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CITY OF GREAT FALLS,

Plaintiff and Appellee,

v.

CODY JAMES SNIDER,

Defendant and Appellant.

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**BRIEF OF APPELLANT**

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On Appeal from the Montana Eighth Judicial District Court,  
Cascade County, the Honorable John W. Parker, Presiding

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## **STATEMENT OF THE ISSUE**

Did the Municipal Court violate Cody Snider's fundamental right to trial by jury when it ordered a bench trial after Mr. Snider did not appear at his rescheduled jury confirmation hearing, even though his personal appearance was not ordered, and then denied Mr. Snider's motion to reinstate his jury trial without holding a hearing to consider the circumstances or issuing an order explaining its reasoning?

## **STATEMENT OF THE CASE**

Cody Snider was arrested and charged by Complaint in Great Falls Municipal Court with (1) driving under the influence of alcohol ("DUI"), 1st violation, a misdemeanor, in violation of Mont. Code Ann. § 61-8-401(1)(a), and (2) driving or in actual physical control of a motor vehicle with a blood alcohol content of 0.08 or greater upon a way of the state open to the public, 1st violation, a misdemeanor, in violation of Mont. Code Ann. § 61-8-406 ("DUI per se"). (D.C. Doc. 1 (Notice to Appear and Complaint (06/19/2016); Probable Cause Affidavit (06/19/2016); Motion to Set Arraignment/Initial Appearance and Notice

to Appear and Complaint (08/05/2016)).<sup>1</sup>) Mr. Snider's case was set for a jury trial and he was ordered to personally appear for his jury confirmation hearing. (D.C. Doc. 1 (Order Setting Jury Trial (06/20/2016).))

At the unopposed request of Defense Counsel, due to the upcoming birth of counsel's baby, the Municipal Court rescheduled Mr. Snider's jury confirmation hearing and trial. (D.C. Doc. 1 (Motion to Continue Jury Trial (10/28/2016), Order Continuing Jury Trial (11/02/2016)).) Unlike the original scheduling order, the rescheduling order did *not* require Mr. Snider's personal appearance at the jury confirmation hearing. Nevertheless, when Mr. Snider did not appear at the jury confirmation hearing, the Municipal Court deemed his jury trial waived and ordered a bench trial. (D.C. Doc. 1 (Jury Confirmation Memorandum (12/05/2016)).)

Defense Counsel promptly moved to reinstate Mr. Snider's jury trial and requested a hearing on the motion, explaining Mr. Snider did not receive notice of the rescheduled hearing. (D.C. Doc. 1 (Motion to

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<sup>1</sup> District Court Document #1 contains the Municipal Court record. The Municipal Court documents are not numbered and lack an index or case register. They are cited herein by their titles.

Continue Trial (12/07/2016)).) The Municipal Court set a hearing on the motion. (D.C. Doc. 1 (Order Setting Hearing on Motion for Jury Trial (12/29/2016)).) When counsel and Mr. Snider appeared for the hearing, the Municipal Court orally denied the motion without holding a hearing or creating a record of its decision.<sup>2</sup> (D.C. Doc. 4 at 3 (Appellant's Initial Brief); Tr. at 21 (01/24/2018).)

Mr. Snider subsequently pled guilty to DUI per se and reserved the right to appeal the denial of his motion for a jury trial. (D.C. Doc. 1 (Waiver of Rights and Entry of Guilty Plea) (03/22/2017); D.C. Doc. 2 (03/22/2017 Hrg. CD at 0:01 – 3:05).) The Municipal Court accepted Mr. Snider's guilty plea to DUI per se, first offense, and dismissed the DUI charge at the City's request. (D.C. Doc. 2 (03/22/2017 Hrg. CD at 3:05 – 4:20); D.C. Doc. 1 (Initial Appearance and Sentencing Order – DUI per se, First Offense (03/22/2017) (guilty); Initial Appearance and Sentencing Order – DUI, First Offense (03/22/2017) (dismissed). The two sentencing orders are attached hereto as App. A.) The Sentencing Orders conform with the oral pronouncement of sentence.

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<sup>2</sup> The Municipal Court advised the Appellate Defender Division that no audio recording exists of the January 10, 2017 proceedings.

