IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 16-0445

CITY OF KALISPELL,

Plaintiff and Appellee,

v.

THOMAS SALSGIVER,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, the Honorable David M. Ortley, Presiding

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STATEMENT OF THE ISSUES

1. Do the Municipal Court's and District Court's orders deeming Defendant's right to a jury trial waived for personally failing to appear at the omnibus hearing violate his right to trial by jury guaranteed to him under the Sixth and Fourteenth Amendments to the United States Constitution?

2. Are certain provisions in the sentencing Agreement to Pay Fines illegal on the ground that they are unsupported by statutory authority?

3. Should Defendant receive credit for jail time served of four days, instead of two days, against his sentence?

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Municipal Court Proceedings

On March 17, 2015, Thomas Scott Salsgiver was arrested and charged by Complaint in Kalispell Municipal Court with the offenses of Partner or Family Member Assault ("PFMA"), 1st violation, a misdemeanor, in violation of Mont. Code Ann. § 45-5-206 (2015), and Criminal Mischief, a misdemeanor, in violation of Mont. Code Ann.

§ 45-6-101 (2015).[1] (Municipal Court Record at Notice to Appear and Complaint) (03/17/2015).) Mr. Salsgiver appeared for a video arraignment the following day. (Order for Conditions of Release/Notice of Hearing/Trial (03/18/2015).) As a condition of release on his own recognizance, Mr. Salsgiver was ordered to, "**Personally appear for all court proceedings. Failure to appear shall result in a waiver of jury trial.**" (Order for Conditions of Release/Notice of Hearing/Trial (03/18/2015) (emphasis in original).) The Order states: "NEXT SCHEDULED HEARING: **Tuesday, May 5, 2015 01:30 PM.**" (Order for Conditions of Release/Notice of Hearing/Trial (03/18/2015) (emphasis in original).) The order was signed by Mr. Salsgiver and served personally on him. No transcript or audio recording exists of Mr. Salsgiver's initial appearance.[2]

[1] The 2015 version of the Montana Code Annotated governs Mr. Salsgiver's case. *State v. Tirey*, 2010 MT 283, ¶ 26, 358 Mont. 510, 247 P.3d 701 ("The law in effect at the time an offense is committed controls as to the possible sentence for the offense[.]"). Unless otherwise stated, all subsequent citations herein to the Montana Code Annotated are to the 2015 version.

[2] Kalispell Municipal Court confirmed on November 7, 2017, that they are unable to locate a recorded hearing of the March 18, 2015 hearing.

On March 23, 2015, the Municipal Court issued a Notice of Omnibus and an Omnibus Order. Notice of Omnibus provides in boilerplate format,

> **YOUR PERSONAL PRESENCE IS REQUIRED.** FAILURE TO APPEAR WILL RESULT IN A WAIVER OF JURY TRIAL AND MAY RESULT IN A WARRANT FOR YOUR ARREST AND YOUR DRIVER'S LICENSE AND DRIVING PRIVILEGES MAY BE SUSPENDED.

(Notice of Omnibus (03/23/2015) (emphasis in original.) The personal-presence warning is not specifically directed to Mr. Salsgiver. The Notice was served by mail on Defense Counsel, not on Mr. Salsgiver.

The Omnibus Order signed on the same day as the Notice of Omnibus, and also in boilerplate format, provides:

> The purpose of the Omnibus Hearing is to expedite the procedures leading up to trial of the defendant. The parties shall discuss the case with each other prior to the scheduled hearing. At this hearing, the parties will also complete and file a signed omnibus action form.[3] The judge will be available to accept a change of plea at the time set for Omnibus Hearing. A trial date will be set at the Omnibus Hearing if parties have not arrived at an agreement.

[3] The record of proceedings contains no "omnibus action form".

(Omnibus Order at 1 (emphasis in original.) The Order set various deadlines for discovery, motions, and other pre-trial matters. (Omnibus Order at 1 -2.) The Order also contains the following admonitions:

> The prosecuting attorney, defense counsel or defendant, if acting pro se, must be present at the omnibus hearing to discuss pretrial issues and disposition of this case prior to trial. . . .
>
> . . .
>
> ***The defendant must attend all court appearances and notify the court of any change of address in writing. Failure to appear at any Court-ordered hearing, if acting pro se, may result in bail forfeiture and the issuance of an arrest warrant. Failure to stay in contact with your attorney may also result in the issuance of a warrant.***

(Omnibus Order at 2 – 3 (emphasis in original).) This Order was served on Defense Counsel.

Subsequently, Mr. Salsgiver did not appear for the omnibus hearing on May 5, 2015, but Defense Counsel did appear. (Order to Waive Jury Trial and Schedule Judge Trial (05/06/2015.) In a one-paragraph order, the Municipal Court wrote in pertinent part, "[N]otice was given to the Defendant to personally be present at all court hearings and the Defendant failed to appear at the Omnibus Hearing. IT IS HEREBY ORDERED the Jury trial in the above-referenced

matter is WAIVED and a Judge Trial is scheduled[.]" (Order to Waive Jury Trial and Schedule Judge Trial (05/06/2015) (emphasis in original).) The Municipal Court issued a bench warrant for Mr. Salsgiver's arrest, and scheduled a judge trial. (Bench Warrant (05/06/2015); Notice of Judge Trial (05/06/2015).) No transcript or audio recording exists of the omnibus hearing.[4]

Mr. Salsgiver was arrested on the bench warrant and taken into custody on October 15, 2015. (Returned Bench Warrant (10/15/2015).) He was arraigned the following day, October 16, 2015, and again released on his own recognizance. (Amended Order for Conditions of Release/Notice of Hearing/Trial (10/16/2015).) No transcript or audio recording exists of this video arraignment.[5]

On October 28, 2015, Defense Counsel filed a motion for a jury trial, arguing that Mr. Salsgiver did not voluntarily, knowingly, and intelligently waive his right to be tried by a jury pursuant to the 6th and 14th Amendments to the United States Constitution. (Motion for Trial by Jury (10/28/2015).) The City contended that Mr. Salsgiver's

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[4] Kalispell Municipal Court confirmed on November 1, 2017, that they are unable to locate a recorded hearing for May 5, 2015, beginning at 1:30 p.m.

[5] Kalispell Municipal Court confirmed on November 6, 2017, that they have no recorded hearing for October 16, 2015 beginning at 11:00 a.m.

failure to appear at the omnibus hearing constituted a voluntary, knowing, and intelligent waiver of his right to a jury trial, and that Article II, Section 26 of the Montana Constitution and Montana Supreme Court cases interpreting Section 26 should be applied to determine whether a Sixth Amendment waiver occurs under the U.S. Constitution. (Plaintiff's Opposition to Motion for Jury Trial (11/06/2015).) The Municipal Court denied the motion, relying on *City of Missoula v. Cox*, 2008 MT 364, 346 Mont. 422, 196 P.3d 452, that a defendant waives his right to a jury trial by failing to appear at a hearing, and explained that Mr. Salsgiver offered no "legitimate reason" in the motion for his failure to appear. (Order Denying Motion for Jury Trial at 2 (11/10/2015), attached hereto as App. A.)

