, often-prosecuted federal criminal law because it is all of a sudden unconstitutionally vague is an extraordinary event in this Court.") (Kavanaugh, J., joined by Alito and Thomas, JJ., dissenting). It is

especially so when the burden the Court has imposed for facial constitutionality is not mandated by our federal or state constitutions. I do not agree that the Court's exercise of judicial review is here compelled.

¶90 I would reject the facial challenge to § 61-8-731(3), MCA (2019), and affirm.

/s/ JIM RICE

Justice Beth Baker joins in the concurring in part and dissenting in part Opinion of Justice Rice.

/s/ BETH BAKER

Appendix B — Judgment and Sentence of the Montana Nineteenth Judicial District Court, Lincoln County, filed June 30, 2021

MONTANA NINETEENTH JUDICIAL DISTRICT COURT, LINCOLN COUNTY

Cause No. DC-19-119

STATE OF MONTANA,

Plaintiff,

vs.

ROBERT MURRAY GIBBONS, DOB: 10/31/1943

Defendant.

Filed June 30, 2021

JUDGMENT AND SENTENCE

MATTHEW J. CUFFE, District Judge

The Defendant, ROBERT MURRAY GIBBONS, was convicted after a jury trial on April 29, 2021, of the following offense committed in Lincoln County, Montana:

> **COUNT I, DRIVING UNDER THE INFLUENCE OF ALCOHOL—4TH OR SUBSEQUENT OFFENSE,** a felony, committed on or about September 19, 2019.

Appendix B

The Court received a Pre-sentence Investigation Report and conducted a hearing in aggravation or mitigation of sentence on June 21, 2021. Defendant was personally present with his counsel, Liam Gallagher, Esq. The State was represented by Marcia Boris, Lincoln County Attorney.

The Court heard recommendations from the parties concerning sentencing.

IT IS HEREBY ORDERED:

1. As to the offense of **COUNT I, DRIVING UNDER THE INFLUENCE OF ALCOHOL—4TH OR SUBSEQUENT OFFENSE,** a felony, in violation of § 61-8-401, M.C.A., Defendant is sentenced to the Montana Department of Corrections for a period of 5 years. Defendant shall receive 11 days credit for time served.

2. The Defendant shall pay a fine in the amount of $5,000.00 payable to the Clerk of District Court, 512 California Avenue, Libby, MT 59923.

IT IS HEREBY FURTHER ORDERED:

During the period of time the Defendant is released on parole or community supervision, the Court recommends that the Defendant comply with the following terms and conditions:

Appendix B

1. The Defendant shall be placed under the supervision of the Department of Corrections, subject to all rules and regulations of Adult Probation & Parole.

2. The Defendant must obtain prior written approval from his supervising officer before taking up residence in any location. The Defendant shall not change his place of residence without first obtaining written permission from his supervising officer or the officer's designee. The Defendant must make the residence open and available to an officer for a home visit or for a search upon reasonable suspicion. The Defendant will not own dangerous or vicious animals and will not use any device that would hinder an officer from visiting or searching the residence.

3. The Defendant must obtain permission from his supervising officer or the officer's designee before leaving his assigned district.

4. The Defendant must seek and maintain employment or maintain a program approved by the Board of Pardons and Parole or the supervising officer. Unless otherwise directed by his supervising officer, the Defendant must inform his employer and any other person or entity, as determined by the supervising officer, of his status on probation, parole, or other community supervision.

5. Unless otherwise directed, the Defendant must submit written monthly reports to his supervising officer on forms provided by the probation and parole bureau. The Defendant must personally contact his supervising officer or designee when directed by the officer.

6. The Defendant is prohibited from using, owning, possessing, transferring, or controlling any firearm, ammunition (including black powder), weapon, or chemical agent such as oleoresin capsicum or pepper spray.

7. The Defendant must obtain permission from his supervising officer before engaging in a business, purchasing real property, purchasing an automobile, or incurring a debt.

8. Upon reasonable suspicion that the Defendant has violated the conditions of supervision, a probation and parole officer may search the person, vehicle, residence of the Defendant, and the Defendant must submit to such search. A probation and parole officer may authorize a law enforcement agency to conduct a search, provided the probation and parole officer determines reasonable suspicion exists that the Defendant has violated the conditions of supervision.

9. The Defendant must comply with all municipal, county, state, and federal laws and ordinances

and shall conduct himself as a good citizen. The Defendant is required, within 72 hours, to report any arrest or contact with law enforcement to his supervising officer or designee. The Defendant must be cooperative and truthful in all communications and dealings with any probation and parole officer and with any law enforcement agency.

10. The Defendant is prohibited from using or possessing alcoholic beverages and illegal drugs. The Defendant is required to submit to bodily fluid testing for drugs or alcohol on a random or routine basis and without reasonable suspicion.

11. The Defendant is prohibited from gambling.

12. The Defendant shall pay all fines, fees, and restitution ordered by the sentencing court.

13. The Defendant shall pay a fine in the amount of $5,000.00 payable to the Clerk of District Court, 512 California Avenue, Libby, MT 59923.

14. The Defendant, convicted of a felony offense, shall submit to DNA testing. (§44-6-103, MCA)

15. The Defendant shall not abscond from supervision. Absconding is a non-compliance violation as defined in §46-23-1001(1), MCA.

16. The Defendant shall obtain a chemical dependency evaluation by a state-approved evaluator. The Defendant shall pay for the evaluation and follow all of the evaluator's treatment recommendations.

17. The Defendant shall successfully complete Cognitive Principles & Restructuring (CP&R) or similar cognitive and behavioral modification program.

18. The Defendant shall not possess or use any electronic device or scanner capable of listening to law enforcement communications.

19. The Defendant shall abide by a curfew as determined necessary and appropriate by the Probation & Parole Officer.

20. The Defendant shall not enter any bars.

21. The Defendant shall not enter any casinos.

22. The Defendant shall not knowingly associate with probationers, parolees, prison inmates, or persons in the custody of any law enforcement agency without prior approval from the Probation & Parole Officer. The Defendant shall not associate with persons as ordered by the court or BOPP. No association with known drug users.

23. The Defendant shall comply with all sanctions given as a result of an intervention, on-site (preliminary), or disciplinary hearing.

24. The Defendant's driver's license shall be suspended pursuant to §45-9-202(2)(e), MCA, or §61-5-205 and §61-5-208, MCA.

25. The Defendant shall participate in the 24/7 Sobriety and Drug Monitoring Program, or any program specifically designed to monitor and address the Defendant's use of intoxicants, for a period of time to be determined by the supervising Probation & Parole Officer, if the Officer deems it necessary and the program is available. [§46-18-201(4)(o), MCA]

26. The Defendant shall not operate a motor vehicle unless authorized by the Probation & Parole Officer. If the Officer authorizes the Defendant to drive, he shall not drive unless the vehicle is equipped with an ignition interlock system. (§61-8-731, MCA)

27. The Defendant shall enter and remain in an aftercare treatment program for the entirety of the probationary period. The Defendant shall pay for the cost of out-patient alcohol treatment during the term of probation. (§61-8-731, MCA)

28. The PSI report shall be released by the Department to certain persons, such as treatment providers, mental health providers,

and/or medical providers, as needed for the Defendant's rehabilitation.

THE COURT'S REASONS FOR THIS SENTENCE:

1 The sentence is appropriate sentence given the Defendant's criminal history.

NOTICE:

If a written judgment and an oral pronouncement of sentence or other disposition conflict, the defendant, or the prosecutor in the county in which the sentence was imposed may, within one hundred twenty (120) days after filing of the written judgment, request that the court modify the written judgment to conform to the oral pronouncement. The court shall modify the written judgment to conform to the oral pronouncement at a hearing, and the defendant must be present at the hearing unless the defendant waives the right to be present or elects to proceed pursuant to §46-18-115, M.C.A. The defendant and the prosecutor waive the right to request modification of the written judgment if a request for modification of the written judgment is not filed within one hundred twenty (120) days after the filing of the written judgment in the sentencing court.

DONE IN OPEN COURT the 21st day of June, 2021.

SIGNED this 30th day of June, 2021.

/s/ Matthew J. Cuffe
MATTHEW J. CUFFE
District Judge

Appendix C — Transcript of Sentencing Hearing on Appeal in the Supreme Court of the State of Montana, filed June 7, 2021

IN THE SUPREME COURT
OF THE STATE OF MONTANA

Case Number: DA 21-0413

STATE OF MONTANA,

Plaintiff/Appellee,

vs

ROBERT MURRAY GIBBONS,

Defendant/Appellant.

Filed June 7, 2021

TRANSCRIPT ON APPEAL

From the District Court of
the Nineteenth Judicial District of the State
of Montana in and for the County of Lincoln

Appendix C

[3] MONTANA NINETEENTH
JUDICIAL DISTRICT COURT
LINCOLN COUNTY

DC-19-119

THE STATE OF MONTANA,

Plaintiff,

vs.

ROBERT MURRAY GIBBONS,

Defendant.

JUDGE MATTHEW J. CUFFE

Taken in Lincoln County Courthouse, June 21, 2021.

APPEARANCES

MARCIA BORIS, Lincoln County Attorney
Attorney for the State of Montana

LIAM GALLAGHER, Office of the Public Defender
Attorneys for Defendant, Robert Murray Gibbons

TRANSCRIPT OF SENTENCING HEARING

Appendix C

[4] INDEX

[5] JUNE 21, 2021

SENTENCING

THE COURT: Okay, next up DC-19-119, State of Montana versus Robert Murray Gibbons. All right. The Court calls to order DC-19-119, State of Montana versus Robert Gibbons. Mr. Gibbons is here in Court today along with his attorney, Mr. Liam Gallagher. The State is represented by County Attorney, Marcia Boris.

So this is the time set for sentencing having held a jury trial and that jury finding Mr. Gibbons guilty. We set sentencing for today and the PSI has been filed and

the Court has had an opportunity to review it. Did you receive the PSI, Ms. Boris?

MS. BORIS: I did, Your Honor.

THE COURT: Any factual inaccuracies that we need to address or deal with?

MS. BORIS: No.

THE COURT: Mr. Gallagher, you received the PSI?

MR. GALLAGHER: Yes, we have, Judge.

THE COURT: Any factual inaccuracies [6] or things we need to address?

MR. GALLAGHER: No, Judge.

THE COURT: Okay. With respect to terms and conditions of community supervision that are outlined on pages 8, 9, 10 and 11 in paragraphs 1 through 28, any of those that either do not relate to Mr. Gibbons, or the crime for which he has been found guilty of, or are unreasonable as they apply to him?

MR. GALLAGHER: No, Judge. I don't believe so, I think we would be asking the Court to not fully impose some of the fines and fees due to an inability to pay, but that's all.

THE COURT: All right. Do you want to handle those now through—are you going to do witness testimony

on those, are you going to do argument, how do you want to handle it?

MR. GALLAGHER: Yes, Judge. I will be calling Mr. Gibbons as a witness to testify and to get some other information so I would just handle it at that time.

THE COURT: Very good. That's what I needed to know. Any witnesses from the State?

[7] MS. BORIS: No, Your Honor, but the State does have an exhibit.

THE COURT: Mr. Gallagher, have you seen the exhibit? All right. The State doesn't have any—you may bring that exhibit up and give it to the Clerk please and have her mark it. What is the exhibit?

MS. BORIS: Driving history, Your Honor.

THE COURT: Driving history. Any objection to the State introducing this, Mr. Gallagher?

MR. GALLAGHER: Just one moment.

THE COURT: Okay.

MR. GALLAGHER: We have no objection, Judge.

THE COURT: All right, very good. So State's Exhibit 1 has been admitted for purposes of today's sentencing only without objection. So there that is. Let's

go ahead and call your witness then, Mr. Gallagher, you may call Mr. Gibbons. Mr. Gibbons, if you would please, come up, our Clerk will swear you in and then you will [8] take the witness stand for me, sir.

ROBERT MURRAY GIBBONS

Called as a witness herein, having been first duly sworn, was examined and testified as follows:

THE COURT: All right, Mr. Gibbons, if you would please, come right over and have a seat in the witness chair. I need you to speak into the microphone. That's how we get our record. It is pretty sensitive. You don't need to shout or anything but make sure you speak into it. Tell us your first and last name.

MR. GIBBONS: My name is Robert Gibbons.

THE COURT: All right. And you are the Defendant in this action, is that right?

MR. GIBBONS: That is right.

THE COURT: Okay. Mr. Gallagher you may inquire.