The Defense filed a Notice of Appeal and the Municipal Court stayed execution of the sentence pending appeal. (D.C. Doc. 1 (Notice of Appeal (03/22/2017); Order Staying Execution of Sentence (03/24/2017).) Following briefing and oral argument, the District Court concluded the Municipal Court did not abuse its discretion in denying Mr. Snider's motion to reinstate his jury trial and denied Mr. Snider's appeal. (D.C. Doc. 10 at 5 (Findings of Fact and Conclusions of Law), attached hereto as App. B; Tr. at 23 – 25 (bench ruling) attached hereto as App. C.)

Mr. Snider timely appealed to this Court.

## **STATEMENT OF THE FACTS**

### *Municipal Court Proceedings*

The Municipal Judge read Mr. Snider his rights at the beginning of his initial appearance hearing on the DUI charge.<sup>3</sup> (06/20/2016 Hrg. CD at 10:44:45.) Concerning the right to trial by jury, the Judge instructed:

You have the right to a jury trial. If you plead not guilty and waive that right, then you'll have what's called a bench trial. A bench trial is

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<sup>3</sup> The audio from the hearing on June 20, 2016, is contained in two exhibits filed with the Court on January 2 and 21, 2020, respectively. The recordings appear to be identical.

with a judge only rather than a six-person jury, and, uh, if you choose a jury trial and you're convicted, you may have to pay the cost of bringing in a jury, which is about \$500 more, in addition to any fines or restitution, if you're convicted. If you're acquitted or found not guilty, then there is no extra cost.

(06/20/2016 Hrg. CD at 10:45:29 – 10:45:56.) At the end of the hearing, Mr. Snider pled not guilty. (06/20/2016 Hrg. CD at 10:50:25 – 10:50:27.)

The Municipal Court issued an Order Setting Jury Trial, which provided in pertinent part:

You, the defendant, are hereby notified that the above case(s) has been set for trial in Great Falls Municipal Court at **10:30 AM on Wednesday, November 02, 2016.**

**AN OMNIBUS HEARING WILL BE HELD ON October 3, 2016 AT 9:30 AM.**

**A JURY CONFIRMATION HEARING WILL BE HELD October 31, 2016 AT 9:30 AM.**

*If you fail to appear **personally** for the jury confirmation hearing and/or if there is not an appearance at the omnibus hearing, a jury will not be called in and a non-jury trial will be held at 10:30 AM on the day of trial.*

(D.C. Doc. 1 (Order Setting Jury Trial (06/20/2016) (emphasis, font changes, and formatting in original)).)

Mr. Snider signed an acknowledgment at the bottom of the order, “**I hereby acknowledge notice of the above trial date and my responsibility to be present at that time and place.**” (D.C. Doc. 1 (Order Setting Jury Trial (06/20/2016) (emphasis in original)).) Mr. Snider also signed an Acknowledgement of Rights that stated, in relevant part, “You have the right to a jury trial. If you plead not guilty and waive that right, a trial will be held with the Judge as a trier of the fact.” The acknowledgment form also provided, above Mr. Snider’s signature line, “By signing below, you agree that you understand your constitutional rights and the court’s policies.” (D.C. Doc. 1 (Acknowledgement of Rights (06/20/2016)).)

Subsequently, the Municipal Court issued an Order Setting Discovery and Briefing Schedule, which stated in relevant part, “**THIS CASE HAS BEEN SET FOR A JURY TRIAL. The Trial is set for 10:30 AM on Wednesday, November 02, 2016. . . .** A jury will not be called if the defendant fails to appear to the jury confirmation hearing the Monday before trial. If the defendant fails to appear, a non-jury trial will be held at 10:30 am on the day of trial.” (D.C. Doc. 1 (Order Setting

Discovery and Briefing Schedule (07/13/2016) (emphasis and formatting in original)).)

In August 2016, after receiving the results of a blood sample taken at the time of the alleged DUI, the City added an additional charge to the pending ticket, asserting Mr. Snider was driving or in actual physical control of a motor vehicle with a blood alcohol content of 0.08 or greater upon a way of the state open to the public, a misdemeanor, in violation of Mont. Code Ann. § 61-8-406 (“DUI per se”). (D.C. Doc. 1 (Motion to Set Arraignment/Initial Appearance and Notice to Appear and Complaint (08/05/2016))).) This new arraignment/initial appearance occurred on September 12, 2016. (D.C. Doc. 1 (Order Setting Arraignment/Initial Appearance) (08/08/2016)).)