Mr. Salsgiver appeared with counsel at the bench trial on November 12, 2015. (Trial CD at 12:07:02 – 12:07:08.) At the beginning of trial, Defense Counsel noted Mr. Salsgiver's continuing objection to the Municipal Court's waiver of his jury trial, which the Municipal Court acknowledged. (Trial CD at 12:08:02 - 12:08:07.) Defense Counsel continued, "And Mr. Salsgiver's here, and uh, he never

waived his jury trial right. Is that correct?", to which Mr. Salsgiver responded, "Correct." (Trial CD at 12:08:07 - 12:08:16.)

At the conclusion of the trial, the Municipal Court found Mr. Salsgiver guilty of the two charged offenses. (Trial CD at 12:27:45 – 12:28:00.) The alleged victim declined a restitution order. (Trial CD at 12:28:48 – 12:29:10.)

For the PFMA, the Municipal Court sentenced Mr. Salsgiver to 364 days incarceration in the Flathead County Detention Center, with 362 days suspended, subject to conditions. (Trial CD at 12:31:30 – 12:31:40, 12:32:10 – 12:33:25; D.C. Doc. 1.2[6], PFMA Judgment and Sentence (11/12/2015), attached hereto as App. B.) Mr. Salsgiver received credit against his sentence for two days of time served in jail, March 17, 2015 and October 15, 2015. (Trial CD at 12:29:14 – 12:29:50, 12:31:42 – 12:32:03; App. B, PFMA Judgment and Sentence at 1.) The Municipal Court ordered Mr. Salsgiver to pay a lump-sum fine and surcharges of $450.00, less $150.00 credit for pre-trial incarceration of two days. (Trial CD at 12:30:15 – 12:31:00; App. B, PFMA Judgment

[6] D.C. Doc. 1.2 consists of the three orders on appeal: 1) the Judgment and Sentence for PFMA, 2) the Sentencing Order for Criminal Mischief, and 3) the Agreement to Pay Fines in installments for both offenses. These are three separate documents, and all three are included in App. B.

and Sentence at 1.) The judgment does not specify the individual amounts of the fine or surcharges.

For the Criminal Mischief offense, Mr. Salsgiver received a 180-day sentence with all time suspended, subject to conditions. (Trial CD at 12:30:05 – 12:30:15; App. B, Criminal Mischief Sentencing Order (11/12/2015).) The Municipal Court imposed a lump-sum "Fine/Fee/Surcharge" of $400.00, a $10.00 witness fee, and court costs of $20.00. (Trial CD at 12:30:00 – 12:30:05, 12:33:33 – 12:34:07; App. B, Criminal Mischief Sentencing Order.) The sentencing order does not specify the individual amounts of the fine, fee, or surcharge.

The Municipal Court imposed a $10 "contract fee" so that Mr. Salsgiver could pay his fine, costs and surcharges in installments of $25.00/month, after Mr. Salsgiver stated that he could not pay the $740 amount in-full within 30 days. (Trial CD at 12:31:00 – 12:31:25, 12:33:25 – 12:33:30, 12:35:18 – 12:35:30; App. B, PFMA Judgment and Sentence at 2.) The contract imposes a 10% annual interest rate on the unpaid principal balance until paid in-full. (Trial CD at 12:35:30 – 12:35:40; App. B, Agreement to Pay Fines)

The Agreement to Pay Fines, signed by Mr. Salsgiver, provides in pertinent part:

> **I agree to pay said fine/restitution/cost [sic] ordered by this court in the following manner: $740.00 in installments of $25.00 per month beginning 12/12/2015, until paid in full. I understand that the fine amount includes a $10.00 contract fee and that any unpaid balance under this contract shall bear interest at the rate of ten percent (10%) per year.**
>
> I fully understand that if I fail to pay the fines in accordance with this agreement I can be prosecuted for contempt of Court and confined in jail until I make such payment. All payments are due on a monthly basis and No monthly prepayments are allowed unless authorized by Judge Adams.

(App. B, Agreement to Pay Fines (11/12/2015) (emphasis in original).) The second paragraph in the above quote from the Agreement to Pay Fines was not included in the oral pronouncement of sentence.

The PFMA Judgment and Sentence, Criminal Mischief Sentencing Order, and Agreement to Pay Fines otherwise conform with the oral pronouncement of sentence.

District Court Appeal

Mr. Salsgiver timely filed a Notice of Appeal to the District Court, challenging only the denial of his motion for a jury trial. (Notice of

Appeal (11/18/2015).) Following briefing, the District Court affirmed the Municipal Court's decision to deny Mr. Salsgiver's motion for a jury trial. (D.C. Doc. 5 (Order on Appeal) (06/13/2016), attached hereto as App. C.) The District Court determined that Mr. Salsgiver validly waived his right to a jury trial under Article II, Section 26 of the Montana Constitution, and under the Sixth and Fourth Amendments to the United States Constitutions. (App. C at 7 – 10.) In addition, the District Court determined that Mr. Salsgiver was not prejudiced by the Municipal Court's conflicting orders concerning whether his personal presence was required at the omnibus hearing.[7] (App. C at 6 – 7.) Mr. Salsgiver timely appealed the District Court order.

STANDARDS OF REVIEW

District courts serve as intermediate appellate courts for cases tried in municipal courts. Mont. Code Ann. §§ 3-5-303, 3-6-110. This Court reviews district court appellate decisions as if originally appealed

[7] The District Court discovered "an inherent conflict" in the various orders concerning the requirement of Mr. Salsgiver's personal presence, and noted that the issue was not argued in the Municipal Court or addressed on appeal by the parties. (App. C at 6.) Applying plain error review, the District Court determined that reversal of the Municipal Court order denying the motion for a jury trial was not required because it was "clear" that Mr. Salsgiver suffered no prejudice from the "patent ambiguity" in the orders, because Mr. Salsgiver submitted no evidence to explain his failure to appear. (App. C at 7.)

to this Court. *City of Missoula v. Girard*, 2013 MT 168, ¶ 9, 370 Mont. 443, 303 P.3d 1283 (citation omitted). The Court examines the municipal court record independently of the district court's decision and applies the appropriate standard of review. *Girard*, ¶ 9 (citation omitted).

A lower court's conclusions of law and interpretations of the Constitution are reviewed de novo. *Girard*, ¶ 10 (citations omitted). Constitutional questions are subject to plenary review. *Girard*, ¶ 10 (citations omitted). "Discretionary trial court rulings, including trial administration issues, are reviewed for abuse of discretion. . . . Judicial discretion, however, must be guided by the rules and principles of law. A court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Girard*, ¶ 10 (citations omitted).