[9] DIRECT EXAMINATION

QUESTIONS BY MR. GALLAGHER:

Q. Thank you. So, Mr. Gibbons, first I want to talk to you about this—the incident that led to this conviction.

Can you just—you didn't testify at any of your jury trials, is that correct?

A. That's right.

Q. And so I want to ask you, can you tell us what was going on that evening? What was your—what had happened prior to you falling asleep in your vehicle and what was your intention that evening?

A. Well, I first went to the Home Bar and had four rum and cokes. Then I went over to the VFW and had a couple. I was looking for a lady friend I used to know ten years ago, that's why I went there. And then on the way out I realized I was feeling sick and I knew I had too much to drink. So I got into my car, my truck, put the key in the ignition and said to myself, I can't do that. I can't drive. I just am, I know I am too intoxicated. I didn't want a get a DUI [10] and I didn't want to hurt anybody, so I just fell asleep leaving the key in the ignition.

And it seemed like but a minute and Officer Miller tapped on the window and I was sleeping but I woke right up. He asked me what I was doing. I said, "sleeping, I can't drive." And then he proceeded to call me out and was going through the procedure they have, and I failed it, of course. And that's about it.

Q. So, Mr. Gibbons, in this case you elected to go to a jury trial, correct?

A. Yes, I did.

Q. And we had reviewed a number of offers that would have potentially avoided that trial, correct?

A. Yes, I consulted you with it too.

Q. One of those offers was amending the DUI to a Criminal Endangerment and us jointly recommending to this Court five years of probation. Do you recall me conveying that offer to you and you rejecting it and electing to proceed to jury trial?

A. That's right. I remember it very [11] well.

Q. Okay. So why, Mr. Gibbons, did you reject that offer? Why didn't you just take that offer and plead guilty to that amended charge of Criminal Endangerment?

A. Well, I felt I wasn't guilty of driving while intoxicated because I wasn't driving, I was sleeping. And my intentions were not to drive intoxicated so I felt that I was—I could plead guilty on something that I felt that, you know, I was doing the right thing.

Q. Okay. Since this allegation arose, has it caused you to make some changes in your life?

A. Yes, a great deal. I haven't had anything to drink since then. My Dr. Miller told me that I can't anymore. I've got liver failures because of drinking so many years and I also now I am a full-fledged diabetic, so I can't drink anymore, and I haven't, and I feel a lot better.

Q. And during the pendency of this case, roughly twenty months or so now, is that correct?

A. That's right.

[12] Q. You've been subject to pretrial monitoring?

A. I've seen, if you mean by I seen Vanessa Williamson. I've seen her quite often and talked to her and got her advice. So if that's what you are referring to.

Q. I guess I was under the impression that you were subject to some 24/7 monitoring where you submitted a breath test?

A. Oh, yes, yes. Five months of it right here and then I went on my own OR after that for over a year now.

Q. Okay. During the five months that you were subject to that monitoring were there any issues that you are aware of?

A. No, I complied with it.

Q. And then since that point in time working with Ms. Williamson, are you aware of any issues that she has with your conduct?

A. No, I get along with her real well.

Q. You gave me some documents regarding your medical situation, is that right?

A. Yes.

[13] Q. May I approach, Judge.

THE COURT: You may.

Q. So, Mr. Gibbons, I've handed you what's been marked Defendant's Exhibits A, B and C. Why don't you start with Defendant's Exhibit A and tell me what that is. And that is probably the three-page document.

A. Oh, yeah. Well, this is from the VA in Spokane, and they show that, well, when they do—well, when they first got a hold of me they said I better get down right away because I have liver and kidney failures. And beings I've been off of alcohol for over a year this shows that I am improving. So if I was drinking this would have showed it was worse. So, that's A.

Q. Okay. Then what about Defendant's Exhibit B, what is that, Mr. Gibbons?

A. Oh, yeah, this is from the Libby Clinic from my doctor, and this is where she says that I can't be drinking alcohol anymore and I've been taking her advice because of the letter.

Q. Okay. And then what's Defendant's Exhibit C?

[14] A. Oh, I have a bad back and this is ever since 2017 I've been seeing Scott Foss over here and he's been adjusting my—and VA also is my health provider and they are paying for it in other words.

Q. Okay. So for your back you are seeing someone here in Libby and getting that addressed, correct?

A. Yes, that's Dr. Foss, Scott Foss.

Q. I'm sorry, go ahead.

A. Dr. Scott Foss.

Q. And you said Dr. Miller as well. Can you tell us what services Dr. Miller is providing to you?

A. Well, I have an annual checkup but now it is every six months because of my health, and that's what she does. And I work with the VA through her and the clinic.

Q. As far as attending to your medical issues, specifically your liver, do you feel like you are adequately addressing those issues?

A. Oh, yes. I stay sober, that's the whole thing. I can't drink anymore. That's, you [15] know, it's a death sentence if I do.

Q. Okay. So now that you aren't consuming alcohol any longer, have you found—I mean how has life been during the last year? Have you gotten different hobbies or how is it different?

A. All together I feel so much better. I'm attending church now. And in (unintelligible) they just got started there and I just feel a hundred percent better. I was really

miserable not realizing it not with drinking. I didn't know that it was actually killing me.

Q. While this case has pended for the last 20 months you resided here in Libby for a little while but you also went down to Arizona, right?

A. Yes, I did.

Q. And that's where you try to spend your winter months?

A. That's what I do and I visit my sister in (unintelligible). She said she was glad to hear I had quit drinking.

Q. I bet. So, Mr. Gibbons, as far as [16] you say that you are engaged for some medical services at the VA, the Veterans Administration, is that correct?

A. It's the Libby Clinic and they deal with the VA.

Q. And so can you tell us our you a veteran, or have you served in the military?

A. Yes, I served in the U.S. Air Force and got an honorable discharge.

Q. That was honorable you said?

A. Yes.

Q. Okay. And what—how many years were you in the Air Force?

A. I was a total of six years. Two years active and four years inactive. That was during the Cuban crisis, 62, 3, 4.

Q. Okay. So, Mr. Gibbons, you are aware that you've had some prior DUIs, correct?

A. Yes, I did.

Q. And despite that, what are you requesting that the Judge do with you? Are you wanting to go off to the Department of Corrections and receive treatment or are you asking this Court [17] for some type of probationary sentence where you could be on probation?

A. The latter. The probation, I feel that I, beings that I am not drinking I won't be a risk or a problem.

Q. I don't have any further questions.

THE COURT: Any questions, Ms. Boris?

MS. BORIS: Yes, thank you, Your Honor.

Appendix C

CROSS EXAMINATION

QUESTIONS BY MS. BORIS:

Q. Good afternoon, Mr. Gibbons.

A. Good afternoon.

Q. You have had an opportunity to review the Presentence Investigation Report that was prepared in this case, is that right?

A. I haven't looked at it, no.

Q. Okay. You heard your attorney indicate to the Court that there were no changes or corrections, no factual changes or corrections to that, is that fair?

A. Yeah, Earlier I did, yes.

Q. Okay. And in looking at your [18] criminal history with regard on this Presentence Investigation Report, it appears that you have had a total of 15 arrests for DUI since 1986. Would you disagree with that?

A. No, that's probably accurate.

Q. Okay. And isn't it also true, sir, that this conviction after you—when you were found guilty by the jury, after your jury trial, is your 10th DUI conviction since 1986?

A. So many of them I just have to assume you are right. I am not denying that.

Q. Okay. And you sat through your trial, correct?

A. Yes, I was there.

Q. And as a result of doing that you understand that it is illegal for you to be in actual physical control of a motor vehicle while you under the influence of alcohol, correct?

A. I'd have to disagree. When I was laying flat down sleeping, I can't see how I could be under physical control. That is why I pleaded not guilty.

Q. Okay. So, but a jury found that you [19] were in actual physical control, would you disagree with that?

A. Yeah, the third time, they did the third time, yeah.

Q. Sure. Okay. And would you disagree with me that that is illegal?

A. Um, in a position laying down sleeping, I wouldn't do it again, but I just can't see how I could have been under physical control. I have never seen a person laying down driving a car while he was sleeping laying down. As the way I see it I did the right thing. I have to stick to that. You know.

Q. All right. Okay. Your attorney asked you some questions relating to your medical condition and you referred to a number of exhibits that you have in front of you, correct?

A. Yes.

Q. Okay. I'm going to have you look at Exhibit A, and that is I think the three-page document, are we talking about the same one?

MR. GALLAGHER: Yes.

A. Right.

[20] Q. Okay. I would like to direct your attention to the second paragraph of that letter that begins "Belinda Wise has reviewed . . . " Do you see that?

A. Yes.

Q. Could you read that paragraph for us please?

A. "Belinda Wise has reviewed your recent lab results (listed below) and wants you to know that over all your CBC (complete blood count), CMP (complete metabolic panel/liver panel), Free T4 and TSH typhoid tests look good."

Q. And that last set of parenthesis, it actually reads Thyroid test not Typhoid, would you agree with that?

A. Um, I don't have my glasses on that's why I'm kind of slow at reading this but you are probably right.

Q. Okay. So this letter tells you and this letter is dated when, sir?

A. Okay. May 26th, this was the last one of what I got.

Q. And do you wear reading glasses, sir?

[21] A. Yes, I thought I had them with me but I left them at home. Sorry about that.

Q. No, that's okay. And it appears that the date of that letter is actually May 25th not 26th.

A. Okay.

Q. See that?

A. Okay.

Q. And so on May 25th your liver panel looked good according to this record, correct?

A. Yes.

Q. And you are telling us that that is as a result of you no longer drinking alcohol, is that right?

A. Yeah, it's gone up since my first papers I had that showed that I was poor, which was six months ago or so, or a year. This is the second letter I got and now it is saying I'm good.

Q. Okay. Okay.

A. That's why I mentioned it. From staying away from alcohol and so now the results is good.

Q. Okay. And so if you were committed [22] to the Department of Corrections you would agree with me that you would not be able to consume alcohol, correct?

A. I've been in prison before, and I'll tell ya if I wanted to drink in prison I could, they make it there. I wouldn't do it. If I was in prison I wouldn't drink, if I am out here I wouldn't drink. I can't drink anymore.

Q. Right, because you said it would be a death sentence for you if you drink, right? Is that what I heard earlier?

A. Yes. Yeah, I would go back to cirrhosis of the liver or something.

Q. Okay. And would you agree with me that if you drink and drive that's going to be potentially a death sentence for someone else?

A. I wouldn't do that. I wouldn't drink and drive anymore.

Q. All right.

A. I wouldn't drink so I wouldn't be drunk driving.

Q. All right. Your Honor, I don't have any further questions for this witness.

[23] THE COURT: Okay. Redirect?

MR. GALLAGHER: Judge, I would just offer Defendant's Exhibits A, B and C. That's all.

THE COURT: Any objection to A, B and C?

MS. BORIS: No, Your Honor.

THE COURT: All right. A, B and C are admitted as exhibits. You can just leave them right there, Mr. Gibbons, we will pick them up when we are done.

A. Okay.

THE COURT: You can go back to the table. Thank you.

A. Thank you.

THE COURT: Yes. That's your only witness, Mr. Gallagher?

MR. GALLAGHER: Yes, Judge, correct.

THE COURT: All right. Very good. So, no rebuttal to that, correct?

MS. BORIS: No, Your Honor.

THE COURT: okay. I will hear recommendations then from the parties. We will [24] start with the State, please.

Appendix C

STATE'S RECOMMENDATION

MS. BORIS: Thank you, Your Honor.

This case was charged as a Fifth Offense, DUI, but that is misleading. The statutory scheme in Montana only provides for punishment at different, and increasing punishment up to the fifth Offense. A review of Mr. Gibbons' criminal history as contained in the Presentence Investigation Report indicates that he has been arrested for DUI on 15 occasions and this is his tenth conviction for DUI.

For that reason the State is recommending that the Defendant be committed to the Department of Corrections for the maximum possible period of time, and that is five years. We would ask that he be assessed a fine in the amount of five thousand dollars ($5,000), and pursuant to §61-8-733(1)(c) of the Montana Code Annotated, we would ask that the vehicles that Mr. Gibbons owned at the time of the offense be forfeited. I did have a list of those run this morning. And we are talking about a 1992 GMC [25] Sierra pickup, and I do have the VIN number here if the Court needs it, as well as a 2013 motorcycle, I also have the VIN of that if the Court requires it. We would ask that Mr. Gibbons be given credit for eleven days served in custody prior to his sentencing today. And we are asking that should Mr. Gibbons be released to any sort of community supervision that the Court impose the conditions that are contained on pages 8 through 11 of the Presentence Investigation Report and those are conditions 1 through 28. Thank you.

