IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 20-0188

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BRANDON MICHAEL BAILEY,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Michael F. McMahon, Presiding

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I. The Effect Of The State's Motion to Allow The Crime Lab Expert To Testify *Via* Skype Was Not Harmless Because There Is No Admissible Evidence To Prove Mr. Bailey's Blood Alcohol Concentration.

In accord with this Court's holding in *State v. Mercier*, 2021 MT 12, ____ Mont. ____, ____ P.3d ____, the State agrees that the Mr. Bailey's Sixth Amendment right to confrontation was violated when the Justice Court granted the State's baseless motion to allow the State's chief material and expert witness, Eric Miller of the Montana State Crime Lab, ("Mr. Miller" herein), to testify *via* Skype.

Notwithstanding its concession, the State resorts to making a futile argument that other cumulative evidence presented at the Justice Court Trial was sufficient to prove beyond a reasonable doubt that Mr. Bailey's blood alcohol concentration ("BAC" herein) exceeded the Montana's statutory legal limit of 0.08. As more fully expounded below, the State's argument is unsupported by any case law or other authority, contrary to Montana law, and should not be condoned by this Court.

A. There Is No Admissible Cumulative Evidence To Establish That Mr. Bailey's BAC Exceeded 0.08 And Therefore, The Admission Of The Tainted Testimony Of Mr. Miller And The Tainted Toxicology Report Was Indeed Harmful And Prejudicial To Mr. Bailey, Warranting Reversal Of His Conviction.

Central to the illusory nature of the State's argument that it presented sufficient cumulative evidence to sustain Mr. Bailey's conviction is the juxtaposition of the separate and respectively distinct elements of each of the

crimes of Driving Under the Influence of Alcohol, in violation of § 61-8-401(1)(a), M.C.A. ("DUI" herein), and Operation of Noncommercial Vehicle by Person with Alcohol Concentration of 0.08 or more in violation of § 61-8-406, M.C.A.

Mr. Bailey was convicted of violating § 61-8-406, M.C.A., which provides that it is unlawful for a person to drive or be in actual physical control of a motor vehicle upon the ways of this State open to the public while the person's alcohol concentration, **as shown by an analysis of the person's blood, breath, or urine**, is 0.08 or more. (Emphasis given.) "Alcohol concentration" is defined as either grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath. § 61-8-407, M.C.A.

The accepted methods of BAC analyses are mandated by statute and the Administrative Rules of Montana 23.4.201 - 23.4.225.

The Department of Justice Forensic Science Division Toxicology Section ("Montana State Crime Lab" herein) is charged with performing BAC testing in DUI and Operation of Noncommercial Vehicle by Person with Alcohol Concentration of 0.08 cases and adhering to strict scientific protocols.

A cursory review of the relevant statute and Montana Administrative Rules confirms the glaring hollowness of the State's proposition that the jury was permitted to conclude that Mr. Bailey's BAC exceeded the legal limit 0.08 by

considering only part of the results of the HGN test and Mr. Bailey's admission that he had consumed two (2) beers.[1]

The statute is clear on its face - conviction of Operation of Noncommercial Vehicle by Person with Alcohol Concentration of 0.08 or more requires that a person's alcohol concentration be proven by an analysis of the person's blood or breath.

The State's argument blatantly disregards the strict scientific protocols for blood alcohol concentration analyses dictated by the Administrative Rules of Montana, 23.4.201-23.4.225, and the applicable statutory authority enacted by the Montana Legislature.

There is no legal authority, whatsoever, warranting that the results of an HGN test, an individual's admission of consuming alcohol, and a law enforcement officer's speculation that a person who demonstrates a certain score on the HGN test would have a BAC in excess of the legal limit of .08, constitutes the statutorily mandated scientific analysis of a person's blood or breath for purposes of measuring alcohol concentration.

[1] Mr. Bailey brings to the Court's attention the objections advanced by defense counsel throughout the testimony of Trooper Inman regarding the results of the HGN test and how those results may somehow be indicative or determinative of an individual's BAC level. Defense counsel advanced multiple foundational objections as well as objections to speculative testimony. (*See Brief of Appellee*, p. 40, citing to 5/23/19 Tr. 109-135; *Id.*, 132, 166).

Rather, it is uncontroverted that the evidence necessary to prove that a person's BAC exceeds the legal limit is an actual biological sample obtained from the individual's breath of bodily fluids.