When a criminal sentence is not eligible for review by the Sentence Review Division, this Court reviews the sentence for both legality and abuse of discretion. *State v. Himes*, 2015 MT 91, ¶ 22, 378 Mont. 419, 345 P.3d 297, *cert. denied*, 136 S. Ct. 111, 193 L. Ed. 2d 38 (2015) (citation omitted). This Court's "review for legality is confined to

determining whether the sentencing court had statutory authority to impose the sentence, whether the sentence falls within the parameters set by the applicable sentencing statutes, and whether the court adhered to the affirmative mandates of the applicable sentencing statutes. This determination is a question of law and, as such, our review is de novo." *Himes,* ¶ 22 (citation omitted).

This Court generally refuses to review issues on appeal to which the party failed to object at trial. *State v. Kotwicki*, 2007 MT 17, ¶ 8, 335 Mont. 344, 151 P.3d 892 (citing *State v. Lenihan*, 184 Mont. 338, 341, 602 P.2d 997, 999 (1979)). *Lenihan* recognizes an exception to the general rule, allowing appellate review of a sentence that is alleged to be illegal or in excess of statutory mandates, even if the defendant raised no objection in the trial court. *Kotwicki*, ¶ 8 (citing *Lenihan*, 184 Mont. at 343, 602 P.2d at 1000).

SUMMARY OF ARGUMENT

Mr. Salsgiver possesses a Sixth Amendment right to trial by jury for the PFMA count. The trial court denied him his Sixth Amendment right to trial by jury as there was no knowing, voluntary, and intelligent waiver. That is the only way a defendant can waive his Sixth

Amendment right to trial by jury. In contrast to Article II, Section 26 of the Montana Constitution, the Sixth Amendment does not contain a default of appearance provision. The trial court improperly relied on Section 26, specifically the waiver of jury trial upon default of appearance provision as to the PFMA count. The trial court was not in error in applying Section 26 to the Criminal Mischief count. The trial court relied on *City of Missoula v. Cox*, 2008 MT 364, 346 Mont. 422, 196 P.3d 452. However, the defendant in *Cox* was not charged with a "serious" offense and thus, did not possess a Sixth Amendment right to trial by jury. Mr. Salsgiver was denied his Sixth Amendment right to trial by jury and the conviction for Partner or Family Member Assault must be reversed and remanded to the Kalispell Municipal Court for a jury trial.

Alternately, if the Court does not discern a violation of Mr. Salsgiver's Sixth and Fourteenth Amendment right to trial by jury, Mr. Salsgiver requests the following relief:

Two provisions in the Agreement to Pay Fines should be struck or corrected, because they fall outside of statutory parameters. First, the $10 contract fee and 10% annual interest rate charged on the unpaid

balance of Mr. Salsgiver's fines, fees, costs, and surcharges are not authorized by any statute and must be struck. Second, because no statute authorizes a bar on a defendant paying his or her installment payments early unless approved by a Municipal Judge, the prepayment bar also must be struck.

The Municipal Court did not credit Mr. Salsgiver with all days of his pre-trial incarceration. Mr. Salsgiver is entitled to four days of credit for time served, pursuant to Mont. Code Ann. § 46-18-403(1). The Municipal Court credited him only with two days of jail time served. This judgment must be remanded to credit Mr. Salsgiver with all four days of time served and to apply that amount to reduce his fines, pursuant to Mont. Code Ann. § 46-18-403(2).

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ARGUMENT

I. MR. SALSGIVER HAS A SIXTH AND FOURTEENTH AMENDMENT RIGHT TO TRIAL BY JURY ON THE PFMA COUNT AND HE NEVER KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY WAIVED THAT RIGHT.

A. Mr. Salsgiver has a right to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution as the maximum punishment for a PFMA is one year imprisonment.

The Sixth Amendment to the United States Constitution provides that,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI. In *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), the U.S. Supreme Court held that "the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which -- were they to be tried in a federal court -- would come within the Sixth Amendment's guarantee." The *Duncan* Court noted that jury trials were only required under the Sixth Amendment for "serious" offenses and that "petty" offenses could still be tried

without a jury. *Id.* at 159-160. "[N]o offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." *Baldwin v. New York*, 399 U.S. 66, 69, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970). Mr. Salsgiver was charged with the offense of Partner or Family Member Assault under Mont. Code Ann. § 45-5-206. The offense is punishable by up to one year imprisonment.[8] Thus, Mr. Salsgiver had a right to trial by jury under the Sixth and Fourteenth Amendments to the United States Constitution.

By contrast, the three Montana Supreme Court cases the District Court relied upon below: *City of Missoula v. Cox*, 2008 MT 364, 346 Mont. 422, 196 P.3d 452; *State v. Trier*, 2012 MT 99, 365 Mont. 46, 277 P.3d 1230; *City of Missoula v. Girard*, 2013 MT 168, 370 Mont. 443, 303 P.3d 1283, did not address or even mention the Sixth Amendment as the defendants in those cases were charged with offenses that did not authorize more than six months imprisonment. Thus, the defendants in those cases did not possess a right under the Sixth and Fourteenth Amendments to trial by jury. The Montana Constitution does provide a

[8] Mont. Code. Ann. § 45-5-206(3)(a)(i) states: "An offender convicted of partner or family member assault shall be fined an amount not less than $100 or more than $1000 and be imprisoned in the county jail for a term not to exceed 1 year or not less than 24 hours for a first offense."

right to a jury trial for "petty" offenses and thus in the context of "petty" offenses extends a right to those defendants that the U.S. Constitution does not extend to them. Because the state of Montana does not need to provide a jury trial to those accused of "petty" offenses under the U.S. Constitution, the state is free to dictate how that state constitutional right is invoked, exercised and waived without running afoul of the Sixth Amendment since those defendants have no right to jury trial under the Sixth and Fourteenth Amendments.

B. The Sixth Amendment right to trial by jury may only be waived voluntarily, knowingly, and intelligently as the Sixth Amendment does not have a "default of appearance" provision as Article II, Section 26 of the Montana Constitution contains.

Article II, Section 26 of the Montana Constitution states, in pertinent part, that:

> The right of trial by jury is secured to all and shall remain inviolate. But upon default of appearance or by consent of the parties expressed in such manner as the law may provide, all cases may be tried without a jury or before fewer than the number of jurors provided by law.