In a group setting at the beginning of the hearing, the Judge read the defendants their rights.<sup>4</sup> (09/12/2016 Hrg. CD at 10:02:40 – 10:04:23.) Concerning the right to a jury trial, the Judge stated:

You have the right to a jury trial. If you plead not guilty and waive that right, a trial will be held with a judge as the trier of fact.

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<sup>4</sup> The audio exhibit filed with the Court on January 30, 2020, appears to contain complete proceedings from hearing on September 12, 2016. The three audio exhibits filed with the Court on January 2, 9, and 21, 2020, respectively, contain incomplete segments of that hearing.

(09/12/2016 Hrg. CD at 10:03:26 – 10:03:33.) Mr. Snider appeared with counsel and pled not guilty to the additional charge. (09/12/2016 Hrg. CD at 10:39:50 – 10:40:53.) The Judge entered Mr. Snider’s not guilty plea and, with the agreement of the parties, assigned the same trial date as trial on the DUI charge. (09/12/2016 Hrg. CD at 10:41:26 – 10:41:36.) The record does not contain any orders or acknowledgments from that hearing.

An omnibus hearing occurred on October 3, 2016, at which Mr. Snider and his lawyer appeared. (D.C. Doc. 1 (Omnibus Memorandum) (10/03/2016).) The Omnibus Memorandum form indicates Mr. Snider’s jury trial was not waived. Then on October 28, 2016, without objection from the City, Mr. Snider’s lawyer moved to continue the November 2 trial date because, “due to the impending birth of his child, counsel will be unavailable for trial.” (D.C. Doc. 1 (Motion to Continue Jury Trial (10/28/2016).) The Municipal Court continued the jury trial until December 8, 2016, and set the jury confirmation hearing for December 5, 2016. (D.C. Doc. 1 (Order Continuing Jury Trial (11/02/2016).) The new order did not require the personal attendance of Mr. Snider at the jury confirmation hearing.

Mr. Snider did not appear for the rescheduled jury confirmation hearing, but his attorney did. Nevertheless, the Municipal Court deemed his jury trial waived. (D.C. Doc. 1 (Jury Confirmation Memorandum (12/05/2016))).) Two days later, the Defense filed a motion to continue the December 8 bench trial, averring that Mr. Snider “did not receive notice of the adjourned date for his jury confirmation hearing, and desires a jury trial; as such, Counsel anticipates filing a motion to restore Defendant’s jury trial.” (D.C. Doc. 1 (Motion to Continue Trial (12/07/2016))).) The Municipal Court continued the trial to allow the Defense to file the motion. (D.C. Doc. 1 (Order Continuing Trial (12/09/2016))).)

The Defense duly filed a motion for jury trial and hearing, which the City opposed. (D.C. Doc. 1 (Motion for Jury Trial and Hearing with Memorandum in Support (12/20/2016), (Brief in Response to Motion to Reassert Jury Trial (01/06/2017))).) In the motion, Defense Counsel contended his office had mailed the rescheduling order to Mr. Snider at his last known mailing address, but Mr. Snider denied receiving the notice. (D.C. Doc. 1 (Motion for Jury Trial and Hearing with Memorandum in Support at 2)).) Due to the last minute continuance,

Counsel argued Mr. Snider did not knowingly, intelligently, and voluntarily waive his right to a jury trial. (D.C. Doc. 1 (Motion for Jury Trial and Hearing with Memorandum in Support at 2).) The Municipal Court set a hearing on the motion and, this time, ordered Mr. Snider’s personal appearance. (D.C. Doc. 1 (Order Setting Hearing on Motion for Jury Trial (12/29/2016)).)

Counsel and Mr. Snider appeared for the hearing, “but the [municipal] court reserved determination, and the motion was submitted on papers, without testimony from the Defendant. The [Municipal] Court subsequently notified counsel that the motion was denied, but no written Order was ever issued.” (D.C. Doc. 4 at 3. *Accord* Tr. at 21 (defense counsel explaining during oral argument on appeal, “the matter was set for hearing . . . . [w]hen we appeared for the hearing, we were told that the motion was denied”).)