Appendix C

THE COURT: Okay. Recommendation, Mr. Gallagher.

DEFENDANT'S RECOMMENDATION

MR. GALLAGHER: Thank you, Judge.

So I can appreciate the State's concern on the one end. We have an individual here who has a history of DUI. I think though that even the State could appreciate our perspective here, that we have an older gentleman who made a decision to sleep in his vehicle, and I guess law even criminalizes that now, but on the spectrum of potential harm, making the decision to sleep in your car is sure a [26] lot better decision than driving down the road. And you know maybe there are other ways of avoiding that scenario which is not drinking to the point of excess and we can appreciate that. But if you find yourself in a situation where you drank too much, it's sure a lot better to make the decision that Mr. Gibbons made than to going cruising down the road.

At the testimony at trial we had testimony proffered that was essentially well maybe it wouldn't have been actual physical control if the key would have been in a different place, or maybe had something else slightly been done. And that's the kind of conundrum of this actual physical control law. What does it actually mean? What does it boil down? We at least can agree I think that Mr. Gibbons was moving in the right direction away from driving, and maybe he just didn't get far enough away from actual physical control to take his conduct out of the

criminalization sphere. But I would submit that he was moving in that direction by not moving at all, of course.

[27] And I say that I think the State can appreciate our side because, in fact, they offered us an entirely suspended sentence on criminal endangerment. So when they come in here today and say we want the maximum, this gentleman needs to go off to the Department of Corrections, well, had Mr. Gibbons not been a man of, maybe some people would say principle, other people would say, I don't know, is stubborn about the way the laws have changed and it is not the same country or the same place that she grew up in. Things are more strict and we are more fearful, and we are trying to make sure people don't even get near that ignition and what you did was technically illegal now.

But, you know, whether that is stubbornness or whether that's principle, he made the decision to go to trial. And I submit to the Court that he shouldn't be punished for that.

When you have a county attorney's office making an offer of a five-year suspended sentence, and here we are, why are we giving him five years to the Department of Corrections simply because he [28] exercised his right to trial and he wanted twelve people of the community to tell him this is not acceptable anymore. And sometimes people just need to see it to believe it. And now he knows. As he testified today he is not going to find himself in that situation anymore because it is going to be a lot easier to avoid any of those types of situations when you are not drinking.

Appendix C

And it is sure a lot easier to refuse alcohol when it is a death sentence.

Mr. Gibbons has given some information to the Court and, you know, that's not the only information he has, he's consulting with doctors. And he knows now that the condition that he has he will quickly deteriorate if he consumes alcohol and he has made the conscious decision not to do that. He looks a lot healthier than he did when this case first got off the ground. And he would have, if the Court were to go along with a five year DOC suspended sentence, he would have not only his doctors telling him you will die if you drink, he's going to have probation and parole keeping an eye on him and making sure that he [29] doesn't make a bad decision. If he were to ever come near alcohol whatsoever, he would—could have that sentence very quickly revoked.

I have some additional concerns. I have the key to Mr. Gibbons' camper, which is if he is arrested I am supposed to put that underneath a—well, I shouldn't tell everyone here. I'm not telling you where I am going to put it. Hopefully I am not in that situation but his camper is loaded on the back of that pickup truck. And you know in the plea agreement that we had been offered there was nothing about forfeiture of vehicles, let alone a man's home. That's where he lives. And I would ask that the Court go along with a suspended sentence and show this man some mercy, he's given a military service to this country. And if ever there was a time to throw the book at him it wouldn't be on this one, it would have been on the previous ones where maybe we were lax in the 80's and 90's, but it

is not this one. He's made changes in his life and I don't want to see this guy in custody and I don't think we need him in custody. Probation and [30] parole would be able to adequately supervise him. I wanted to ask Probation and Parole to get an answer to that question. I suspect they would have told me the same thing the County Attorney told me when they offered a suspended sentence to Mr. Gibbons, that he is supervisable in the community. Mr. Watson who did the PSI is not here. And I tried to get Mr. Vanderhoef to go out on a limb with me and he declined, which I can appreciate. But that's our request, Judge. Thank you.

THE COURT: Okay. So, Mr. Gibbons, sir, you've already provided some testimony from your attorney, or in answering your attorney and the State's questions. You have the right to give a statement. You don't have to. You have the right to remain silent. This is your opportunity if you wish to provide the Court with some sort of a statement prior to sentencing that you want me to have additional information that you wish me to consider before I impose sentence now is your opportunity to do that. Do you wish to make any sort of a statement?

[31] MR. GIBBONS: I would. I don't know what to say but I know I can't drink anymore. I know in the past and I was driving and I deserved it. This time I feel in my heart I did the right thing. I didn't want to put anybody in danger, and I know I can't drink anymore, and I know I could follow the rules, as long as I'm not drinking I have nothing to worry about if I am on probation. And I will do the best I can and be 110 percent and I know I could do it. And that's all I need to say.

Appendix C

THE COURT: Okay. All right. Any reason why we shouldn't impose sentence at this time, Ms. Boris?

MS. BORIS: No, Your Honor.

THE COURT: So we have State's 1, for the record, we have Defendant's A, B and C, they have all been moved for and admitted. Is that right? You agree, Ms. Boris?

MS. BORIS: I do, Your Honor.

THE COURT: You agree, Mr. Gallagher?

MR. GALLAGHER: Yes, Judge.

[32] THE COURT: So that's the record including the PSI. So any reason why we shouldn't impose sentence at this time?

MR. GALLAGHER: No, Judge.

COURT'S SENTENCE

THE COURT: All right. So, I appreciate everybody's arguments that have been made today. I understand them. I understand the arguments made at trial in all the cases. But my job is to look at this and to assess it and to see what is the appropriate sentence regardless of what somebody may have, how they may have looked at it before trial or after trial. My job is to look at this with an individual in Mr. Gibbons' situation who has ten convictions of DUI dating back to the mid-80s. And the last one, it's not even

a conviction, the last arrest was in 2016 and apparently there is some sort of Oregon warrant out there, I don't know for failure to appear. I don't know those situations.

I understand the request for a suspended sentence. The statements about not drinking and all of those things. But when I look [33] through your record I see bouts of a year or two of not drinking while you are on supervision or when you are doing those other things. Then suddenly it is revoked for whatever reason, situations where your performance on community supervision has wound up back with DOC or incarcerated at the prison.

As I look through the facts and circumstances of this, I think that it is appropriate to sentence Mr. Gibbons to the Department of Corrections for five years. I am going to sentence him to that. I am going to fine him the minimum of $5,000, the statutory minimum. I am not imposing any other financial obligations on him with respect to this case.

In the event that there is any community supervision, I'm no doing any sort of parole restriction or limitations there. In the event he winds up with community supervision as determined by the DOC then I am recommending that paragraphs 1 through 28, with the exception of paragraph 13 being amended as I indicated for the financial obligations, be the terms and conditions [34] of his community supervision.

I understand what Mr. Gibbons is saying today. I am just not convinced that it is going to be that way for the long-term, and as a result I think that this is, and it

is a particularly appropriate sentence for the facts and circumstances surrounding this case. It is consistent with Montana law. So five years DOC, no parole restrictions, $5,000 fine, all the other terms and conditions of any community supervision are recommended as paragraphs 1 through 28 indicate, he gets credit for any time served. Anything I forgot, Ms. Boris?

MS. BORIS: Just for clarity, you are not ordering vehicles forfeited?

THE COURT: No, I'm not ordering vehicle forfeiture.

MS. BORIS: Thank you.

THE COURT: Anything I forgot or need to address Mr. Gallagher?

MR. GALLAGHER: No, Judge, thank you.

THE COURT: All right. So, Mr. [35] Gibbons, you are remanded to the custody of the Department of Corrections. Good luck to you.

Whereupon the proceeding was concluded.

Appendix D — Verdict of the Montana Nineteenth Judicial District Court, Lincoln County, filed April 29, 2021

MONTANA NINETEENTH JUDICIAL DISTRICT COURT, LINCOLN COUNTY

Cause No. DC-19-119

STATE OF MONTANA,

Plaintiff,

vs.

ROBERT MURRAY GIBBONS,

Defendant.

Filed April 29, 2021

VERDICT

MATTHEW J. CUFFE, District Judge

We the jury, duly empaneled and sworn to try the issues in the above-entitled cause, enter the following unanimous verdict:

Count I: To the charge of driving under the influence of alcohol:

Guilty

Write "Not Guilty" or "Guilty" on the line above

Appendix D

[NOTE: IF YOU FIND THE DEFENDANT "NOT GUILTY" OF COUNT I, PROCEED TO ALTERNATIVE COUNT II. IF YOU FIND THE DEFENDANT "GUILTY" OF COUNT I, DO NOT CONSIDER ALTERNATIVE COUNT II.]

Count II: To the charge of operation of a motor vehicle by a person with a blood alcohol concentration of 0.08 or more:

_____

Write "Not Guilty" or "Guilty" on the line above

DATED this 29th day of April, 2021.

/s/ Douglas J. Kurosky
SIGNATURE OF FOREPERSON

Douglas J. Kurosky
PRINTED NAME OF FOREPERSON

Appendix E — Acknowledgment of Rights, filed October 7, 2019

Jessica Polan
Office of State Public Defender
Regional Office, Region 1
P.O. Box 304
Libby, MT 59923
Phone: (406) 334-3859

Attorney for Defendant

MONTANA NINETEENTH JUDICIAL DISTRICT COURT, LINCOLN COUNTY
BEFORE THE HONORABLE MATTHEW J. CUFFE

STATE OF MONTANA,

Plaintiff,

v.

ROBERT M. GIBBONS,

Defendant.

Cause No. DC-19-119

DEFENDANT'S ACKNOWLEDGMENT OF RIGHTS

By my initials I, Robert M. Gibbons, the above-charged Defendant, certify that I understand and acknowledge the following:

Appendix E

1. I am charged with the following:

   DRIVING UNDER THE INFLUENCE OF ALCOHOL - 4TH OR SUBSEQUENT OFFENSE, in violation of MCA§ 61-8-401(1)(a) [4th+]

2. The maximum penalty for DRIVING UNDER THE INFLUENCE OF ALCOHOL - 4TH OR SUBSEQUENT OFFENSE, in violation of MCA §61-8-401(1)(a) [4th+] or OPERATION OF NONCOMMERCIAL VEHICLE BY A PERSON WITH ALCOHOL CONCENTRATION OF 0.08 OR MORE-FOURTH OR SUBSEQUENT OFFENSE, a felony in violation of MCA § 61-8-406, shall be committed to the Department of Corrections for placement in an appropriate correctional facility or program for a term of not less than 13 months or for a term of not more than 2 years without parole. If the person successfully completes a residential alcohol treatment program operated or approved by the Department of Corrections, the remainder of the 13 months shall be served on probation. The initial 13 months shall be followed by commitment for a term of not more than 5 years, all of which must be suspended, to either the DOC or the state prison, to run consecutively to the term of 13 months, and a fine in an amount of not less than $5,000 or more than $10,00-. Additionally the motor vehicle owned and operated by the person at the time of the offense shall be seized

and forfeited as provided by law. My attorney has instructed me that a lesser-included offense(s) may apply.

3. A lesser-included offense is one that is less serious than the charged offense. I understand that I cannot be convicted of both the more serious charge and the lesser charge. I understand that until we review the evidence, we do not know what, if any, lesser-included offenses might apply.

4. I am charged with 1 counts. Therefore, (circle one):

   a. The discussion about my sentences running consecutively or concurrently does not apply.

   b. The Court can run the sentence for each offense at the same time as the sentence for another charge (concurrently) or run the sentences for each charge one after another (consecutively).

5. If I plead guilty, or I am found guilty after a trial, the Court may order me to pay restitution, Court fees, cost of prosecution, jury costs, and/or the costs of my Court-appointed attorney. I can request a hearing regarding my ability to pay these costs.

6. I understand that the sentencing Judge may order that I serve my prison time without the

possibility of parole or place restrictions on my eligibility for parole.

7. I am alleged / am not alleged to have used a weapon in the commission of the offense. My sentence can be enhanced by a minimum of two (2) years to a maximum of (10) years.