Mont. Const., Art. II § 26. "Section 26 plainly provides for two distinct circumstances in which trial without a jury is appropriate: where a defendant fails to appear, and where the parties consent to trial without

a jury expressed in such a manner as the law may provide. These are two separate situations. Logically, unlike the expression of consent of the parties to a non-jury trial, non-appearance is self-evident." *City of Missoula v. Cox*, 2008 MT 364, ¶ 11, 346 Mont. 422, 196 P.3d 452. Section 26 "clearly allows for trial without a jury upon the defendant's failure to appear, notwithstanding the defendant's lack of explicit agreement that his non-appearance results in a waiver." *Id.* at ¶ 10. Of the two distinct circumstances stated in Section 26, Mr. Salsgiver's case clearly falls into the failure to appear situation. The Municipal Court and the District Court are in agreement as reflected by their respective orders. The Municipal Court stated in its "ORDER DENYING MOTION FOR JURY TRIAL" that "Mr. Peabody does not state any legitimate reason for the Defendant's failure to appear at the May 5, 2015 Omnibus Hearing." (App. A, at 2.) The Municipal Court then cites *City of Missoula v. Cox*, 2008 MT 364, 346 Mont. 422, 196 P.3d 452, "that a criminal defendant similarly waives his right to a trial by jury by his failure to appear." (App. A, at 2.) Notably, the Municipal Court did not make a finding of a knowing, intelligent, and voluntary waiver as it was relying on the default of appearance language of

Section 26. While there are two distinct circumstances in which trial without a jury is appropriate under Section 26, there is only one circumstance under the Sixth Amendment where trial without a jury is appropriate in the case of a "serious" offense. That one circumstance is a knowing, intelligent, and voluntary waiver. See *People v. Collins*, 26 Cal.4th 297, 305, 27 P.3d 726, 109 Cal. Rptr. 2d 836 (2001); *Colorado v. Spring*, 479 U.S. 564, 573, 107 S.Ct. 851, 857, 93 L.Ed. 2d 954 (1987) [a knowing, intelligent, and voluntary waiver of the Fifth Amendment privilege against self-incrimination must precede a confession that is the product of police interrogation]; *McCarthy v. United States*, 394 U.S. 459, 465-466, 89 S.Ct. 1166, 1170, 22 L.Ed.2d 418 (1969) [an intentional revocation of a known right or privilege must accompany a guilty plea, which in effect is a waiver of the right to trial by jury, the right to confront opposing witnesses, and the privilege against self-incrimination]; *Johnson v. Zerbst*, 304 U.S. 458, 464, 468, 58 S.Ct. 1019, 1024-1025 (1938) [a knowing and intentional waiver of the Sixth Amendment right to assistance of counsel is required before a defendant may proceed without counsel]; *Patton v. United States*, 281 U.S. 276, 298, 308-312, 50 S.Ct. 253, 261-263, 74 L.Ed. 854 (1930) [an

intelligent waiver of right to trial by jury is required]; *State v. Mann*, 2006 MT 33, ¶ 14, 331 Mont. 137, 130 P.3d 164. There is no default of appearance provision in the text of the Sixth Amendment. In the three Montana Supreme Court opinions interpreting the default of appearance provision of Section 26, there is not any discussion of whether there is a knowing, intelligent, and voluntary waiver. *City of Missoula v. Cox*, 2008 MT 364, 346 Mont. 422, 196 P.3d 452; *State v. Trier*, 2012 MT 99, 365 Mont. 46, 277 P.3d 1230; *City of Missoula v. Girard*, 2013 MT 168, 370 Mont. 443, 303 P.3d 1283. That makes sense, because those defendants were charged with "petty" offenses. Their right to jury trial emanated solely from Section 26, and by its plain language, "clearly allows for trial without a jury upon the defendant's failure to appear, notwithstanding the defendant's lack of explicit agreement that his non-appearance results in a waiver." *City of Missoula v. Cox*, 2008 MT 364, ¶ 10, 346 Mont. 422, 196 P.3d 452.

The Supreme Courts of Nebraska and Kansas have had to address the same issue as Mr. Salsgiver's case presents. In *State v. Bishop*, 224 Neb. 522, 527-528, 399 N.W.2d 271 (1987), the defendant was charged with four separate counts. The rules of the county court in which the

defendant was tried, provided "that all demands for a jury trial in misdemeanor cases must be made within 10 days following the entry of a plea of not guilty." *Id.* at 527. The rule did not draw a distinction between jury trials provided for by state law and those constitutionally required under the Sixth and Fourteenth Amendments to the U.S. Constitution. *Id.* One of the four counts was for the charge of resisting arrest, which carried a maximum penalty of one year imprisonment. *Id.* at 528. The defendant had the right to a jury trial under the Sixth and Fourteenth Amendments for the charge of resisting arrest. The defendant was also charged with driving under the influence and refusing to take a chemical test, for which each offense carried a maximum penalty of seven days imprisonment. *Id.* These two offenses are "petty" offenses for which the defendant did not have a right to jury trial under the Sixth and Fourteenth Amendments. *Id.* However, the defendant did have a statutory right to jury trial on these two charges. *Id.* To invoke the statutory right to jury trial, the defendant must demand a jury trial, and a "failure to file a timely request in accordance with the rules of court constitutes a waiver of the statutory right to a jury trial." *Id.* at 527-528, citing *State v. Vernon*, 218 Neb. 539, 356

N.W.2d 887 (1984). The defendant requested a jury trial but the request was denied because it was after ten days from his not guilty plea rendering it untimely. *Id.* The Nebraska Supreme Court affirmed the convictions for the two "petty" offenses because he failed to make a proper demand for trial which was required to invoke his statutory right to jury trial. *Id.* at 528. The Court reversed the conviction for resisting arrest because the record did not show a voluntary, knowing, and intelligent waiver of his Sixth and Fourteenth Amendment right to jury trial. *Id.*, citing *Patton v. United States*, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930) disapproved on other grounds in *Williams v. Florida*, 399 U.S. 78, 86-88, 90 S.Ct. 1893, 1898-1899, 26 L.Ed.2d 446 (1970); see also *State v. Lafler*, 224 Neb. 613, 616, 399 N.W.2d 808 (1987).

In Kansas, pursuant to statute, a defendant charged with a misdemeanor must file a written request for a jury trial not later than seven days after receiving notice of a bench trial assignment. K.S.A. § 22-3404(1); see *State v. Sykes*, 35 Kan.App.2d 517, 524, 132 P.3d 485 (2006). In *State v. Sykes*, 35 Kan.App.2d 517, 132 P.3d 485 (2006), the defendant was charged with misdemeanor theft, which carried a

maximum penalty of one year imprisonment. The defendant, Sykes, did not file a written request for a jury trial. *Id.* at 523. "However, on the morning of the scheduled bench trial, Sykes made it clear to the district court that he wanted to proceed with a jury trial." *Id.* The trial court proceeded to a bench trial where Mr. Sykes was convicted of the theft. *Id.* at 519, 523. Despite not exercising his statutory right to a jury trial, the Court of Appeal stated that he had not waived his right to jury trial under the Sixth and Fourteenth Amendments. *Id.* at 524. "'Where the potential imprisonment for the offense charged exceeds six months, a defendant standing trial for a misdemeanor or a traffic offense has a right to a jury trial, regardless of whether it is requested within seven days after notification of a trial setting.'" *State v. Sykes*, 35 Kan.App.2d 517, 523-524, 132 P.3d 485 (2006), quoting *State v. Jones*, 19 Kan.App.2d 982, 984, 879 P.2d 1141 (1994); see also *State v. Irving*, 216 Kan. 588, 533 P.2d 1225 (1975).