In addition, while the State attempts to show that there was evidence of impairment, the State disregarded the overwhelming evidence that Mr. Bailey was not physically impaired by the consumption of alcohol.

Mr. Bailey admitted that he had consumed two (2) beers prior to operating his motor vehicle and insisted that he was not impaired and Trooper Sutherland's observations of Mr. Bailey show that Mr. Bailey was not impaired. (Hr. Tr., 1:32:27-1:32:59).

Prior to asking Mr. Bailey to perform the HGN Test, Trooper Sutherland testified that there was no indication that Mr. Bailey was slurring his words or showing other signs of impairment. (*See* Hr'g Tr., 1:30:40-1:30:45).

Mr. Bailey did not have difficulty performing any physical tasks or show any signs of physical impairment, such as swaying or difficulty keeping his balance. Mr. Bailey had no difficulty entering or exiting his own vehicle or Trooper Sutherland's patrol car. (Hr'g Tr., 1:42:15-1:42:58).

In addition, Mr. Bailey did not demonstrate any difficulty providing Trooper Sutherland with his driver's license, registration, and insurance, which is another indicator of impairment. (*Id.*).

Perhaps the most significant evidence omitted from the State's untenable argument is testimony regarding a component of the HGN Test itself. Trooper Sutherland testified that he did not observe vertical gaze nystagmus, which indicated that Mr. Bailey had not ingested a substantial dose of alcohol. (Hr'g Tr., 1:49:25-1:49:34).

According to Trooper Sutherland, vertical gaze nystagmus is present when a person has reached a certain limit of alcohol for what their body can handle. (Hr'g Tr. 1:49:51-1:50:03).

Finally, perhaps most compelling, is the jury's verdict itself. At Mr. Bailey's trial, the jury was instructed on the charges of Driving Under the Influence of Alcohol, first offense, or in the alternative, Operation of Noncommercial Vehicle by Person with Alcohol Concentration of 0.08 or more.

Mr. Bailey was acquitted of the former which requires a finding of diminished capacity.

Pursuant to the statute, the jury is instructed that if at the time of the defense, a person's alcohol concentration is found to be 0.08 or greater, they are permitted to infer that the person's ability to operate the motor vehicle is impaired.

Notably, after considering all evidence presented, including the tainted Toxicology Report, the jury acquitted Mr. Bailey of Driving Under the Influence.

While HGN test results and other circumstantial evidence may serve as indicators of physical impairment to prove that an individual's ability to safely operate a motor vehicle was diminished, such evidence is not determinative of an individual's blood alcohol concentration level, which is the sole component of the offense of Operation of Noncommercial Vehicle by Person with Alcohol Concentration of 0.08 or more.

Pursuant to Montana law, it is uncontroverted that the Montana State Crime Lab Toxicology Report admitted pursuant to Mr. Miller's improper video testimony is the only evidence sufficient to prove that Mr. Bailey's BAC exceeded the legal limit 0.08 in violation of § 61-8-406, M.C.A.

The State is conniving an argument to attempt to circumvent the consequences of having violated Mr. Bailey's constitutional right by moving to have Mr. Miller testify *via* Skype rather than personally appear at the Trial.

The State's argument disregards the mandated technical and scientific requirements of proper forensic alcohol concentration analysis.

The State's reliance upon *State v. Weldele*, 2003 MT 117, 315 Mont. 452, 69 P.3d 1162, to support its contention that the aforementioned cumulative evidence proves beyond a reasonable doubt that Mr. Bailey was guilty of Operation of Noncommercial Vehicle by Person with Alcohol Concentration of 0.08 is misplaced. The relevant facts of *Weldele* are clearly distinguishable from the

instant case, which is likely why the State failed to provide any detailed correlation.

In *Weldele*, this Court found that the introduction of the PBT test to prove intoxication was harmless because the State also introduced the Intoxilyzer result, "which on its own, established the 'under the influence' element of the crime charged, thereby rendering the PBT result redundant, unnecessary, non-prejudicial and harmless." *Weldele*, ¶ 63.

Unlike *Weldele*, here, the State presented no evidence of Mr. Bailey's measurable BAC other than that of the tainted testimony of Mr. Miller and the Toxicology Report from the State Crime Lab. That is because the only method of proving that Mr. Bailey's BAC exceeded the legal limit of 0.08 is by presenting the Montana State Crime Lab's Toxicology Report.