8. My attorney has explained Persistent Felony Offender (PFO) status to me and I acknowledge that I understand the potential punishments. If I am designated a first-time PFO, my sentence is a minimum of five (5) years' commitment to the Montana State Prison (MSP) or Montana Women's Prison (MWP) and a maximum sentence of one hundred (100) years. I may also be required to pay up to an additional $50,000 in fines. If I am designated a second time PFO, my sentence is a minimum of ten (10) years' commitment to the MSP or MWP and a maximum sentence of one hundred (100) years. PFO sentence must run consecutively to any other sentence imposed.

9. I understand that the Court may impose conditions or requirements that must be performed during probation or parole.

10. I may ask for one substitution of the District Judge presiding in my case within ten (10) calendar days from the time that I make an initial appearance in District Court.

Appendix E

LEGAL RIGHTS

1. I have the right to plead not guilty to any and all charges and to persist in my plea of not guilty.

2. I have the right to be represented by an attorney at every stage of these proceedings, and if I cannot afford an attorney, to have one appointed to represent me at no initial expense to me. I understand that if I plead guilty or am found guilty following a trial, the Court may order that I pay the cost of my Court-appointed attorney if I am financially able to do so.

3. I have the right to object to and move for the suppression of any evidence that may have been obtained in violation of the law or U.S. or Montana Constitutions. I understand that if my motion to suppress is denied that I, with the consent of the State, have the right to plead guilty, and reserve the right to appeal adverse determination of specified pretrial motions to the Montana Supreme Court.

4. I have the right to remain silent and the State may not force me to testify or in any way incriminate myself. I have the right to testify on my own behalf, but if I do testify, I risk incriminating myself.

5. I have the right to present certain defenses on my own behalf, including but not limited to alibi; self-

defense; mental disease or defect; entrapment; compulsion; mistake and lack of specific intent.

6. I have the right to appeal any conviction on these offenses.

7. I have the right to a speedy and public trial by jury on these charges and at that trial I have the following rights in addition to the rights stated above:

    a. To have the jury instructed that the State has the burden of proving my guilt beyond a reasonable doubt as to all elements of the charges against me;

    b. To have the jury instructed that I am presumed to be innocent of all charges against me;

    c. To confront and cross-examine witnesses against me;

    d. To present witnesses and evidence on my behalf and I can compel the attendance of these witnesses by the use of subpoena at no cost to myself.

    e. To offer jury instructions on lesser-included offenses, and argue that a jury find me not guilty of the charge(s) against me but guilty of a lesser-included offense(s);

f. To have the jury instructed that any verdict on my guilt or innocence must be unanimous.

ACKNOWLEDGMENT BY Defendant

I have received a copy of the Information and I have read it or my attorney has read it to me. I fully understand its contents. I hereby waive the reading of the Information in Court.

Respectfully submitted this 7 day of October, 2019.

/s/ Robert Gibbons
Robert Gibbons
Defendant

CERTIFICATION BY DEFENDANT'S COUNSEL

I certify that the above-named Defendant has read the above document or that I have read it to the Defendant. We have fully discussed its contents.

Respectfully submitted this 7 day of October, 2019

/s/ Jessica Polan
Jessica Polan
Attorney for Defendant

Appendix E

CERTIFICATE OF SERVICE

The undersigned certifies that on the 7 day of October, 2019, a true and accurate copy of the foregoing Defendant's Acknowledgment of Rights was delivered to the following:

Delivery Type: Hand Delivery
Marcia Boris
Lincoln County Attorney's Office

/s/ Jessica Polan
Office of State Public Defender

Appendix F — Information,
filed September 30, 2019

Marcia Boris
Lincoln County Attorney
512 California Avenue
Libby, MT 59923
(406) 293-2717

Attorney for Plaintiff

MONTANA NINETEENTH JUDICIAL
DISTRICT COURT, LINCOLN COUNTY

Cause No. DC-19-119

STATE OF MONTANA,

Plaintiff,

vs.

ROBERT MURRAY GIBBONS, DOB: 10/31/1943

Defendant.

Filed September 30, 2019

MATTHEW J. CUFFE, District Judge

Marcia Boris, Lincoln County Attorney for the State of Montana, charges that on or about September 19, 2019, at Lincoln County, Montana, the above-named Defendant committed the offenses of:

Appendix F

COUNT I

DRIVING UNDER THE INFLUENCE OF ALCOHOL OR DRUGS – FIFTH OR SUBSEQUENT OFFENSE, a felony, in violation of §§61-8-401 and 61-8-731, M.C.A.

The facts of the offense are that on or about September 19, 2019, at Lincoln County, Montana, the Defendant drove or was in actual physical control of a motor vehicle upon the ways of this state open to the public while under the influence of alcohol and/or drugs.

OR IN THE ALTERNATIVE

COUNT II

OPERATION OF NONCOMMERCIAL VEHICLE BY A PERSON WITH ALCOHOL CONCENTRATION OF 0.08 OR MORE - FIFTH OR SUBSEQUENT OFFENSE, a felony, in violation of §§61-8-406 and 61-8-731, M.C.A.

The facts of the offense are that on or about September 19, 2019, at Lincoln County, Montana, the Defendant drove or was in actual physical control of a noncommercial vehicle upon the ways of the state open to the public while the Defendants alcohol concentration, as shown by analysis of the Defendants blood, breath, or urine, was 0.08 or more.

Appendix F

A person convicted of **DRIVING UNDER THE INFLUENCE OF ALCOHOL OR DRUGS - FIFTH OR SUBSEQUENT OFFENSE, a felony, or in the alternative, OPERATION OF NONCOMMERCIAL VEHICLE BY A PERSON WITH ALCOHOL CONCENTRATION OF 0.08 OR MORE - FIFTH OF SUBSEQUENT OFFENSE**, a felony, who was upon a prior conviction, placed in a residential alcohol treatment program under §61-8-731(3), M.C.A., whether or not the person successfully completed the program, shall be sentenced to the Montana Department of Corrections for a term of not less than 13 months or more than 5 years or be fined an amount of not less than $5,000.00 or more than $10,000.00, or both. Additionally, the motor vehicle owned and operated by the person at the time of the offense shall be seized and forfeited as provided by law.

A list of possible witnesses for the State now known to the prosecution is as follows:

Officer Travis Miller, Troy Police Department
Richard Starks, Troy, MT
Any witness needed for rebuttal, impeachment, chain of custody, or foundation purposes;
Any witness listed by Defendant.

DATED this 30th of September, 2019.

/s/ Marcia Boris
Marcia Boris
Lincoln County Attorney

Appendix G — Excerpts of Brief of Appellant in the Supreme Court of the State of Montana, filed March 24, 2023

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0413

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT MURRAY GIBBONS,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Nineteenth Judicial District Court,
Lincoln County, the Honorable Matthew J. Cuffe, Presiding

Appendix G

APPEARANCES:

CHAD WRIGHT
Appellate Defender
DEBORAH S. SMITH
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
debbiesmith@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K PLUBELL
Bureau Chief
Appellate Services Bureau
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

MARCIA J. BORIS
Lincoln County Attorney
512 California Avenue
Libby, MT 59923

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

Appendix G

STATEMENT OF THE ISSUES

(1) Robert Gibbons went to his parked truck to lie down and sleep after becoming intoxicated. The State does not allege he drove after getting drunk. The District Court instructed the jury it "shall" consider "the Defendant need not be conscious to be in actual physical control." Did the District Court incorrectly instruct the jury on "actual physical control" in Mont. Code Ann. § 61-8-401 (2019), driving under the influence?

(2) Did the District Court violate Mr. Gibbons's substantial rights and cause him prejudice when it permitted the prosecutor to tell the jury during closing argument about evidence given to the Defense during discovery but not introduced into evidence by the State at trial? Alternatively, did Mr. Gibbons receive ineffective assistance of counsel when his lawyer could not find the discovery to bring to trial for use during cross-examination of State witnesses?

(3) Is the mandatory minimum fine of $5,000 set out in Mont. Code Ann. § 61-8-731 (2019) facially unconstitutional?

STATEMENT OF THE CASE

The State charged Robert Gibbons with: Count 1, Driving Under the Influence of Alcohol, Fifth or Subsequent Offense, a felony, in violation of Mont. Code Ann. §§ 61-8-401, 61-8-731 (2019), or in the alternative, Count 2, Operation of Noncommercial Vehicle with Alcohol

Appendix G

Concentration of 0.08 or More, Fifth or Subsequent Offense, a felony, in violation of Mont. Code Ann. § 61-8-406, 61-8-731 (2019).[1] (D.C. Doc. 4.) Mr. Gibbons pled not guilty. (D.C. Doc. 9.) The case proceeded to three separate jury trials.

Mr. Gibbons's primary defense was that the State could not prove beyond a reasonable doubt he was in actual physical control as he lay on the front seat sleeping because he was a passenger and did not exercise actual physical control.[2] Over the course of the three trials, the District Court heard considerable argument and issued multiple rulings concerning the meaning of "actual physical control." (Trial 2 Tr. at 198 – 209, 255 – 74, 276 – 80; Trial 3 Tr. at 8 – 15, 20 – 24, 135 – 40, 161 – 63, 216 – 25, 232 – 48, 250 – 51, 254 – 66, 315 – 19, 323 – 25; D.C. Docs. 28; 55 at 3; 65 – 68; 69 at 1, 3 – 4 (D.C. Doc. 68, Order on State's Motions in Limine is attached hereto as App. A).)

---

1. Mont. Code Ann. §§ 61-8-401, -406, and -731 were repealed in 2021, and amended and recodified in Title 68, Part 10 of the Montana Code. Mont. Laws 2021, ch. 498, § 44 (eff. 01/01/2022). All cites herein are to the statutes in effect at the time of the alleged offense in June 2019.

2. The State presented no evidence Mr. Gibbons drove his truck while under the influence and acknowledged as much at trial. (Trial 2 Tr. at 310; Trial 3 Tr. at 290 – 91, 314.) The Defense also argued below the State presented insufficient evidence to prove beyond a reasonable doubt Mr. Gibbons parked his truck on a way of the state open to the public. (Trial 2 Tr. at 233, 239 – 40; Trial 3 Tr. at 222 – 24. This issue is not pursued on appeal.

Appendix G

The first trial ended in a mistrial during voir dire. (D.C. Doc. 28 (Minutes, 02/13/2020).) The second trial also ended in a mistrial following a hung jury. (02/09-10/2021 ("Trial 2") Tr. at 352 – 64; D.C. Doc. 55 at 4.) The State finally succeeded in convicting Mr. Gibbons when a jury in the third trial found Mr. Gibbons guilty of Count 1, driving under the influence of alcohol. (04/28-29/2021 ("Trial 3") Tr. at 327 – 28; D.C. Doc. 69 at 5, 73.) In the second and third trials, the District Court instructed the jury that it "shall" consider a person need not be conscious to be in "actual physical control" of a vehicle. (D.C. Docs. 57 at Instr. 15 (from Trial 2), 72 at Instr. 15 (from Trial 3); Instruction 15 from Trial 3 is attached hereto as App. B.)

At sentencing, the District Court imposed a five-year commitment to the Department of Corrections and a $5,000 fine, pursuant to Mont. Code Ann. § 61-8-731 (2019). The District Court declined to order vehicle forfeiture or to impose any fees, costs, or surcharges (06/21/2021 ("Sent.") Tr. at 33 – 34, attached hereto as App. C.)

The written judgment conforms with the oral pronouncement of sentence. (D.C. Doc. 77, attached hereto as App. D.) Mr. Gibbons timely appealed.

STATEMENT OF THE FACTS

The Incident

One June evening, Robert Gibbons drove his truck into Troy, parked in a designated parking space on Yaak Avenue, and walked to the nearby Home Bar and the VFW

to have some drinks. After several drinks, Mr. Gibbons walked back to his truck, sat down behind the wheel, turned the ignition part-way on, and laid down across the front bench-seat to go to sleep, folding his arm under his head like a pillow, not intending to drive anywhere. (Sent. Tr. at 9 – 10; Trial 2, Exh's 1, 2 (02/09/2021) (photographs).) A retired police officer from California, Richard Starks, observed Mr. Gibbons drinking in the bars and then going to sleep in his truck. Mr. Starks took two photographs of Mr. Gibbons sleeping and called the police about a possible drunk driver. (Trial 2 Tr. at 141 – 61; Trial 3 Tr. at 157 – 78.) Officer Travis Miller responded and ultimately arrested Mr. Gibbons after tapping on the truck's driver-side window to wake him and observing signs of intoxication. (Trial 2 Tr. at 163 – 231; Trial 2 Exh's 3, 4, 5 (02/09/2021) (body camera video); Trial 3 Tr. at 180 – 214; Trial 3 Exh's 1, 2 (04/28/2021) (much shorter excerpts of the body camera video than shown in Trial 2).)