Just as the statutes in Nebraska and Kansas do not differentiate between "petty" and "serious" misdemeanors, neither does Article II, Section 26 of the Montana Constitution. Nor does Mont. Code Ann. § 46-16-110 which draws the line between misdemeanor and felony,

rather than "petty" and "serious". Mr. Salsgiver's conviction for Criminal Mischief did not violate his Sixth Amendment right to trial by jury as the maximum amount of imprisonment authorized is six months.[9] Thus, it is a "petty" offense and the Sixth Amendment does not grant him a right to a jury trial. Mr. Salsgiver did have a right to a jury trial under Article II, Section 26 of the Montana Constitution for both counts. He did "waive"[10] his state constitutional right as to both counts as that term is applied under the default of appearance provision of Section 26 of the Montana Constitution. However, such a "waiver" under state law cannot substitute for the knowing, voluntary, and intelligent waiver that is required under the Sixth and Fourteenth Amendments to the United States Constitution. See *Patton v. United States,* 281 U.S. 276, 298, 308-312, 50 S. Ct. 253, 74 L. Ed. 85 (1930); *State v. Lafler*, 224 Neb. 613, 616, 399 N.W.2d 808 (1987); *State v.*

[9] Mont. Code Ann. § 45-6-101(3) states in relevant part, "A person convicted of the offense of criminal mischief shall be fined not to exceed $1,500 or be imprisoned in the county jail for any term not to exceed 6 months, or both."

[10] "The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards." *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed.2d 274 (1969), citing *Douglas v. Alabama*, 380 U.S. 415, 422, 85 S. Ct. 1074, 13 L. Ed.2d 934 (1965).

Sykes, 35 Kan.App.2d 517, 132 P.3d 485 (2006); *State v. Irving*, 216 Kan. 588, 533 P.2d 1225 (1975).

C. Mr. Salsgiver never knowingly, intelligently, and voluntarily waived his Sixth Amendment right to trial by jury.

The constitutional right to trial by jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution may be waived by a defendant. *Duncan v. Louisiana*, 391 U.S. 145, 157-158, 88 S. Ct. 1444, 20 L. Ed.2d 491 (1968); *Patton v. United States*, 281 U.S. 276, 50 S. Ct. 253, 74 L. Ed. 854 (1930). However, "[a]s with the waiver required of several other constitutional rights that long have been recognized as fundamental, a defendant's waiver of the right to jury trial may not be accepted by the court unless it is knowing and intelligent, that is, 'made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it,' 'as well as voluntary' 'in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.' (See fn. 2)" *People v. Collins*, 26 Cal.4th 297, 305, 27 P.3d 726, 109 Cal. Rptr. 2d 836 (2001) (citations omitted). The Municipal Court did not find a knowing, intelligent, and voluntary waiver. (See App. A at 2.)

The Municipal Court instead deemed a waiver based on the failure to appear at the Omnibus hearing.[11]

The alleged waiver was not voluntary; Mr. Salsgiver never expressed any desire in open court to waive his right to trial by jury. On March 18, 2015, he was in custody at the time of his initial appearance and arraignment. He was given a boilerplate form entitled "ORDER FOR CONDITIONS OF RELEASE/NOTICE OF HEARING/TRIAL" that he was required to sign as a condition of being released on his own recognizance. Under the heading "DEFENDANT SHALL" the form had a box with a preprinted "X" in it next to the command that he "**Personally appear for all court proceedings. Failure to appear shall result in a waiver of jury trial.**" Despite being a court of record, Kalispell Municipal Court is unable to locate the recorded hearing for March 18, 2015. The record is silent as to whether there was any discussion regarding a jury trial or a bench trial. However, given the boilerplate, mandatory language stating that "[f]ailure to

[11] "Section 26 plainly provides for two distinct circumstances in which trial without a jury is appropriate: where a defendant fails to appear, and where the parties consent to trial without a jury expressed in such a manner as the law may provide. These are two separate situations." *City of Missoula v. Cox*, 2008 MT 364, ¶ 11, 346 Mont. 422, 196 P.3d 452.

appear shall result in a waiver of jury trial," Mr. Salsgiver not waiving his right to jury trial at his March 18, 2015 court date, and being forced to sign the form as a condition of being released on his own recognizance, this was not a free and deliberate choice of Mr. Salsgiver. He did not have counsel with him on March 18, 2015 during his video arraignment. His attorneys never made any representation to the trial court that he wished to waive his right to trial by jury at any time during the criminal proceedings. Unlike *State v. Reim*, 2014 MT 108, ¶ 33, 347 Mont. 487, 323 P.3d 880, where the attorney filed a motion to vacate the jury trial and set a bench trial, on October 28, 2015, Mr. Salsgiver's attorney filed a motion requesting a jury trial, stating that Mr. Salsgiver never voluntarily, knowingly, and intelligently waived his right to trial by jury. His attorney would be precluded from requesting a jury trial if Mr. Salsgiver had stated differently to his attorneys, as the decision to waive jury belongs to the defendant, not defendant's counsel. See *Florida v. Nixon*, 543 U.S. 175, 187, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004). Similarly unlike *Reim*, on the day of the bench trial, Mr. Salsgiver was present in court and his attorney renewed the objection to the jury trial being deemed waived. His attorney then asks

him on the record "[a]nd Mr. Salsgiver's here, and uh, he never waived his jury trial right. Is that correct?" Mr. Salsgiver responded, "Correct." (Trial CD at 12:08:07 - 12:08:16.) The record shows Mr. Salsgiver's attorney objected at least twice, once in writing and once in court. Mr. Salsgiver did not passively acquiesce as *Reim* did on the day of trial, but stated on the record that it was correct that he never waived his jury trial right. The trial judge then proceeded to the bench trial without any further inquiry of Mr. Salsgiver's desire for a jury or bench trial. That makes sense because the trial judge, as evidenced by her "ORDER DENYING MOTION FOR JURY TRIAL," was not making a finding of a voluntary, knowing, and intelligent waiver, but was instead relying on the failure to appear provision of Section 26 and *Cox.* (See App. A, at 2.) If this were a civil contract, it would be an unenforceable contract of adhesion made between two entities of unequal bargaining strength, one of whom having the power to jail the other party for failure to agree. When dealing with something as important as a fundamental federal constitutional right with one's liberty at stake, the Sixth and Fourteenth Amendments require more scrutiny, not less. See also *U.S. v. Scott*, 450 F.3d. 863, 866-867 (9th

Cir. 2006); *Lebron v. Secretary, Florida Dept. of Children and Families*, 710 F.3d 1202, 1214-18 (11th Cir. 2013); *Johnson v. United States*, 333 U.S. 10, 13, 68 S. Ct. 367, 92 L. Ed. 436 (1948) (citation omitted) (Consent to search invalid when "granted in submission to authority rather than as an understanding and intentional waiver or a constitutional right.")