The submission of cumulative evidence consisting of speculative testimony from a law enforcement officer regarding an individual's BAC level, incomplete and self-serving results of an HGN test, and an admission of consuming two (2) beers prior to driving, in no way equates to or satisfies the State's burden to prove beyond a reasonable doubt that statutorily mandated scientific analysis showed that Mr. Bailey's blood alcohol concentration exceeded the legal limit of 0.08.

This Court anticipated this exact scenario noting that:

> We readily acknowledge that there will be cases in which there was no other admissible evidence proving the same facts that the tainted evidence proved, making the burden of producing cumulative evidence of the fact impossible. Clearly, if the only evidence tending to prove an element of the crime is tainted, then reversal will be compelled.

State v. Van Kirk, 2001 MT 184, ¶ 45, 306 Mont. 215, 32 P.3d 735.

The procurement and scientific analysis of a biological sample of Mr. Bailey's blood or breath pursuant to applicable statutes and administrative rules is the State's exclusive mode of obtaining evidence sufficient to prove beyond a reasonable doubt that Mr. Bailey's BAC level exceeded the legal limit of 0.08.

Because the only evidence of the same in this case – the testimony Mr. Miller and the State Crime Lab Toxicology Report – is tainted, this Court is compelled to reverse Mr. Bailey's conviction of Operation of Noncommercial Vehicle by Person with Alcohol Concentration of 0.08 or more.

B. An Order Remanding To Justice Court For Dismissal Is Justified.

The breadth and audaciousness of the State's argument is unconscionable. Despite being fully aware of Mr. Bailey's objection to Mr. Miller testifying by video, the State gambled and proceeded to file the baseless motion.

Now, having no choice but to concede that Mr. Bailey's constitutional rights were in fact violated, the State is banking on this Court to grant it a do-over.

The government is entrusted with a duty to protect the fundamental constitutional rights of every person charged with a crime. The State breached its duty and is now conniving to shift the blame to the Justice Court for making insufficient findings in granting the State's warrantless motion. The fact of the matter is that the motion should never have been filed to begin with.

Now, the State seeks to benefit, at the expense of Mr. Bailey, and the taxpayers, by making a completely specious argument that the error was harmless and further by asking for a remand and retrial.

Mr. Bailey has already been burdened with an unfair trial, an appeal to District Court, an appeal to this Court, and now the State wants him to be burdened with a retrial.

This Court has the opportunity to send a message to prosecutors and the judiciary that these types of constitutional violations must end.

The State must be held accountable. It is wholly unjust and fundamentally unfair to subject Mr. Bailey and the taxpayers of this State to the time, expense, stress, and burden of another trial.

While Mr. Bailey recognizes that the typical remedy employed by this Court in situations where a defendant's right to confrontation has been violated, is remand for a new trial, Mr. Bailey respectfully asserts he should not be forced to incur the significant financial burden and stress of defending another trial.

In addition to the constitutional protections which should be afforded to Mr. Bailey, important considerations of judicial economy and the time and expense of the public outweigh any importance of retrying this misdemeanor case.

Accordingly, Mr. Bailey maintains that his conviction should be reversed and that this case should be remanded to Justice Court for dismissal of the charge against him.

II. The Justice Court Abused Its Discretion When It Granted The State's Motion to Dismiss Juror H. For Cause.

The State's contention that Juror H demonstrated general and specific bias and that he expressed an inability to follow the law and the Court's instructions is unsupported by the record and is not warranted under Montana law.

The State relies solely upon *State v. Burkhart*, 2004, MT 372, 325 Mont. 27, 103 P.3d 1037, to support its position that Juror H was properly excused for cause. Mr. Bailey cited to and distinguished the facts of *Burkhart* in Appellant's Opening Brief (*see* pp. 29-30).

The State failed to address a major factor distinguishing Juror H from the juror in *Burkhart* – that Juror H unequivocally stated that he would follow the law and convict a person if he felt that their ability to safely operate a vehicle was diminished by the intake of alcohol (*See* Appellant's Opening Brief, pp. 13-14). The ambiguous spontaneous statement offered by Juror H is not sufficient to raise a serious question about Juror H's ability to be impartial.

In the plethora of cases that this Court has reviewed, all potential jurors or jurors in question made statements concerning biases, reluctance, etc., but the key issue was whether they expressed fixed opinions and would be able to follow the law be impartial.

In the instant case, Juror H demonstrated that he would follow the law when he affirmatively stated that he would convict a person of DUI if he the evidence proved that his ability to safely operate a vehicle was diminished by the intake of alcohol (*See* Appellant's Opening Brief, pp. 13-14).