* * *

Mandatory Fine

Robert Gibbons is an Air Force veteran who served our country from 1962 during the Cuban missile crisis until his honorable discharge in 1968. Following his military service, he earned a bachelor degree in Forestry and had been employed by Weyerhaeuser. When he was sentenced in June 2021, Mr. Gibbons was 77 years old. He lived in a camper hitched to his truck, spending summers in northwest Montana and winters in Arizona with his sister. (Sent. Tr. at 14 – 15, 29.) He had retired from Weyerhaeuser and drew a pension of $130/month.

He also received $1,300/month in social security benefits. (D.C. Doc. 75 at 1 – 2.)[5]

Mr. Gibbons acknowledged a history of alcohol overuse and multiple prior DUI arrests and convictions going back to 1986 (Sent. Tr. at 18.) However, before his conviction, Mr. Gibbons had stopped drinking and attended church. (Sent. Tr. at 11, 14 – 15.) Mr. Gibbons testified about his poor health. He has a bad back and suffers from liver and kidney disease. (Sent. Tr. at 13 – 15.)

At the beginning of the sentencing hearing, the District Court asked Defense Counsel if any of the recommended terms and conditions of community supervision outlined in the PSI do not apply to Mr. Gibbons, the crime for which he was convicted, or are unreasonable as they apply to him. Counsel responded, "No, Judge. I don't believe so, I think we would be asking the Court to not fully impose some of the fines and fees due to an inability to pay, but that's all." (Sent. Tr. at 6.) Mr. Gibbons testified during the hearing concerning his decision to go to trial and his medical conditions. His testimony did not address his ability to pay any of the recommended financial obligations, nor did the District Court inquire about his ability to pay.

---

5. Mr. Gibbons's PSI contains confidential personal information that is exempt from public disclosure. Mont. Code Ann. § 46-18-113(1); M. R. App. P. 10(7)(a), (b). All references herein to the PSI pertain to information that is also located elsewhere in the record on appeal or Mr. Gibbons's has consented to its disclosure. Mr. Gibbons reserves the right to object to any disclosure of confidential information by the State in its response brief that is not included herein or in the public record.

In its sentencing recommendation, the State requested a five-year DOC commitment, with no time suspended, a fine of $5,000, and forfeiture of any vehicles Mr. Gibbons owned at the time of the offense. (Sent. Tr. at 24 – 25.) Defense Counsel recommended a "five year DOC suspended sentence" and objected to the State's request to forfeit Mr. Gibbons's truck and camper. (Sent. Tr. at 28 – 29.) Counsel did not address the State's request for a $5,000 fine or mention any other financial obligations.

The District Court sentenced Mr. Gibbons to a five-year DOC commitment with no time suspended, and stated, "I am going to fine him the minimum of $5,000, the statutory minimum. I am not imposing any other financial obligations on him with respect to this case." (App. B at 33.) The District Court declined to order vehicle forfeiture. (App. B at 34.)

STANDARDS OF REVIEW

* * *

This Court reviews a claim that a sentence violates a constitutional provision de novo. *State v. Yang*, 2019 MT 266, ¶ 8, 397 Mont. 486, 452 P.3d 897, citing *State v. Le*, 2017 MT 82, ¶ 7, 387 Mont. 224, 392 P.3d 607.

SUMMARY OF ARGUMENT

* * *

If the Court does not find reversible error justifying a new trial, it should strike the $5,000 mandatory fine set by Mont. Code. Ann. § 61-8-731 as facially unconstitutional

and remand for an ability to pay inquiry before any costs may be imposed.

ARGUMENT

* * *

III. The $5,000 mandatory, minimum fine upon conviction of Mont. Code Ann. § 61-8-731 is facially unconstitutional under the excessive fines clause of the Eighth and Fourteenth Amendments to the United States Constitution and Article II, Section 22 of the Montana Constitution. In every case it bars the sentencing court from considering the proportionality of the fine to a defendant's conduct or the defendant's ability to pay the minimum fine. The Court's decision in *Mingus* is manifestly wrong.

The Montana and United States Constitutions prohibit the government from imposing excessive fines on people. U.S. Const. Amends. VIII, XIV; Mont. Const. Art. 2, § 22; *Timbs v. Indiana*, ___ U.S. ___, 139 S.Ct. 682, 686 – 87, 203 L.Ed.2d 11 (2019); *U.S. v. Bajakajian*, 524 U.S. 321, 327 – 28, 118 S.Ct. 2028, 2033, 141 L.Ed.2d 314 (1998); *Yang*, ¶ 15; *State v. Wilkes*, 2021 MT 27, ¶ 26, 403 Mont. 180, 480 P.3d 823. "The proportionality of a fine to the gravity of the subject offense is the touchstone to whether a fine is constitutionally excessive." *Wilkes*, ¶ 26, citing *Yang*, ¶¶ 16 – 17 (quoting *Bajakajian*, 524 U.S. at 334, 118 S.Ct. at 2036). Mont. Code Ann. § 46-18-231(3) implements the proportionality requirement by ensuring that "'a fine is not grossly disproportionate to the gravity of the offense.'" *Wilkes*, ¶ 27, quoting *Yang*, ¶ 19. That statute provides:

Appendix G

> The sentencing judge may not sentence an offender to pay a fine unless the offender is or will be able to pay the fine. In determining the amount and method of payment, the sentencing judge shall take into account the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine will impose.

Mont. Code Ann. § 46-18-231(3).

In *Yang*, the Court held the mandatory fine required by Mont. Code Ann. § 45-9-130(1), which sets a 35% market-value fine for dangerous-drug convictions, must be read in conjunction with § 46-18-231(3).

> A sentencing judge may not impose the 35% market-value fine contained in § 45-9-130(1), MCA, without considering the factors in § 46-18-231(3), MCA, thereby ensuring that the offender's fine is not grossly disproportional to the offense committed and protecting an offender's federal and state constitutional rights to be free from excessive fines. Because the District Court imposed the mandatory 35% market-value fine under § 45-9-130(1), MCA, without considering the nature of the crime Yang committed, Yang's financial resources, or the nature of the burden the imposed fine would have on Yang, we remand this case to the District Court for recalculation of Yang's fine consistent with this Opinion.

Yang, ¶ 28.

Similarly, in *Wilkes*, the Court ruled,

> In considering the gravity of the defendant's offense under § 46-18-231(3), MCA[,] sentencing courts may consider all relevant factors of record including, *inter alia*: (1) the nature and extent of the crime[;] (2) whether the violation was related to other illegal activities[;] (3) the other penalties that may be imposed for the violation[;] and (4) the extent of the harm caused" by the crime.

Wilkes, ¶ 27 (citations, quotation marks omitted; brackets in original).

When considering the facial constitutionality of the market-value fine in *Yang*, the Court quoted Mont. Code Ann. § 45-9-130(1), "[T]he court shall fine each person found to have possessed or stored dangerous drugs 35% of the market value of the drugs as determined by the court." *Yang*, ¶ 18. The Court then reasoned:

> The statute's "shall" language makes the fine non-discretionary—a court *must* impose the fine upon a person found to have possessed or stored dangerous drugs. Section 45-9-130(1), MCA, removes any ability of the trial court, through its mandatory nature, of protecting against an excessive fine. Accordingly, it is inconsequential that in *some* situations—following consideration of the nature of the crime committed, the financial resources of the offender, and the nature of the burden

> of payment of the fine—imposition of the 35%-market-value fine is not excessive. What is consequential, however, and which occurs in *every* case as a result of the mandatory nature of the fine, is the inability of the trial court to even consider whether the fine is excessive. Here, the important distinction is that in *all* situations a trial court is precluded from considering the factors the Montana legislature has expressly mandated be considered when it enacted § 46-18-231(3), MCA, to ensure that fines are not excessive as guaranteed in both the United States Constitution and Montana's Constitution.

Yang, ¶ 18 (emphasis original).

Notwithstanding *Yang*'s holding that a mandatory-fine statute which prohibits a sentencing court from even considering whether the fine is excessive is facially unconstitutional, combined with the Court's subsequent application of that holding in *Wilkes*, the Court has taken a different path when considering the mandatory fine imposed for DUI convictions under Mont. Code Ann. § 61-8-731. The DUI-fine decisions, however, have not involved a facial constitutionality challenge. For example, in *State v. Yeaton*, 2021 MT 312, 406 Mont. 465, 500 P.3d 583, and *State v. Ingram*, 2020 MT 327, 402 Mont. 374, 478 P.3d 799 (*en banc*), the Court held even though federal law prohibited the State from *collecting* a fine imposed under § 61-8-731, federal law did not bar the State from

imposing the fine in a judgment.[7] *Yeaton*, ¶ 12; *Ingram*, ¶ 11. The Court remarked "income sources can change over time" and drew a distinction between creating a debt and requiring social security benefits be used to satisfy a debt. The former does not violate federal law, while the latter does." *Yeaton*, ¶ 11, citing *Ingram*, ¶¶ 11 – 12.

In *State v. Mingus*, 2004 MT 24, 319 Mont. 349, 84 P.3d 658 (*en banc*), the Court rejected a statutory-interpretation argument the mandatory DUI fine under an earlier version of § 61-8-731 could not be imposed without first determining the defendant had the ability to pay the fine under § 46-18-231. *Mingus*, ¶¶ 14 – 15. The Court instead held § 46-18-231 "does not apply to mandatory fines. When a fine is statutorily mandated, the court has no discretion as to whether to impose the fine, irrespective of the defendant's ability to pay." *Mingus*, ¶ 15. *Accord State v. Reynolds*, 2017 MT 317, ¶ 19, 390 Mont. 58, 408 P.3d 503 (same).

---

7. Mont. Code Ann. § 61-8-731 imposes a mandatory, minimum fine of $5,000 in three subsections: 1. subsection (1)(a)(iii) (for three or more DUIs or other stated offenses when sentenced to a DOC commitment or to prison); 2. subsection (1)(b)(ii) (for three or more DUIs or other stated offenses when sentenced to treatment court); and 3. subsection (3) (for four or more DUIs or other stated offenses under certain circumstances). Ingram's fine was imposed under § 61-8-731(1)(a)(iii). *Ingram*, ¶ 9. Yeaton's fine was imposed under § 61-8-731(3). *Yeaton*, ¶ 14. Mr. Gibbons's fine is imposed under § 61-8-731(3). (D.C. Doc. 4 at 2.) The arguments herein apply to the mandatory fine required in all three locations within § 61-8-731.

Appendix G

Notably, two years before deciding the mandatory dangerous-drug fine was facially unconstitutional in *Yang*, the Court cited *Mingus* in *Le* for the proposition that the mandatory, dangerous-drug fine in § 45-9-130(1) "is not subject to the discretionary authority provided to courts under the general sentencing statutes. Sections 46-18-201 *et seq*., MCA; [*Mingus*, ¶ 15] (holding discretionary sentencing statutes do not apply to mandatory fines)." *Le*, ¶ 12. *Le*, however, did not involve a statutory interpretation claim that § 45-9-130(1) was subject to the ability to pay requirements in § 46-18-231(3). Rather, Le argued, in relevant part, the 35% mandatory fine was a sentence enhancement that violated Mont. Code Ann. § 46-1-401 and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), because the State did not allege the enhancement as part of the charged offense. *Le*, ¶ 9. The Court rejected Le's contention, ruling the fine was a penalty applied at sentencing, not an element of the offense to be proven at trial or admitted by the defendant in a change of plea. *Le*, ¶¶ 13 – 14. Thus, the Court's discussion of *Mingus* in *Le*, ¶ 12, is *dicta* unnecessary for *Le*'s holding. Paragraph 12 could be overruled without affecting the remainder of the decision.

Also noteworthy in *Le* is the Court's rejection of Le's facial constitutional challenge under the excessive fines clause of the Montana Constitution, Article 2, Section 22, to the mandatory fine in § 45-9-130(1). *Le*, ¶ 15. The Court ruled:

> Here, the Legislature incorporated the concept of proportionality into § 45-9-130, MCA,

> by requiring that the amount of the fine be based upon the market value of the dangerous drugs that a defendant illegally possessed. Thus, the greater the value of the illegally possessed drugs, or "gravity" of the offense, the greater the fine. Le's fine of $15,000 resulted from carrying 23 pounds of illegal drugs, and the calculation of the value of those drugs. Further, $15,000 is significantly less than the maximum discretionary fine of $50,000 that the sentencing court was authorized to impose for Le's conviction. Le has not demonstrated that the fine is "grossly disproportional" to the gravity of his offense and violates the Excessive Fines Provision.