At the combined change of plea and sentencing hearing, the Defense indicated Mr. Snider was reserving the right to appeal the denial of his motion for a jury trial and the Municipal Court confirmed it had not issued a written order denying the motion. (D.C. Doc. 2 (03/22/2017 Hrg. CD at 1:00 – 1:50, 4:35 – 4:50).)

District Court Appeal

On appeal in District Court, the Defense argued the Municipal Court abused its discretion by denying Mr. Snider's motion for a jury trial without a hearing and not providing any reasons to support its denial. (Tr. at 5 – 7.) Counsel explained Mr. Snider contacted him the day after the jury confirmation hearing to ask, “When are we going to court next?” It just happened to be that he called me the day after his jury confirmation hearing. That's why we filed the motion in the time that we did.” (Tr. at 13 – 14.)

Mr. Snider maintained the Municipal Court failed to consider or address the circumstances underlying his nonappearance at the rescheduled jury confirmation hearing, as instructed by *City of Missoula v. Girard*, 2013 MT 168, ¶ 19, 370 Mont. 443, 303 P.3d 1283. (D.C. Doc. 4 at 2 – 3.) Through counsel's offer of proof on appeal, Mr. Snider explained he did not receive the rescheduling order and contended a hearing was necessary to receive testimony and evidence, particularly because he had faithfully appeared at every other court date. (D.C. Doc. 4 at 4 – 5.) He argued a hearing was required for the Municipal Court to gauge his reliability as a witness. (D.C. Doc. 4 at 5.)

The Prosecutor retorted, “the state would argue that that’s [i.e., failure to hold a hearing is] kind of just a harmless procedural error in this matter. The Court clearly put the defendant on notice directly that his motion was denied. And that’s well within the discretion of the Court to do so.” (Tr. at 22. *Accord* D.C. Doc. 5 at 3 – 4.) The Prosecutor asserted, “So, just not receiving the letter [i.e., the rescheduling order] is clearly not good cause for the Court – this Court to find that the Municipal Court abused its discretion in waiving the defendant’s jury.” (Tr. at 11.) The Prosecutor argued even if the Municipal Court believed that Mr. Snider did not receive notice, “it’s still not good cause for an individual to fail to appear at one of these hearings[,]” and contended the briefing contained sufficient facts to justify the Municipal Court’s denial of Mr. Snider’s motion to reinstate his jury trial. (Tr. at 16 – 17, 20 – 21.)

Following oral argument, the District Court ruled from the bench, “The City of Great Falls is going to be the prevailing party.” (Tr. at 23, attached hereto as App. B.) The District Court stated:

I am persuaded by the argument that the – that Mr. [Snider’s] appearance at a number of other hearings indicated that he was receiving his mail, and I infer from that he was on notice. .

. . . I further find as a matter of fact that defendant's December 20th, 2016 motion placed the Municipal Court on notice of Mr. Snider's position as to why he failed to appear at the jury confirmation hearing.

(App. B at 24.) Based on these findings, the District Court relied on *State v. Trier*, 2012 MT 99, 365 Mont. 46, 277 P.3d 1230, and *City of Missoula v. Cox*, 2008 MT 364, 346 Mont. 422, 196 P.3d 452, to conclude that Mr. Snider waived his right to a jury trial by failing to appear at the jury confirmation hearing as ordered by the Municipal Court. (App. B at 24 – 25.) The District Court found no abuse of discretion by the Municipal Court and denied Mr. Snider's appeal. (App. B at 25.)

In its written Findings of Fact and Conclusions of Law, the District Court similarly ruled:

The Court concludes that the Great Falls Municipal Court did not abuse its discretion in denying the Defendant's motion to reinstate the Defendant's jury trial. The Defendant has not met its [sic] burden demonstrating that the Municipal Court misapplied applicable law or grossly misapplied the evidence presented. The Municipal Court appropriately applied the above cited applicable law. When viewing the evidence in light most favorable to the Defendant, the Municipal Court reasonably concluded that circumstances were not present which call into question the defendant's ability to comply with

the Court's order requiring his appearance, pursuant to *Girard*, 2013 MT 168.

(D.C. Doc. 10 at 5, attached hereto as App. C.)

Mr. Snider timely appealed.

### **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 to this Court. *City of Kalispell v. Salsgiver*, 2019 MT 126, ¶ 11, 396 Mont. 57, 443 P.3d 504 (citations omitted). The Court examines the municipal court record independently of the district court's decision and applies the appropriate standard of review to its own examination of the record. *Salsgiver*, ¶ 11 (citation omitted).