In addition to the requirement that a waiver be voluntary, it must also be knowing, and intelligent.

> This requires that the defendant have the mental capacity to understand the right and that he or she know what that right guarantees and the consequences of a decision to forgo the right. Courts disagree, however, as to precisely what the defendant must know. Some have held that the accused must know that the jury is chosen from members of the community, that the accused can participate in the selection of jurors, and that the jury's verdict must be unanimous (when so required), and, in addition, according to some courts, the accused must know that if he or she waives the right to a jury trial the judge alone will decide the question of guilt or innocence. Other courts, however, do not require that the defendant know the specific features of the right. They have concluded that it is sufficient if the defendant understands that his or her choice is either to be judged by a group of people from the community or to have the facts determined by the judge.

3-14 Criminal Constitutional Law § 14.06 (2017). In Matthew Bender's, 3-14 Criminal Constitutional Law § 14.06 (2017), the cases cited in

footnote 22, which follows the last sentence in the block quotation above, are *Haliym v. Mitchell*, 492 F.3d 680, 698 (9th Cir. 2007); *State v. Baker*, 217 Ariz. 118, 120, 170 P.3d 727, 729 (Ariz. Ct. App. 2007); *State v. Turner*, 826 N.E.2d 266, 272, 105 Ohio St. 3d 331, ¶ 26 (Ohio 2005); *State v. Ketterer*, 855 N.E. 2d 48, 61, 111 Ohio St. 3d. 70, ¶ 68-70 (Ohio 2006). These four cases are examples of the bare minimum that courts require the defendant know before deciding whether to waive trial by jury. The record in Mr. Salsgiver's case consists of a statement in the "ORDER FOR CONDITIONS OF RELEASE/NOTICE OF HEARING/TRIAL" that "[f]ailure to appear shall result in a waiver of jury trial." It does not convey the bare minimum distinctions between a jury trial and judge trial, let alone mention that the alternative to a jury trial is a judge trial. It does not explain that at a jury trial he would be judged by a group of people from the community, and in the alternative, that a judge would determine his guilt or innocence in a bench trial. See *United States ex rel. Williams v. De Robertis*, 715 F.2d 1174, 1180 (7th Cir. 1983). Thus, this was not a knowing and intelligent waiver.

"The prosecution has the burden of proof of waiver of constitutional rights." *State v. Lucero*, 151 Mont. 531, 538, 445 P.2d 731 (1968), overruled on other grounds in *State v. Reavley*, 2003 MT 298, citing *Carnley v. Cochran*, 369 U.S. 506, 82 S. Ct. 884, 8 L.Ed.2d 70 (1962). "This burden of proof is heavy and the standards required for waiver are high." *Id.*, citing *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). "Courts indulge in every reasonable presumption against waiver of fundamental constitutional rights and will not indulge in any presumption of waiver." *Id.* citing *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938); *Brookhart v. Janis*, 384 U.S. 1, 86 S. Ct. 1245, 16 L.Ed.2d 314 (1966); *Emspak v. United States*, 349 U.S. 190, 75 S. Ct. 687, 99 L.Ed. 997 (1955); *Carnley v. Cochran*, 369 U.S. 506, 82 S. Ct. 884, 8 L.Ed.2d 70 (1962). "We cannot presume a waiver of these … important federal rights [including the right to a trial by jury] from a silent record." *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969); see also *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1102 (9th Cir. 2005); *United States v. Hamilton*, 391 F.3d 1066, 1071 (9th Cir. 2004).

There is no recording from the March 18, 2015, initial appearance and arraignment. Mr. Salsgiver signed the "ORDER FOR CONDITIONS OF RELEASE/NOTICE OF HEARING/TRIAL." The alleged waiver occurred not on March 18, 2015, but on May 5, 2015. On May 5, 2015, Mr. Salsgiver does not appear in court for the omnibus hearing. By his failure to appear, the trial judge deems a waiver. The Municipal Court has no recording of the omnibus hearing. There is no statement of counsel indicating that Mr. Salsgiver wished to waive his right to trial by jury. We do have a record of a motion for trial by jury filed by his attorney on October 28, 2015, and a recording from the morning of trial in which defense counsel objects again to the denial of trial by jury and same as the defendant in *Sykes*, Mr. Salsgiver confirming that he never waived his right to trial by jury. (Trial CD at 12:08:02 - 12:08:16). The trial judge did not find a knowing, voluntary, and intelligent waiver. (App. A, at 2.) The District Court opinion made the statement that, "[p]resumably, in the absence of a reasonable explanation, Salsgiver made the conscious decision not to appear and therefore consented to a bench trial." (App. C, at 8-9.) However, there is a strong presumption against finding waiver of fundamental federal

constitutional rights. *United States v. Robertson*, 45 F.3d 1423, 1433 (10th Cir. 1995), citing *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019 (1938). A court may not "permit the waiver of a fundamental constitutional right based on nothing more than conjecture and speculation." *United States v. Robertson*, 45 F.3d 1423, 1433 (10th Cir. 1995).

D. The Sixth Amendment right to trial by jury may be waived but may not be forfeited or lost through conduct in contrast to the Sixth Amendment's Confrontation Clause

The Sixth Amendment right to trial by jury may only be waived voluntarily, knowingly, and intelligently. The Sixth Amendment right to jury trial may not be forfeited or lost as a sanction or punishment for violating court orders unlike one's Confrontation Clause rights. *Freytag v. Commissioner*, 501 U.S. 868, 894, n. 2, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991) (Scalia, J., concurring in part and concurring in judgment). The opinion of the District Court Judge on appeal in Mr. Salsgiver's case, cited *Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) for the proposition that a right guaranteed by the Sixth Amendment can be lost through conduct of the defendant which prevents the trial from going forward. (App. C, at 8-9). This statement

is not correct for two reasons. The first reason is that different rights that emanate from the same amendment do not necessarily have the same waiver/forfeiture rules. At issue in *Allen* was the defendant's right to be present at trial which was guaranteed by the Confrontation Clause of the Sixth Amendment. In *Allen*, the defendant was talking over the proceedings, stated his intent was to be so disruptive that the trial could not go forward, and was making abusive comments to the court, including telling the judge that he was going to be a corpse after lunch. *Allen*, at 340-341. The judge removed *Allen* from the courtroom and the jury trial proceeded in his absence. *Id.* at 340. The judge told him he could remain in the courtroom if he behaved himself and did not interfere with the case. *Id.* *Allen* was allowed back in and then had another outburst where he promised to talk throughout the trial. *Id.* at 341. After his second removal, the judge let him back in the courtroom and *Allen* was not removed from his trial thereafter. *Id.* The U.S. Supreme Court held,