Le, ¶ 15. The Court expressly retreated from *Le*'s interpretation of § 45-9-130 as a matter of state and federal constitutional law in *Yang*, recognizing the statute does not allow the sentencing judge to consider proportionality factors, other than the amount of illegal drugs the defendant possessed, that are important under the Eighth Amendment and Article 2, Section 22. *Yang*, ¶ 24.

Mingus's statutory analysis of the mandatory DUI fine in § 61-8-731 is irreconcilable with this Court's constitutional analysis in *Yang* of the mandatory drug fine in § 45-9-130(1). The crux of the holdings in *Yang*, determining § 45-9-130(1) was facially unconstitutional because it prohibited a sentencing judge from considering the ability to pay factors listed in § 46-18-231(3), and in *Wilkes*, determining the proportionality factors of § 46-18-

231(3) include "all relevant factors of record", apply with equal force to the mandatory DUI fine. It is irrelevant from a constitutional perspective that the mandatory drug fine is a set percentage of the value of the drugs with no maximum cap, while the mandatory DUI is set in a specified range here from no less than $5,000 to no more than $50,000. Both statutes bar the sentencing court from considering any proportionality factors.

The DUI mandated fine is no less offensive to the constitutional proportionality requirement than the uncapped drug fine simply because it is banded between $5000 and $50,000. *See Yang*, ¶ 23 (comparing the mandatory drug fine to the mandatory DUI fine). The problem is the non-discretionary application of fines that are disproportional to the offense or the offender. The minimum DUI fine might be grossly disproportional to the conduct underlying the offense or to the defendant's ability to pay the minimum $5,000 fine. By comparison, the mandatory drug fine would be less onerous for an indigent person convicted of felony possession of dangerous drugs by having a $50 baggie of methamphetamine in their pants pocket ($50 x .35 = $17.50 market-value fine) than if they were convicted of a felony DUI for sleeping in the front seat of their car while intoxicated with no intention of driving ($5,000 minimum fine). The dollar amount of the fine is just one piece of the proportionality analysis under the excessive fines clause, as this Court pointed out in *Yang* and *Wilkes*.

Similarly to the mandatory, 35%-market-value drug fine, the mandatory $5,000-minimum DUI fine "could be

disproportionately high in certain situations, [but] there exists no way for a sentencing judge to consider those situations and decrease the amount. Depending on the nature of the crime committed, the offender's financial resources, and the nature of the burden that the fine will impose," a minimum fine of $5,000 "may very well be excessive under both the Eighth Amendment to the United States Constitution and Article II, Section 22 of the Montana Constitution. *Yang*, ¶ 23. To the extent that *Mingus* prohibits a district court from considering the proportionality factors in § 46-18-231(3) when imposing a fine under § 61-8-731, it is manifestly wrong and must be overruled. Applying the logic of *Yang*, "No set of circumstances exist under which [§ 61-8-731(1)(a)(iii), (1)(b)(ii), or (3),] MCA is valid – the statute is unconstitutional in all of its applications because it completely prohibits a district court from considering whether the [$5,000 minimum] fine is grossly disproportionate to the offense committed. *Yang*, ¶ 23. Additionally, Mont. Code Ann. § 61-8-731(5)(a) allows a district court to impose a proportional fine under Mont. Code Ann. § 46-18-231 on top of the mandatory fine plus other costs. This statutory scheme violates the excessive fines clause in all cases.

A litigant challenging the facial constitutionality of a statute must establish that either no set of circumstances exists under which the statute would be valid, meaning that it is unconstitutional in all its applications, or the statute lacks a plainly legitimate sweep. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, 128 S.Ct. 1184, 1190, 170 L.Ed.2d 151 (2008); *Yang*, ¶ 14; *State v. Sedler*, 2020 MT 248, ¶ 17, 401 Mont.

437, 473 P.3d 406. The mandatory, minimum fine of $5,000 in Mont. Code Ann. § 61-8-731(1)(a)(iii), (1)(b)(ii), and (3), is unconstitutional in *all* applications because it prohibits a sentencing court from considering its proportionality to a defendant's particular DUI offense, including but not limited to the defendant's ability to pay the minimum fine. This Court should reverse and vacate the $5,000 fine imposed in Mr. Gibbons's judgment and remand for recalculation of the fine consistent with the Court's opinion. *Yang*, ¶ 25.

CONCLUSION

For the foregoing reasons, Mr. Gibbons respectfully requests the Court to reverse his conviction and remand for a new trial. The District Court did not fully and accurately instruct the jury on "actual physical control." Additionally, the District Court violated Mr. Gibbons's substantial rights when it permitted the Prosecutor to tell the jury during rebuttal argument about discovery provided to the Defense that was not introduced into evidence; alternatively, Mr. Gibbons received ineffective assistance of counsel when his attorney could not find the discovery to use during cross-examination of State witnesses.

If the Court does not discern a basis for reversing Mr. Gibbons's conviction and remanding for a new trial, it should strike the $5,000 fine and remand for a hearing in which the District Court undertakes a proportionality and ability to pay analysis.

Appendix H — Excerpts of Brief of Appellee in the Supreme Court of the State of Montana, filed June 21, 2023

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0413

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT MURRAY GIBBONS,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Nineteenth Judicial District Court,
Lincoln County, The Honorable Matthew J. Cuffe, Presiding

Appendix H

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
CORI LOSING
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Cori.losing@mt.gov

MARCIA BORIS
Lincoln County Attorney
512 California Avenue
Libby, MT 59923

ATTORNEYS FOR PLAINTIFF AND APPELLEE

CHAD WRIGHT
Appellate Defender
DEBORAH S. SMITH
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59610-0147

ATTORNEYS FOR DEFENDANT
AND APPELLANT

Appendix H

STATEMENT OF THE ISSUES

1. Did the district court abuse its discretion when it instructed the jury that it should consider, as part of the totality of the circumstances, that Gibbons need not be conscious to be in actual physical control of his vehicle?

2. Did the district court prejudice Gibbons's substantive rights when it denied the State's motion to exclude discussion of photographs, not admitted into evidence, and allowed the State to respond in rebuttal to Gibbons, in closing argument, commenting on the State not admitting the photographs?

3. Were Gibbons's due process rights violated by defense counsel not admitting into evidence photographs that depicted Gibbons's position in the vehicle?

4. Does Mont. Code Ann. § 61-8-731(3) (2019)'s minimum $5,000 fine violate the Eighth Amendment of the United States Constitution and art. II, § 22 of the Montana Constitution?

STATEMENT OF THE CASE

On September 30, 2019, the State of Montana charged Appellant, Robert Murray Gibbons (Gibbons), with Driving Under the Influence of Alcohol or Drugs (DUI), a felony, in violation of Mont. Code Ann. §§ 61-8-401 and -731 (2019), and the alternative charge of Operation of Noncommercial Vehicle by a Person with Alcohol Concentration of 0.08

or More (DUI per se), a felony, in violation of Mont. Code Ann. §§ 61-8-406 and -731 (2019). (Doc. 4.)

After the jury found Gibbons guilty of DUI, the district court sentenced Gibbons to the Department of Corrections for a term of five years and imposed the statutory minimum fine of $5,000. (6/21/21 Tr. at 33; Docs. 73, 77 at 2.)[1] On appeal, Gibbons challenges the district court's actual physical control jury instruction, the State responding to Gibbons's statements in closing argument regarding the State not admitting photographs of Gibbons's position in his vehicle, Gibbons's counsel not admitting the photographs, and the constitutionality of Mont. Code Ann. § 61-8-731 (2019)'s mandatory minimum fine.

STATEMENT OF THE FACTS

I. The offense

Richard Starks (Starks), a retired Montana Highway Patrol officer, was sitting outside the Home Bar in Troy, Montana, on September 19, 2019, when he witnessed Gibbons being kicked out of the Home Bar before staggering over to the VFW. (4/28/21 Tr. (Trial Tr.) at 158-59.) After the VFW "wouldn't let him in," Gibbons staggered over to his vehicle, which was parked on Yaak Avenue between the Home Bar and the VFW. (*Id*. at

1. Gibbons was convicted at the third jury trial held in this case. (Doc. 73.) Gibbons's first trial resulted in a mistrial during voir dire. (Doc. 28.) Gibbons's second trial resulted in a mistrial due to a deadlocked jury. (Doc. 55 at 4.)

158-59, 182.) After leaving the VFW, Gibbons "realized [he] was feeling sick and [he] knew [he] had too much to drink." (6/21/21 Tr. at 9.) Nonetheless, Gibbons got into the driver's side of his pickup and put his key into the ignition. (Trial Tr. at 159.) Gibbons then "said to [himself], I can't do that. I can't drive. I just am, I know I am too intoxicated." (6/21/21 Tr. at 9.) Gibbons subsequently "passed out." (Trial Tr. at 159, 166.)

When Starks went to Gibbons's vehicle, he observed Gibbons seated in the driver's seat, with his feet in the pedal well, and the gearshift within reach. (*Id.* at 159-60.) After Starks reported Gibbons to law enforcement, Starks took pictures capturing Gibbons's position within his vehicle. (*Id.* at 165, 169.)[2]

When Troy Police Officer Travis Miller (Officer Miller) responded, he observed Gibbons in the same position that Starks did: "sitting in the driver's seat behind the steering wheel with his feet down by the pedals, slumped over about halfway in the middle of the bench seat." (*Id.* at 181-83.) The key was still in the ignition, turned to the on position, and the dash lights were on. (*Id.* at 183.) Officer Miller knocked on Gibbons's window three times in an attempt to wake Gibbons up. (*Id.* at 183, 201.) Once Gibbons woke up, he sat up and attempted to roll his window down, but instead hit the door lock button several times. (*Id.* at 183.) After Gibbons was finally able to roll down his window, Officer Miller smelled alcohol emanating off Gibbons

2. Starks's photos of Gibbons were admitted into evidence during the second trial, but not during the third trial. (Doc. 55 at 2; 2/9/21 Trial, State's Exs. 1, 2.)

and noted that Gibbons's speech was slurred. (*Id*. at 184.) Gibbons admitted that he had two rum and cokes about an hour earlier. (*Id*. at 185.)[3]

Gibbons subsequently submitted to standardized field sobriety tests. (*Id*. at 187-88.) Gibbons presented seven of the eight clues for the walk and turn test and three out of the four clues for the one-leg stand test. (*Id*. at 190-91.) As a result, Officer Miller arrested Gibbons for driving under the influence and transported him to the Lincoln County Sheriff's Department. (*Id*. at 193-94.)[4] Gibbons provided a breath sample via the Intoxilyzer 8000. (*Id*. at 194, 196.) Gibbons's blood alcohol content was 0.136. (*Id*. at 197.)

* * *

SUMMARY OF THE ARGUMENT

* * *

Finally, Gibbons has not met his burden establishing that Mont. Code Ann. § 61-8-731(3) (2019), the only provision that he has standing to challenge, violates the Eighth Amendment of the United States Constitution and art. II, § 22 of the Montana Constitution. The plain language of

---

3. At sentencing, Gibbons testified that he had four rum and cokes at the Home Bar before having a couple more at the VFW. (6/21/21 Tr. at 9.)

4. Gibbons has had "a total of 15 arrests for DUI [offenses] since 1986." (*Id*. at 18.)

Mont. Code Ann. § 61-8-731(3) (2019) supports that if the district court elects to impose a fine, the $5,000 mandatory minimum is proportional in light of the conviction and previous treatment threshold requirements of Mont. Code Ann. § 61-8-731(3) (2019). *Mingus* is not manifestly wrong.

ARGUMENT

* * *

IV. Montana Code Annotated § 61-8-731(3)'s $5,000 minimum fine does not violate the Eighth Amendment of the United States Constitution or art. II, § 22 of the Montana Constitution.

A. Standard of review

This Court reviews de novo an appellant's claim that his sentence violates a constitutional provision. *State v. Ber Lee Yang*, 2019 MT 266, ¶ 8, 397 Mont. 486, 452 P.3d 897. "Legislative enactments are presumed to be constitutional." *In re S.M.*, 2017 MT 244, ¶ 10, 389 Mont. 28, 403 P.3d 324 (citation omitted). "The party challenging the constitutionality of a statute has the burden of proving beyond a reasonable doubt that it is unconstitutional." *Yang*, ¶ 14 (citations omitted). To prevail on a facial challenge, the challenging party must show that "no set of circumstances exists" under which the statute would be valid or that the statute lacks any "plainly legitimate sweep." *Id.* (internal quotations and citations omitted).