A lower court's conclusions of law and interpretations of the Constitution are reviewed de novo. *Salsgiver*, ¶ 11 (citations omitted). Constitutional questions are subject to plenary review. *Salsgiver*, ¶ 11 (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). *Accord Salsgiver*, ¶ 11.

### **SUMMARY OF ARGUMENT**

The Municipal Court violated this Court’s instruction in *Girard* to consider the circumstances surrounding a defendant’s failure to appear at a required hearing before waiving the defendant’s fundamental right to trial by jury. The order rescheduling Mr. Snider’s jury confirmation hearing did not require his personal appearance. Accordingly, Mr. Snider did not fail to attend a required hearing and could appear through counsel only, pursuant to Mont. Code Ann. § 46-16-120.

But even if the rescheduled hearing notice had required Mr. Snider’s personal appearance, which it did not, a *Girard* hearing was necessary once Mr. Snider filed a motion to reinstate his jury trial, contending through counsel that he did not receive notice of the rescheduled jury confirmation hearing. The Municipal Court appropriately set a *Girard* hearing to receive evidence and hear testimony about the circumstances underlying the lack of notice. But inexplicably, on the day of the hearing, the Municipal Court orally

denied Mr. Snider's motion without conducting the hearing or creating a record to explain its reasoning.

Mr. Snider's lack of notice of his rescheduled jury confirmation hearing constitutes good cause to reinstate his jury trial. A defendant cannot be punished by deprivation of a fundamental right for failing to attend a hearing that he does not know about and at which his personal appearance was not ordered. The Court should remand this case for a jury trial. Alternatively, should the Court determine that additional fact-finding is required, this case should be remanded for a *Girard* hearing so the Municipal Court may consider why Mr. Snider did not receive notice.

For these reasons, Mr. Snider's conviction should be reversed, his guilty plea withdrawn, and the matter remanded for the Municipal Court to hold either a jury trial or, if the Court determines additional fact-finding is necessary, a *Girard* hearing.

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## ARGUMENT

The Municipal Court violated Mr. Snider’s constitutional right to a jury trial in two ways: first, it ordered a bench trial after Mr. Snider did not appear at the rescheduled jury confirmation hearing, of which he had no notice and which did not expressly require his personal appearance; and second, it cancelled the *Girard* hearing it had set on Mr. Snider’s motion to reinstate his jury trial and orally denied the motion off-the-record.

### A. Applicable legal standards.

Article II, Section 24 of the Montana Constitution guarantees, “In all criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury[.]” Article II, Section 26 of the Montana Constitution declares, “The right of trial by jury is secured to all and shall remain inviolate. But upon default of appearance . . . expressed in such manner as the law may provide, all cases may be tried without a jury . . . . In all criminal actions, the verdict shall be unanimous.” “[T]his Court specifically has determined that the Montana Constitution provides a person with an enhanced right to a jury trial.” *State v. Covington*, 2012 MT 31, ¶ 20, 364 Mont. 118, 272 P.3d 43, citing *Woirhaye v. Montana Fourth Judicial Dist. Court*, 1998 MT 320, ¶ 14, 292 Mont. 185, 972 P.2d 800. Accord *State v. Rensvold*, 2006 MT 146, ¶ 19, 332 Mont. 392, 139 P.3d 154 (same).

“In many cases, a defendant’s failure to attend a mandatory pretrial hearing establishes a waiver of the right to a jury trial. . . . There are certain situations, however, where a defendant’s nonappearance at a mandatory pretrial conference may not constitute a waiver of the right to a jury trial.” *State v. Sherlock*, 2018 MT 92, ¶¶ 10 – 11, 391 Mont. 197, 415 P.3d 997 (collecting and discussing cases). This Court recently affirmed as a matter of Montana constitutional law that it examines the “particular facts and circumstances surrounding the case to determine whether a waiver of a fundamental constitutional right was knowing, intelligent, and voluntary.” *Salsgiver*, ¶ 17 (citations and internal quotation marks omitted). The State bears the burden to prove by a preponderance of the evidence that a defendant’s waiver of a fundamental constitutional right was knowing, intelligent, and voluntary. *Salsgiver*, ¶ 17 (citations omitted). “Moreover, *Girard* holds that finding an automatic waiver, under any standard, based solely on a defendant’s nonappearance is impermissible, as the trial court’s determination of waiver must be based on the circumstances of the individual case.” *Salsgiver*, ¶ 28, citing *Girard*, ¶¶ 14, 20.