> that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once

> lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

Illinois v. Allen, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). The U.S. Supreme Court later stated that "[u]nder these circumstances we hold that Allen lost his right guaranteed by the Sixth and Fourteenth Amendments to be present throughout his trial." *Id.* at 346. The *Allen* Court never stated that he waived his right to be present. They stated he lost it. As Justice Scalia stated in *Freytag v. Commissioner*, 501 U.S. 868, 894, n. 2, 111 S.Ct. 2631, 115 L.Ed. 2d 764 (1991) (Scalia, J., concurring in part and concurring in judgment) some rights may be forfeited by means short of waiver such as the Confrontation

Clause, while others such as right to trial by jury may not.[12] See also, e.g. *Giles v. California*, 554 U.S. 353, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008) (A defendant's rights under the Confrontation Clause may be forfeited if the defendant kills an adverse witness for the purpose of keeping them from testifying.) For example, in *State v. Lafler*, 224 Neb. 613, 616, 399 N.W.2d 808 (1987), the trial court was in error in advising the defendant at his arraignment that a demand for a jury trial was required pursuant to statute as he had a Sixth Amendment right on the three counts of assault as each count carried a maximum penalty of one year

[12] *United States v. Olano*, 507 U.S. 725, 733 (1993), citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); see, e.g., *Freytag v. Commisioner*, 501 U.S. 868, 894, n. 2 (1991) (Scalia, J., concurring in part and concurring in judgment) ("The Court uses the term 'waive' instead of 'forfeit', see *ante*, at 878-880. The two are really not the same, although our cases have so often used them interchangeably that it may be too late to introduce precision. Waiver, the 'intentional relinquishment or abandonment of a known right or privilege,' *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), is merely one means by which a forfeiture may occur. Some rights may be forfeited by means short of waiver, see, *e.g.*, *Levine v. United States*, 362 U.S. 610, 619 (1960) (right to public trial); *United v. Bascaro*, 742 F.2d 1335, 1365 (CA11 1984) (right against double jeopardy), cert. denied *sub nom. Hobson v. United States*, 472 U.S. 1017 (1985); *United States v. Whitten*, 706 F.2d 1000, 1018, n. 7 (CA9 1983) (right to confront adverse witnesses), cert. denied, 465 U.S. 1100 (1984), but others may not, see, *e.g.*, *Johnson, supra* (right to counsel); *Patton v. United States*, 281 U.S. 276, 312 (1930) (right to trial by jury). A right that cannot be waived cannot be forfeited by other means (at least in the same proceeding), but the converse is not true."

imprisonment. His request for jury trial was denied solely on the ground the request was not made in a timely or proper manner. *Id.* The Nebraska Supreme Court reversed his conviction on the assault counts because he had not knowingly and intelligently waived his Sixth Amendment right to trial by jury. *Id.* However, the court affirmed his conviction for Criminal Mischief as it was a "petty" offense and held that his failure to file a timely request as required to invoke his statutory right to jury trial constituted a waiver of his statutory right. The Nebraska Supreme Court recognized that what it deemed a "waiver" under the statute was not the same standard used for a defendant to knowingly, intelligently, and voluntarily waive his Sixth Amendment right to trial by jury. The statutory "waiver" operated as a "forfeiture" as that term is defined under federal law. See footnotes 10 and 12.

There is also a practical distinction between the two separate rights involved, the Confrontation Clause's right to be present, and a defendant's right to be tried by a jury of his or her peers. It is clear that the defendant in *Allen* was preventing the court from conducting the trial by his obstreperous behavior. There was a nexus. By contrast, a

defendant's presence at trial is no more needed when the trier of fact is by jury, than when it is by judge. *Allen* itself makes that clear, as the jury trial went on without him in the courtroom. Thus, the government would not be, as the District Court suggests, "hamstrung and unable to proceed until the accused was in custody and able to engage in the colloquy that Salsgiver suggests is required."[13] (App. C, at 9.) Had a jury been present, and Mr. Salsgiver not present on the morning of trial, Mr. Salsgiver's Sixth Amendment right to trial by jury certainly would not have prevented the government from going forward. However, the record does show that Mr. Salsgiver was present, and the one colloquy that was conducted on the record by his attorney, demonstrated that he did not waive his right to trial by jury. (Trial CD at 12:08:07 - 12:08:16.)

E. The denial of the Sixth Amendment right to trial by jury is "structural error" requiring automatic reversal

"Under the federal Constitution, the right to trial by jury is recognized as fundamental, and its denial is 'structural error,' compelling reversal of a judgment of conviction without the necessity of

[13] The Sixth Amendment does not require an on the record colloquy.

a determination of prejudice." *People v. Collins*, 26 Cal.4th 297, 311, 27 P.3d 726, 109 Cal. Rptr. 2d 836 (2001), citing *Sullivan v. Louisiana*, 508 U.S. 275, 281-282, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); *Duncan v. Louisiana*, 391 U.S. 145, 156-158, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

II. PROVISIONS IN THE AGREEMENT TO PAY FINES ARE ILLEGAL BECAUSE THEY EXCEED STATUTORY AUTHORITY.

A. The $10 Contract Fee And 10% Annual Interest Rate On The Unpaid Balance Are Unsupported by Statutory Authority, And Thus Are Illegal.

The Municipal Court tacked a $10 contract fee onto the PFMA judgment. (App. B, PFMA Judgment and Sentence at 2.) The contract fee was incorporated into the Agreement to Pay Fines, along with a 10% annual interest rate on the unpaid balance of the $740.00 financial obligation. (App. B, Agreement to Pay Fines.) Mont. Code Ann. §§ 46-18-234 and 46-18-236(4) allow a trial court to grant permission for a defendant to pay fines and other costs in specified installments. There is no statutory authority, however, allowing a trial court to impose a "contract fee" or an interest charge on an installment agreement under either § 46-18-234 or § 46-18-236(4).