B. Gibbons does not have standing to challenge the constitutionality of Mont. Code Ann. § 61-8-731(1)(a)(iii) and (1)(b)(iii) (2019).

On appeal, Gibbons challenges the constitutionality of the fine provisions located at Mont. Code Ann. § 61-8-731(1)(a)(iii), (1)(b)(ii), and (3) (2019). (Appellant's Br. at 47.) The district court, however, imposed Gibbons's fine only pursuant to Mont. Code Ann. § 61-8-731(3) (2019).

To establish standing: "(1) The complaining party must clearly allege past, present or threatened injury to a property or civil right; and (2) the alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party." *State v. Thaut*, 2004 MT 359, ¶ 16, 324 Mont. 460, 103 P.3d 1012 (citation omitted). To satisfy the injury requirement, the complaining party must "allege a personal stake in the outcome of the controversy." *Id.* (internal quotations and citation omitted). The complaining party "must allege an injury personal to themselves as distinguished from one suffered by the community in general." *Id.* (internal quotations and citation omitted). A criminal "defendant must show a direct, personal injury resulting from application of the law in question in order to successfully challenge the constitutionality of a criminal statute." *Id.* (citation omitted).

Because the district court did not impose Gibbons's $5,000 fine pursuant to Mont. Code Ann. § 61-8-731(1)(a)(iii) and (1)(b)(ii), Gibbons has not and cannot establish a direct, personal injury from the applicability of the mandatory

minimum fines imposed pursuant to those statutes. Gibbons accordingly does not have standing to challenge the constitutionality of Mont. Code Ann. § 61-8-731(1)(a)(iii) and (1)(b)(ii).

C. *Mingus* is not manifestly wrong, nor does this Court need to determine whether *Mingus*, a case that involved a statutory challenge to Mont. Code Ann. § 61-8-731, is manifestly wrong to decide Gibbons's constitutional challenge to Mont. Code Ann. § 61-8-731(3)'s fine provision.

Gibbons requests that this Court overrule *State v. Mingus*, 2004 MT 24, 319 Mont. 349, 84 P.3d 658, because "*Mingus's* statutory analysis of the mandatory DUI fine in [Mont. Code Ann.] § 61-8-731 is irreconcilable with this Court's constitutional analysis in *Yang* of the mandatory drug fine in [Mont. Code Ann.] § 45-9-130(1)." (Appellant's Br. at 44.)

"Stare decisis means 'to abide by, or adhere to, decided cases.'" *State v. Gatts*, 279 Mont. 42, 51, 928 P.2d 114, 119 (1996) (quoting *Black's Law Dictionary* 1406 (6th ed. 1990)). It "is a fundamental doctrine which reflects [this Court's] concerns for stability, predictability and equal treatment." *Gatts*, 279 Mont. at 51, 928 P.2d at 119 (citation omitted). The doctrine requires this Court to follow precedent from *Mingus* unless the statutory interpretation supporting the holding was "manifestly wrong." *Formicove, Inc. v. Burlington N.*, 207 Mont. 189, 194-95, 673 P.2d 469, 472.

Appendix H

In *Mingus*, this Court affirmed the district court's imposition of the mandatory minimum fine for felony DUI under Mont. Code Ann. § 61-8-731 without considering a defendant's ability to pay pursuant to Mont. Code Ann. § 46-18-231(3). *Mingus*, ¶¶ 11-15. In reaching its decision, this Court concluded that the plain language of Mont. Code Ann. § 46-18-231 is discretionary and, therefore, does not apply to mandatory fines. *Mingus*, ¶¶ 13-15.[7]

Following its decision in *Mingus*, this Court addressed a constitutional challenge to a mandatory fine statute in *State v. Tam Thanh Le*, 2017 MT 82, 387 Mont. 224, 392 P.3d 607. The challenged statute in *Le*, Mont. Code Ann. § 45-9-130(1), required that the district court impose an additional fine of 35 percent of the drug's market value. *Le*, ¶ 13. Based on that statute, the district court fined Le $15,000. *Le* ¶ 6. In finding that Mont. Code Ann. § 45-9-130 did not violate Mont. Const. art. II, § 22, this Court explained that:

> the Legislature incorporated the concept of proportionality into § 45-9-130, MCA, by requiring that the amount of the fine be based upon the market value of the dangerous drugs that a defendant illegally possessed. Thus, the greater the value of the illegally possessed drugs, or "gravity" of the offense, the greater the fine.

Le, ¶ 15.

---

7. This Court declined to address whether *Mingus* was manifestly wrong in *State v. Ingram*, 2020 MT 327, ¶ 10, 401 Mont. 374, 478 P.3d 799.

Appendix H

Two years after it upheld the constitutionality of Mont. Code Ann. § 45-9-130(1) in *Le*, this Court addressed whether Mont. Code Ann. § 45-9-130(1)'s 35 percent drug market value fine was unconstitutional because it required district courts to impose the fine "without consideration of an offender's financial resources, the nature of the crime committed, and the nature of the burden the required fine would have on the offender." *Yang*, ¶ 9. This Court began its inquiry into the constitutionality of Mont. Code Ann. § 45-9-130(1) by reviewing the constitutionality of Mont. Code Ann. § 46-18-231(3), a statute not referenced by Mont. Code Ann. § 45-9-130(1) or challenged by Yang on appeal. *Yang*, ¶ 41 (Rice, J., dissenting).

As aptly noted in the dissenting opinion, this Court ultimately concluded that Mont. Code Ann. § 45-9-231 "embodies the Eighth Amendment such that other statutes must conform to it to also be constitutional." *Yang*, ¶ 41 (Rice, J., dissenting) (citing *Yang*, ¶¶ 17-19). Through that lens, this Court held that Mont. Const. art. II, § 22 "requires that the sentencing judge be able to consider 'the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine will impose' before ordering the offender to pay the 35%-market-value fine contained in § 45-9-130(1), MCA." *Id.* ¶ 24 (quoting Mont. Code Ann. § 46-18-231(3)).[8]

Simply put, in *Yang*, this Court concluded that the *constitution*, and not the plain language of Mont. Code Ann. § 45-9-130(1), required that, *for the limited purposes*

8. Notably, this Court did not overrule *Le*. *See Yang*, ¶ 24.

of imposing the 35 percent drug market value fine pursuant to Mont. Code Ann. § 45-9-130, district courts must first comply with Mont. Code Ann. § 46-18-231(3). This Court's tailored decision in *Yang*, therefore, does not render *Mingus* manifestly wrong because *Yang* does not undermine *Mingus's* statutory analysis that the plain language of Mont. Code Ann. § 46-18-231(3) does not apply to mandatory fines imposed pursuant to Mont. Code Ann. § 61-8-731. Nor would this Court be required to conclude *Mingus* is manifestly wrong before it can conclude, as Gibbons requests, that Mont. Code Ann. § 61-8-731 (2019) is unconstitutional.

D. Gibbons has not met his burden establishing that Mont. Code Ann. § 61-8-731(3) (2019) is unconstitutional on its face.

The Eighth Amendment of the United States Constitution and art. II, § 22 of the Montana Constitution protect a defendant's right to be free from excessive fines. Proportionality is the touchstone of the Eighth Amendment. *Yang*, ¶ 16 (citation omitted). The fine amount "must bear some relationship to the gravity of the offense that it is designed to punish." *Id.*

The plain language of Mont. Code Ann. § 61-8-731(3) (2019) establishes that gravity of the offense is considered before the district court may impose a minimum $5,000 fine. Statutory construction requires the district court to simply "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." *City of*

Appendix H

Missoula v. Fox, 2019 MT 250, ¶ 18, 397 Mont. 388, 450 P.3d 898. "The starting point for interpreting a statute is the language of the statute itself." *State v. Christensen*, 2020 MT 237, ¶ 95, 401 Mont. 247, 472 P.3d 622. The plain meaning of the statute controls when the "intent of the Legislature can be determined from the plain meaning of the words used in the statute." *Id*. When several statutes apply to a situation, the statutes should be construed, if possible, in a manner that will give effect to each of them. *Fox*, ¶ 18. "Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it." *Id*.

Before the district court can impose a fine pursuant to Mont. Code Ann. § 61-8-731(3), the person must first be convicted of violating Mont. Code Ann. §§ 61-8-401, -406, -411, or -465, and have a single conviction under Mont. Code Ann. § 45-5-106, or the person must have any combination of four or more convictions under Mont. Code Ann. §§ 45-5-104, -205, -628, 61-8-401, -406, or - 465, with the offense under § 45-5-104 occurring while the person was operating a vehicle under the influence of alcohol, a dangerous drug, and/or any other drug, as provided in § 61-8-401(1). The person must also have been, "upon a prior conviction, placed in a residential treatment program under subsection (2)." Mont. Code Ann. § 61-8-731(3).

After a person satisfies the conviction and prior enrollment in residential treatment thresholds of Mont. Code Ann. § 61-8-731(3), then the district court shall sentence the offender to the DOC for a term of 13 months to 5 years, *or* impose a fine of $5,000 to $10,000, *or* both.

Mont. Code Ann. § 61-8-731(3) (emphasis added). As Mont. Code Ann. § 61-8-731(3)'s plain language therefore provides, the district court is not required to impose a fine.[9] However, if the district court does elect to impose a fine, then the district court is required to impose a fine that is not less than $5,000 and but not more than $10,000.

Nonetheless, if the district court imposes a fine, the district court being required to impose a $5,000 mandatory minimum does not negate that Mont. Code Ann. § 61-8-731(3) incorporates the concept of proportionality. Of significant concern for this Court in *Yang*, were the instances in which the 35 percent market value fine, which had no limit, would exceed the offense-specific $50,000 maximum, discretionary fine, such as it did in Yang's case. *Yang*, ¶¶ 6, 23.

In discussing the potential imposition of an excessive fine amount under Mont. Code Ann. § 45-9-130(1), this Court notably distinguished Mont. Code Ann. § 61-8-731(1)(a)(iii) and (b)(ii)'s mandatory $5,000 minimum and $10,000 maximum fines, from Mont. Code Ann. § 45-9-130(1)'s 35 percent drug market value fine. *Yang*, ¶ 23, *see also Ingram*, ¶ 10. In doing so, this Court implicitly

---

9. Montana Code Annotated § 61-8-731(3) (2019) was repealed effective January 1, 2022. Punishment for a fourth or subsequent DUI is now codified at Mont. Code Ann. § 61-8-1008(2), which provides in relevant part, that "the person shall be punished by a fine of not less than $5,000 or more than $10,000, *and* by imprisonment in the state prison for a term of not more than 10 years" (emphasis added). Gibbons, however, does not have standing to challenge the 2021 fine provision. *See Thaut*, ¶ 17.

recognized, as it explicitly did in *Mingus*, that a district court imposing a fine ranging between $5,000 and $10,000 pursuant to Mont. Code Ann. § 61-8-731 did not need to first consider "the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine will impose" as Mont. Code Ann. § 46-18-231(3) requires for discretionary fines. *See Yang*, ¶¶ 23-24; *Mingus*, ¶¶ 11-15.[10]

Furthermore, this Court should decline to expand *Yang*'s holding to apply to Mont. Code Ann. § 61-8-731(3) (2019). Absent from Mont. Code Ann. § 61-8-731(3) is a cross-reference requiring a district court to first comply with Mont. Code Ann. § 46-18-231(3) before it imposes the fine. Additionally, the existence of Mont. Code Ann. § 46-18-231(3) does undermine the presumption that the Legislature was cognizant of the proportionality between the fines imposed and the gravity of the offense as required by the Eighth Amendment of the United States Constitution and art. II, § 22 of the Montana Constitution when it enacted Mont. Code Ann. § 61-8-731(3) (2019). *See Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 32, 384 Mont. 256, 368 P.3d 1131.

In sum, Mont. Code Ann. § 61-8-731(3) (2019)'s plain language prevents Gibbons from establishing, beyond a reasonable doubt, that no set of circumstances exist under

---

10. In *Mingus*, the mandatory fine in Mont. Code Ann. § 61-8-731 (2001) was not less than $1,000 or more than $10,000, but the Legislature has since amended the statute to raise the mandatory minimum fine to $5,000. Mont. Code Ann. § 61-8-731 (2017); *Mingus*, ¶ 11.

which the statute would be valid or that the statute lacks a plainly legitimate sweep. *See Yang*, ¶ 14. The district court is not required to impose the $5,000 fine pursuant to Mont. Code Ann. § 61-8-731(3) (2019). Nonetheless, even if the district court imposes a fine, the $5,000 minimum fine takes into consideration the gravity of the offense. Montana Code Annotated § 61-8-731(3) (2019) requires a specific minimum number of convictions of specific offenses and that the offender has already been sentenced to treatment before the district court could impose the fine. Accordingly, Mont. Code Ann. § 61-8-731(3) (2019) does not violate the Eighth Amendment of the United States Constitution or art. II, § 22 of the Montana Constitution.