“This burden of proof is heavy and the standards required for waiver are high.” *State v. Lucero*, 151 Mont. 531, 538, 445 P.2d 731, 735 (1968) (citation omitted). “This Court indulges in every reasonable presumption against waiver of a fundamental constitutional right. . . . Accordingly, we will not presume waiver of one’s constitutional rights – such waiver must be made knowingly, intelligently, and voluntarily.” *Salsgiver*, ¶ 18. *Accord State v. Walker*, 2008 MT 244, ¶ 18, 344 Mont. 477, 188 P.3d 1069, *citing State v. Mann*, 2006 MT 33, ¶¶ 13 – 14, 331 Mont. 137, 130 P.3d 164; *Duffy v. State*, 2005 MT 228, ¶ 13, 328 Mont. 369, 120 P.3d 398; *State v. McCarthy*, 2004 MT 312, ¶ 32, 324 Mont. 1, 101 P.3d 288.

*Cox* stands for the proposition that a defendant may waive the right to a jury trial by not appearing at a jury confirmation hearing after personally being ordered to appear. *Cox*, ¶ 15. Since *Cox*, this Court repeatedly has held that a failure to appear at a *mandatory* pretrial hearing *may* constitute a “default of appearance” under Article II, Section 26 of the Montana Constitution, resulting in the loss of a jury trial, but that an automatic waiver under any standard is

impermissible. *Salsgiver*, ¶¶ 20 – 21, 28; *Girard*, ¶¶ 14, 19 – 20; *Sherlock*, ¶ 9.

Mont. Code Ann. § 46-16-120 provides, “In all cases in which the defendant is charged with a misdemeanor offense, the defendant may appear by counsel only, although the court may require the personal attendance of the defendant at any time.” While the statute permits a trial court to order a defendant’s personal appearance at any time, the statute does not mandate the automatic or blanket-policy loss of a fundamental right to trial by jury for not appearing at a hearing after being ordered to do so. *Salsgiver*, ¶ 28, *citing Girard*, ¶¶ 14, 20.

**B. Failure to receive notice of a hearing at which Mr. Snider’s personal appearance was not required warrants reinstatement of his jury trial.**

The rescheduled hearing order did not require Mr. Snider’s personal attendance. (D.C. Doc. 1, Order Continuing Jury Trial (11/02/2016).) So, had Mr. Snider received the order, which Counsel’s offer of proof disputes, he reasonably might have concluded that he did not need to attend the jury confirmation hearing. Pursuant to Mont. Code Ann. § 46-16-120, Mr. Snider could appear at the hearing through counsel alone. Therefore, his jury trial should not have been abrogated.

Further, at the District Court hearing, Counsel explained:

And I can relay to the Court that – what had happened in that instance [i.e., when Counsel moved to continue the bench trial because Mr. Snider would be moving to restore his jury trial], Mr. Snider actually did call me and say, “When are we going to court next?” It just happened to be that he called me the day after his jury confirmation hearing. That’s why we filed the motion in the time that we did.

...

He [Mr. Snider] routinely was in contact with me. When he didn’t hear something timely about when his new trial date [sic], he called me and asked and that’s how he discovered that he had missed the date. He was staying in contact with me, he was trying to stay in touch. And that’s why, from our perspective, this was such an unfortunate outcome. This was not how we had planned and done litigation strategy. We had always talked about moving to a trial. So, it was stunning to me when he didn’t show up. And he did immediately make contact with me.

(Tr. at 13 – 14, 19 – 20.)

Defense Counsel filed an unopposed motion to continue Mr. Snider’s trial, less than one week before the jury trial was set. The continuance was not due to circumstances caused by Mr. Snider. Rather, the continuance was necessary because Defense Counsel would be unavailable for trial and the jury confirmation hearing due to the

approaching birth of Counsel's baby. (D.C. Doc. 1, Motion to Continue Jury Trial.) Counsel did not indicate when he would again be available. The Municipal Court continued trial and the jury confirmation hearing for about one month after the original dates. (D.C. Doc. 1, Order Continuing Jury Trial (11/2/2016).)