"It is well-established that a [trial] court's authority to impose sentences in criminal cases is defined and constrained by statute. . . . Moreover, we have long held that a district court has no power to impose a sentence in the absence of specific statutory authority." *State v. Stephenson*, 2008 MT 64, ¶ 30, 342 Mont. 60, 179 P.3d 502 (internal quotation marks and citations omitted). *Accord State v. VanWinkle*, 2008 MT 208, ¶ 10, 344 Mont. 175, 186 P.3d 1258 (same). A sentence not based on statutory authority is illegal. *Stephenson*, ¶ 32, citing *State v. Krum*, 2007 MT 229, ¶ 11, 339 Mont. 154, 168 P.3d 658. See e.g., *State v. Duong*, 2015 MT 70, 378 Mont. 345, 343 P.3d 1218; *State v. Blackwell*, 2001 MT 198, 306 Mont. 267, 32 P.3d 771; *State v. Heafner*, 2010 MT 87, 356 Mont. 128, 231 P.3d 1087.

In *State v. Heafner*, 2010 MT 87, 356 Mont. 128, 231 P.3d 1087, the Court established an approach that requires an illegal portion of a sentence to be remanded to the district court for an opportunity to correct the sentence, unless, under the particular circumstances of the case, the illegal portion cannot be corrected. *Heafner* at ¶11. In situations where the illegal portion cannot be corrected, the case should

be remanded with instructions to strike the illegal conditions. *Heafner* at ¶11.

Pursuant to *Heafner*, Mr. Salsgiver respectfully requests the Court to strike from the Agreement to Pay Fines the $10 contract fee and 10% annual interest charge on the unpaid balance of his fines, fees, costs, and surcharges. The contract fee and interest charge are not authorized by any Montana statute, and thus exceed the Municipal Court's sentencing authority. It does not matter that the contract fee and interest charge are contained in a separate agreement. *Blackwell*, ¶ 8. These assessments fall outside of statutory parameters, and may be challenged on appeal even though no objection was raised to them below. *Kotwicki*, ¶¶ 5, 8.

B. The Bar to Prepayment of The Monthly Installment Without Authorization by Judge Adams is Unsupported by Statutory Authority, And Thus Is Illegal.

The Municipal Court placed the following condition in the Agreement to Pay Fines: "All payments are due on a monthly basis and No monthly prepayments are allowed unless authorized by Judge Adams." (App. B, Agreement to Pay Fines.) Mont. Code Ann. § 46-18-734 provides, "Whenever a defendant is sentenced to pay a fine or costs

under 46-18-231 or 46-18-232, the court may grant permission for payment to be made within a specified period of time or in specified installments. If no such permission is included in the sentence, the payment is due immediately." Similarly, Mont. Code Ann. § 46-18-236(4) provides, "When the payment of a fine is to be made in installments over a period of time, the charges imposed by this section [for each misdemeanor or felony charge of which a defendant is convicted] must be collected from the first payment made and each subsequent payment as necessary if the first payment is not sufficient to cover the charges." Accordingly, the Municipal Court possessed statutory authority to allow Mr. Salsgiver to pay his fines, costs, and charges in installments.

The Municipal Court lacked authority, however, to prohibit Mr. Salsgiver from prepaying his monthly payment without permission of Judge Adams. No statute grants a municipal judge authority to prohibit a defendant from paying off an installment agreement early. Especially when viewed in tandem with the contract fee and 10% annual interest charge on the unpaid balance, the effect of these combined provisions penalizes defendants on installment plans with

additional financial assessments that are not imposed on defendants who can pay in-full at once. *Cf. State v. Haldane*, 2013 MT 32, ¶ 40, 368 Mont. 396, 300 P.3d 657 ("A criminal defendant's right to due process requires that indigency or poverty not be used as the touchstone for imposing the maximum allowable punishment.") (internal quotation marks, brackets, and citations omitted).

This Court consistently has rejected "creative sentencing" provisions that are unsupported by express statutory authority. *Stephenson*, ¶¶ 30 – 33 ($85.00 assessment payable to a community service program is illegal); *VanWinkle*, ¶¶ 10 – 19 (same). *Accord Krum*, ¶¶ 11 – 21 (assessments payable to a county court automation fund, a domestic violence program, and Big Brothers Big Sisters are illegal); *Duong*, ¶¶ 19 – 24 (interpreter costs and 10% administration fee to collect other fees are illegal); *Blackwell*, ¶¶ 6 – 9 (assessment based on local rule for portion of clerk's salary is illegal). The prepayment bar in Mr. Salsgiver's judgment is an example of creative sentencing that runs afoul of this Court's precedent.

The prepayment bar is illegal for the additional reason that it was not included in the oral pronouncement of his sentence. This Court has

"repeatedly held that the oral pronouncement of sentence controls where a conflict exists between the oral and written judgments." *State v. Hammer*, 2013 MT 203, ¶ 27, 371 Mont. 121, 305 P.3d 843 (citations omitted). *Accord Duong*, ¶ 21 (same). Mr. Salsgiver had no ability to object to the prepayment bar prior to the provision appearing in the Agreement to Pay Fines, which was presented to him to sign on a take-it-or-leave-it basis at the very end of the sentencing hearing portion of his trial. (Trial CD at 12:35:15 – 12:36:16.)

Mr. Salsgiver respectfully requests the Court to strike the provision barring prepayment of his monthly installments unless authorized by Judge Adams. *Heafner*, ¶ 11. That provision is not authorized by any Montana statute and conflicts with the oral pronouncement of sentence. Because the prepayment bar falls outside of statutory parameters, it may be challenged on appeal even though no objection was raised to it below. *Kotwicki*, ¶¶ 5, 8.

III. MR. SALSGIVER IS ENTITLED TO FOUR DAYS OF CREDIT FOR JAIL TIME SERVED PURSUANT TO MONT. CODE ANN. § 46-18-403.

During sentencing, the Municipal Court gave Mr. Salsgiver credit for two days of pre-trial incarceration. The record establishes, however,

that Mr. Salsgiver was incarcerated for four days for which his sentence must be credited – 03/17/2015, 03/18/2015, 10/15/2015, and 10/16/2015.

Mr. Salsgiver respectfully requests his sentence to be remanded for the purpose of crediting his sentence with four pre-trial incarceration days pursuant to Mont. Code Ann. § 46-18-403(1), applying those days to reduce his fines pursuant to Mont. Code Ann. § 46-18-403(2), and entering an amended judgment and sentence in accordance therewith. The present judgment and sentence is illegal because it falls outside of statutory parameters.

CONCLUSION

For the above stated reasons, it is respectfully requested that Mr. Salsgiver's conviction for Partner or Family Member Assault be reversed and remanded to Kalispell Municipal Court for a jury trial. It is also requested that his sentence for Criminal Mischief be remanded to correct the sentencing errors. Alternatively, if the Court affirms the conviction for Partner or Family Member Assault, Mr. Salsgiver requests that the sentences for both counts be remanded to correct the sentencing errors.

Respectfully submitted this 5th day of January, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,712, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Ryan Peabody
RYAN PEABODY

APPENDIX

CERTIFICATE OF SERVICE

I, Ryan Patrick Peabody, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 01-05-2018:

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