Appendix I — Excerpts of Reply Brief of Appellant in the Supreme Court of the State of Montana, filed August 3, 2023

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0413

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT MURRAY GIBBONS,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Nineteenth Judicial District Court,
Lincoln County, the Honorable Matthew J. Cuffe, Presiding

Appendix I

APPEARANCES:

CHAD WRIGHT
Appellate Defender
DEBORAH S. SMITH
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
debbiesmith@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
CORI LOSING
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

MARCIA BORIS
Lincoln County Attorney
512 California Avenue
Libby, MT 59923

ATTORNEYS FOR PLAINTIFF AND APPELLEE

III. The $5,000 mandatory-minimum fine facially violates the Excessive Fines clause in the United States and Montana Constitutions.

The State disputes Mr. Gibbons's standing to challenge the facial constitutionality of the mandatory-minimum fine provisions in Mont. Code Ann. § 61-8-731(1)(a)(iii) and (1)(b)(ii), because the District Court imposed a $5,000 fine on Mr. Gibbons under § 61-8-731(3). (Appellee's Br. at 28.) But the State provides no argument why the proportionality analysis under the Excessive Fines Clause should differ among the three provisions.

The State argues the $5,000 minimum fine is discretionary under subsection (3), which governs four or more prior DUI convictions, because the District Court could have imposed no fine at all. (Appellee's Br. at 33 – 34.) But what the State fails to acknowledge is the District Court's stark choice between no fine or a minimum $5,000 fine. The District Court had no discretion to order a fine of $1 – 4,999 under the 2019 statute. Mr. Gibbons facial challenge to all three provisions in § 61-8-731 under the Excessive Fines Clause goes to the prohibition against a fine of less than $5,000 under any circumstances.

Additionally, the State fails to note the District Court's statement at sentencing, "I am going to fine him the minimum of $5,000, the statutory minimum. I am not imposing any other financial obligations on him with respect to this case." (App. C at 33.) The District Court

appeared to believe the fine was mandatory, regardless of Mr. Gibbons's financial circumstances. Moreover, over vigorous dissent, in *State v. Yeaton*, 2021 MT 312, ¶ 15, 406 Mont. 465, 500 P.3d 583, this Court decided the mandatory nature of the $5,000 minimum fine in subsection (3) was "made clear by *State v. Mingus*, 2004 MT 24, 319 Mont. 349, 84 P.3d 658[,]" even though *Mingus* involved a challenge to a former version of Mont. Code Ann. § 61-8-731 that did not permit the District Court to impose no fine as an alternative to the mandatory-minimum. *Mingus*, ¶ 15. This Court drew no distinction in *Yeaton* between the two different statutes, as the *Yeaton* dissent explained. *Yeaton*, ¶ 32 (McKinnon, J., dissenting). The *Yeaton* Court also remarked if the subsection (3) fine were discretionary, it would create an objectionable sentence, not an illegal sentence. *Yeaton*, ¶ 15, citing *State v. Kotwicki*, 2007 MT 17, ¶ 21, 335 Mont. 344, 151 P.3d 892.

Mr. Gibbons's facial challenge under the Excessive Fines Clause avoids *Yeaton*'s statutory-interpretation quagmire. The mandatory-minimum fine in § 61-8-731 is facially unconstitutional because it disregards any circumstance-specific proportionality analysis. "[A] defendant's indigency should *always* be considered by the *sentencing court* when financial obligations are imposed as part of a criminal sentence[,]" because that is what is constitutionally and statutorily required. *Yeaton*, ¶ 40 (emphasis original) (McKinnon, J., dissenting).

This Court possesses plenary review of whether a criminal defendant's constitutional rights were violated. *State v. Zitnik*, 2023 MT 131, ¶ 10, ___ Mont. ___, 532

P.3d 477. Though the Court could decide to limit the challenge in this appeal to subsection (3), the facial constitutionality of the $5,000 mandatory-minimum fine in all three provisions of § 61-8-731 should be decided in this appeal rather than in piecemeal fashion. "In the interests of judicial economy and avoidance of further delay, we have discretion under § 3-2-204, MCA, to reach and decide other issues amenable to judgment as a matter of law on the appellate record when necessary to final determination of the matter on the merits. *See* § 3-2-204, MCA (general scope of appellate review)[.]" *Kipfinger v. Great Falls Obstetrical & Gynecological Assocs.*, 2023 MT 44, ¶ 43, 411 Mont. 269, 525 P.3d 1183 (citations omitted).

Next, the State quarrels with *State v. Yang*, 2019 MT 266, 397 Mont. 486, 452 P.3d 897 (*en banc*). (Appellee's Br. at 31 – 32.) Attempting to distinguish *Yang* from *Mingus*, the State avers because *Yang* involved a constitutional analysis not the statutory language of Mont. Code Ann. § 45-9-130(1), "district courts must first comply with Mont. Code Ann. § 46-18-231(3), requiring sentencing judges to consider a defendant's ability to pay before imposing a fine." (Appellee's Br. at 32.) The State does not address why it seems to believe the Montana and United States Constitutions do not apply to § 61-8-731(1)(a)(iii), (1)(b)(ii), or (3), but do apply to § 45-9-130(1). It would be impossible to ground such a baseless position in the law.

After *Yeaton*, *Mingus* cannot remain viable precedent if the Court declares § 61-8-731(1)(a)(iii), (1)(b)(ii), or (3) facially unconstitutional without first complying with § 46-18-231(3). Citing nothing, the State contends otherwise,

claiming the Court would not have "to conclude *Mingus* is manifestly wrong before it can conclude . . . Mont. Code Ann. § 61-8-731 (2019) is unconstitutional." (Appellee's Br. at 32.) This is a puzzling contention seeing as "manifestly wrong" is the standard the Court applies when considering whether to overturn precedent. "This Court has made clear that '[t]he rule of stare decisis will not prevail where it is demonstrably made to appear that the construction placed upon [a statute] in [a] former decision is manifestly wrong.' . . . 'Principles of law should be definitively settled if that is possible.' . . . Even so . . . 'the search for truth involves a slow progress of inclusion and exclusion, involving both trial and error.'" *State v. Running Wolf*, 2020 MT 24, ¶ 22, 398 Mont. 403, 457 P.3d 218 (*en banc*) (citations, footnote omitted).

The State next notes the plain language of the statute requires a district court to impose a fine based on the number of prior DUI convictions a defendant has. (Appellee's Br. at 32 – 33.) Therefore, says the State, the fine in § 61-8-731(3) "bear[s] some relationship to the gravity of the offense that it is designed to punish." (Appellee's Br. at 32, quoting *Yang*, ¶ 16.) The State asserts that "the existence of Mont. Code Ann. § 46-18-231(3) does undermine the presumption that the Legislature was cognizant of the proportionality between the fines imposed and the gravity of the offense as required by the Eighth Amendment of the United States Constitution and art. II, § 22 of the Montana Constitution when it enacted Mont. Code Ann. § 61-8-731(3) (2019)." (Appellee's Br. at 35 – 36.) The State then cites without discussion *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 32, 384

Mont. 256, 368 P.3d 1131 (*en banc*), apparently for the proposition that "restraint on judicial interference with legislative policy judgments" is especially significant where "the Legislature took the unusual step in the [Medical Marijuana and Registration]Act of imposing upon itself an obligation to continue examination of the issue [of medical marijuana] and further consideration of changes in light of the evolving nature of the issue [of medical marijuana]." (Appellee's Br. at 35 – 36.)

There is nothing "evolving" about the nature of DUI fines. Nor has the Legislature taken the "unusual step" of continuing to exam them. *Mont. Cannabis Industry Ass'n* is irrelevant to Mr. Gibbons's appeal. In fact, as the State observes, the Legislature repealed § 61-8- 731 (2019) and replaced it with § 61-8-1008(2) (2021), which commands a $5,000 mandatory-minimum fine for fourth or subsequent DUI convictions while eliminating a district court's discretion to impose the fine. (Appellee's Br. at 34, n. 9.)

This Court, not the Legislature, declares what the Constitution requires. "[I]t is axiomatic that if a court can interpret a statute, it also can review its constitutionality. *See Driscoll v. Stapleton*, 2020 MT 247, ¶ 11 n.3, 401 Mont. 405, 473 P.3d 386; *see generally Marbury v. Madison*, 5 U.S. 137, 167, 177-78, 1 Cranch 137, 2 L.Ed. 60 (1803); *Gen. Agric. Corp. v. Moore*, 166 Mont. 510, 515-16, 534 P.2d 859, 862-63 (1975)." *Brown v. Gianforte*, 2021 MT 149, ¶ 14, 404 Mont. 269, 488 P.3d 548 (*en banc*). "Since *Marbury*, it has been accepted that determining the constitutionality of a statute is the exclusive province of the judicial branch." *Brown*, ¶ 25. *Accord McLaughlin v.*

Montana State Legislature, 2021 MT 178, ¶ 18, 405 Mont. 1, 493 P.3d 980 (*en banc*), *cert. denied*, 212 L. Ed. 2d 323, 142 S. Ct. 1362 (2022).

The State does not address Mr. Gibbons's argument why the mandatory-minimum fines in § 61-8-731 do not meet the proportionality analysis required under the Excessive Fines Clauses in the United States and Montana Constitutions, as implemented in Montana through § 46-18-231(3). The State simply argues the Court must defer to the Legislature's policy judgment because, unlike the 35% market value fine mandated under § 45-9-130(1), the DUI fine has a maximum limit. (Appellee's Br. at 34 – 35.) According to the State, the Court implicitly recognized in *Yang* what it explicitly recognized in *Mingus*, which is that a sentencing court in a DUI case "[does] not need to first consider 'the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine will impose' as Mont. Code Ann. § 46-18-231(3) requires for discretionary fines. *See Yang*, ¶¶ 23-24; *Mingus*, ¶¶ 11-15." (Appellee's Br. at 35, footnote omitted.)

The State sidesteps the central issue. The maximum limit of the fine, which concerned the Court in *Yang*, is not what Mr. Gibbons challenges. He challenges the mandatory-minimum limit of no less than $5,000, regardless of a defendant's ability to pay the statutorily set minimum amount. It does not matter whether the minimum fine is discretionary under the 2019 version of § 61-8-731(3). (Appellee's Br. at 34.) What matters is that the District Court lacks any ability to impose of fine of less

than $5,000, even if a judge believes a lower fine of some amount would be appropriate under the circumstances for a particular defendant.

"The Court is not 'blind' to the systemic issues surrounding the imposition of fines and fees on indigent defendants." *City of Whitefish v. Curran*, 2023 MT 118, ¶ 21, n.3, ___ Mont. ___, 531 P.3d 547 (*en banc*) (addressing criticism that the Court "remains blind to the inequities and disparate impacts of imposing mandatory fines and fees on persons who are clearly and obviously impoverished[,]" MacKinnon, J., dissenting, ¶ 34). Mr. Gibbons has challenged the facial constitutionality of the mandatory-minimum fine set out in § 61-8-731 (2019) under the Excessive Fine Clause in the Eighth Amendment to the United States Constitution and Art. II, § 22 of the Montana Constitution. He has proved "beyond a reasonable doubt, that no set of circumstances exist under which the statute would be valid or that the statute lacks a plainly legitimate sweep. *See Yang*, ¶ 14." (Appellee's Br. at 36.)

Mont. Code Ann. § 61-8-731(1)(a)(iii), (1)(b)(ii), and (3) is facially unconstitutional in all applications because it prohibits a sentencing judge from considering whether a $5,000 minimum-mandatory fine is grossly disproportional to the gravity of the offense. *Yang*, ¶ 28. Before any fine may be imposed, the sentencing judge must consider the nature of the DUI offense committed, the defendant's financial resources, and the nature the imposed fine would have on the defendant, as required by Mont. Code Ann. § 46-18-231(3).

Appendix I

CONCLUSION

For the foregoing reasons, Mr. Gibbons maintains the requests for relief set forth in his opening brief. (Appellant's Br. at 48.)