The record contains assertions by Defense Counsel that Mr. Snider did not receive the copy of the rescheduled hearing notice that Defense Counsel mailed to him. (D.C. Doc. 4 at 2 and Exh. E.) No one testified about the underlying facts because the Municipal Court cancelled the hearing. Yet, the City claims that even if Mr. Snider did not receive notice of the hearing, and thus was involuntarily absent from the hearing, the Municipal Court still appropriately determined that Mr. Snider waived his jury trial. (Tr. at 11, 16 – 17, 20 – 21.) The City's argument flies in the face of binding precedent.

The City bears the burden to prove by a preponderance of the evidence that a defendant's waiver of a constitutional right must be knowing, intelligent, and voluntary. *Salsgiver*, ¶ 17. The City cannot meet its heavy burden of proof in this case, *Lucero*, 151 Mont. at 538, 445 P.2d at 735, because there is no evidence establishing Mr. Snider

knowingly, intelligently, and voluntarily missed the rescheduled jury confirmation hearing at which his personal attendance was not ordered anyway. Defense Counsel contended that Mr. Snider did not receive notice of the rescheduling order, which would render his nonappearance unknowing. (Tr. at 13 – 14, 19 – 20.) Mr. Snider could not intelligently decide to avoid a hearing that he did not know was occurring.

Further, the City cannot prove that Mr. Snider's failure to appear was voluntary. The City claims that because Mr. Snider appeared at his other pretrial hearings, that means he was receiving his mail and must have received the copy of the rescheduling order Defense Counsel's office mailed to him. (Tr. at 9 – 10.) The City labeled Mr. Snider's lack of notice, "particularly suspect and self-serving." (Tr. at 10.) But legitimate, non-suspect, and non-self-serving reasons could explain mail delivery or receipt problems that do not involve neglect or intentional disregard by Mr. Snider of his obligation to comply with a Municipal Court order.

Notwithstanding the lack of any evidentiary facts to explain Mr. Snider's nonappearance at the jury confirmation hearing, the District Court concluded that Counsel's limited summary of events was

sufficient to find that Mr. Snider had knowingly, intelligently, and voluntarily waived his right to a jury trial. (App. B at 24 – 25; App. C at 4 – 5.) Even if abuse of discretion were the correct standard of review for waiver of a fundamental right, which it is not, the Municipal Court’s unrecorded, unexplained decision to deny Mr. Snider a jury trial was a clearly erroneous assessment of the evidence, because there was no evidence. A determination about a defendant’s default of appearance resulting in a waiver of the right to a jury trial must be based on the circumstances of the individual case. *Girard*, ¶ 10 (citations omitted); *Salsgiver*, ¶ 11.

Mr. Snider had a right to be tried by a jury that he diligently pursued. He attended every pre-trial hearing – his first initial appearance on the DUI charge, his next initial appearance on the DUI per se charge, and then the omnibus hearing – until he missed the rescheduled jury confirmation hearing, because he did not receive the copy of the rescheduling order that did not require his personal attendance in any event. Mr. Snider contacted his lawyer following his paternity leave, which is when he learned that he inadvertently had missed the jury confirmation hearing because he did not receive a copy

of the order in the mail. Soon after speaking with Mr. Snider, Counsel filed a motion to reinstate Mr. Snider's jury trial. Mr. Snider then appeared at the noticed hearing on the motion to reinstate, only to have the Municipal Court cancel the hearing off-the-record and deny his motion without issuing an order.

This Court should reject an outcome where, without reasoned explanation, a defendant can be deprived summarily of a jury trial for not attending a pre-trial hearing that he did not know about, at which his lawyer was present, and his personal appearance was not ordered.

**C. The District Court incorrectly interpreted the law and inaccurately applied the law to the facts.**

The District Court determined, "The Municipal Court was properly advised of the Defendant's assertion that he did not receive notice of the December 5, 2016, jury confirmation hearing. The matter was fully briefed in the Municipal Court, and the Court was provided the opportunity to view the assertion and surrounding circumstances in the light most favorable to the Defendant." (App. C at 4 – 5.) The District Court's ruling is unsupported by record facts and not grounded upon governing law.

Examining Mr. Snider’s right to a jury trial as one of trial administration, the District Court concluded, “[T]he Great Falls Municipal Court did not abuse its discretion in denying the Defendant’s motion to reinstate the Defendant’s jury trial.” (App. C at 5.) The District Court ruled that Mr. Snider had not met “[his] burden demonstrating that the Municipal Court misapplied applicable law or grossly misapplied the evidence presented. . . . When viewing the evidence in light most favorable to the Defendant, the Municipal Court reasonably concluded that circumstances were not present which call into question the defendant’s ability to comply with the Court’s order requiring his presence[.]” (App. C at 5, *citing Girard*.)

The District Court’s analysis inaccurately construes *Girard* and related precedent. The Municipal Court denied Mr. Snider the opportunity to present *any* evidence when it cancelled his hearing without notice. Statements by counsel are not evidence. *See, e.g., State v. Stuart*, 2001 MT 178, ¶ 22, 306 Mont. 189, 31 P.3d 353 (observing “[n]othing at all was submitted to support counsel’s statements,” and “statements of counsel are not evidence”) (citations omitted); *State v. High Elk*, 2006 MT 6, ¶ 17, 330 Mont. 259, 263, 127 P.3d 432, 434 (“A

lawyer's statements are not evidence.”) (citations omitted); *City of Helena v. Whittinghill*, 2009 MT 343, ¶ 21 n.2, 353 Mont. 131, 219 P.3d 1244 (“Absent competent proof, such as by testimony, stipulation, or judicial notice, an attorney's statements do not constitute proof of facts. The fact that neither the prosecution nor the court overtly quarrels with an attorney's assertions is irrelevant to the existence of a fact.”) (citations omitted); *McKenzie v. Scheeler*, 285 Mont. 500, 508, 949 P.2d 1168, 1173 (1997) (“Unsupported arguments of counsel are not evidence and do not establish the existence of the matters that are argued.”).

While Counsel’s offer of proof in the motion to reinstate Mr. Snider’s jury trial was not evidence, it was sufficient for the Municipal Court to schedule a hearing. A *Girard* hearing is necessary where, as here, a defendant alleges facts, such as a lack of notice, that would justify his failure to attend a hearing. Given the record on appeal, which contains no evidence of the circumstances underlying Mr. Snider’s nonappearance at the rescheduled jury confirmation hearing – at which his presence was not required – the Municipal Court could not have reasonably determined that “circumstances were not present which call into question [Mr. Snider’s] ability to comply with [its] order

requiring his appearance.” (App. C at 5.) That finding by the District Court is clearly erroneous and, thus, an abuse of discretion.

Without evidence, the District Court could not find that Mr. Snider “was provided proper notice of the December 5, 2016, jury confirmation hearing.” (App. C at 4.) The record contains no support for the District Court’s finding that “the [Municipal] Court was provided the opportunity to review the [Defense Counsel’s] assertion [in the motion for jury trial] and surrounding circumstances in the light most favorable to the Defendant.” (App. C at 5.) The District Court orally stated, “Mr. [Snider’s] appearance at a number of other hearings indicated that he was receiving his mail, and I infer from that he was on notice [of the rescheduled jury confirmation hearing].” (App. B at 24.) The District Court’s inference is speculation. Mr. Snider’s right to trial by jury should not be abrogated by speculation about an attorney’s offer of proof or inferences about what testimony or evidence would have adduced at a hearing.

This Court should remand this case for a jury trial, or if the Court deems additional fact-finding necessary to explain the circumstances

surrounding Mr. Snider's nonappearance at the jury confirmation hearing, a hearing on Mr. Snider's motion to reinstate his jury trial.

### **CONCLUSION**

For the foregoing reasons, Mr. Snider respectfully requests the Court to reverse his conviction, withdraw his guilty plea, and remand his case for either a jury trial or a hearing on his motion to reinstate his jury trial, if the Court determines additional fact-finding is necessary.

Respectfully submitted this 14th day of February, 2020.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary 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 5,807, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Deborah S. Smith  
DEBORAH S. SMITH

**APPENDIX**

Municipal Court Initial Appearance and Sentencing Orders.....App. A  
District Court Bench Ruling .....App. B  
District Court Findings of Fact and Conclusions of Law.....App. C

## **CERTIFICATE OF SERVICE**

I, Deborah Susan Smith, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-14-2020:

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