Juror H expressed no specific bias and no fixed opinions about DUI cases. Rather, Juror H unequivocally stated and then repeatedly affirmed that he would listen to "all of the evidence." Moreover, Juror H's statements regarding the level of intoxication of an individual are consistent with his unequivocal affirmation that he would convict a person if the evidence showed the ability to safely operate a vehicle was diminished.

When looking at the totality of Juror H's statements, one fixed opinion about an unrelated marijuana case and one ambiguous statement about his views on DUI arrests are not sufficient to outweigh his repeated affirmations that he would consider all of the evidence, he would follow the law, and convict a person, if the evidence showed that the ability to safely operate a motor vehicle was diminished.

Juror H's statements are consistent with one of the most sacred values, yet apparently disregarded principles, of the American Justice System - that an individual charged with a crime is innocent unless proven guilty beyond a reasonable doubt.

In reviewing this Court's extensive jurisprudence on the issue of removal of jurors for cause, whether consciously or subconsciously, it appears that lower courts typically deny defendants' motions to excuse potential jurors whose statements raise serious concern about their ability to set aside bias and opinions.

The crux seems to be that when potential jurors express extreme statements of personal experience, and emotions against specific crimes or the individuals who have been convicted of those crimes, so long as a potential juror states that they will follow the law and convict, those biases are disregarded and those potential jurors are not removed for cause.

On the other hand, it appears that any statements from potential jurors which create any sense of even the slightest disfavor for the government are removed for cause upon motion from the government. This practice does indeed result in the State gaining an advantage of extra peremptory challenges and a loaded jury.

The apparent trend seems to be exactly what happened at Mr. Bailey's trial. Juror H's statements did not favor the government's case.

It appears that the statements made by jurors expressing bias against defendants are on their face, clearly more extreme and fixed than in this case or *Burkhart*, yet trial courts do not excuse those jurors and this Court upholds those opinions. *See gen. State v. Morales*, 2020 MT 188, 400 Mont. 442, 468 P.3d 355.

The fact that a potential juror may express that he does not agree with a law does not equate as to whether he or she will follow the law if instructed to do so by the Judge. At no time did Juror H state that he would refuse to follow the law in Mr. Bailey's trial. Rather, Juror H stated that he would consider all of the evidence and convict based upon that evidence.

The totality of Juror H's statements also shows that that he had no fixed opinion pertaining to Mr. Bailey's guilt or innocence.

Thus, the Justice Court plainly abused its discretion when granting the State's motion to excuse Juror H for cause.

III. Trooper Sutherland's Detention of Mr. Bailey Amounted to An Unlawful Arrest.

The State's claim that Mr. Bailey did not provide any specific authority to support his contention that he was subjected to an illegal search and seizure when he was placed in the back of Trooper Sutherlands patrol car mischaracterizes and misconstrues Mr. Bailey's entire argument.

In his opening Brief, Mr. Bailey cited to several controlling cases regarding the elements of a constitutional seizure amounting to a formal arrest. Mr. Bailey

asserts that when considering the totality of the circumstances in this case amounted to an unlawful arrest. (*See Appellant's Opening Brief*, pp. 32-38).

As asserted in his opening brief, Mr. Bailey maintains that being ordered to sit in Trooper Sutherland's patrol car was a show of authority, and that his being in the patrol car meets the element of restraint, all consistent with a formal arrest.

It is clear Mr. Bailey was not free to leave, and it is uncontroverted that Trooper Sutherland was not transparent with Mr. Bailey about his detainment of Mr. Bailey.

Moreover, the State inappropriately included purported facts regarding Trooper Sutherland's safety concerns, which are not contained in the record to help support its argument, (*See* Brief of Appellee, p. 27). Mr. Bailey respectfully requests that this Court disregard those facts.

Notwithstanding, the inclusion of the inappropriate and inadmissible facts actually draws attention to the lack of objective facts and case law to support the State's argument in this specific case.

This Court has not previously ruled on whether placement in a patrol car is a form of restraint when considering whether the totality of the circumstances amount to a formal arrest. Mr. Bailey appropriately cited to applicable case law addressing the elements of a formal arrest to support his argument. Perhaps the specific facts of this case create a case of first impression, but it is not a failure of

Mr. Bailey to cite to any specific authority. Thus, the State's request that this Court not address his argument, should be denied.

Mr. Bailey maintains that the Justice Court misapprehended the effect of the evidence, misapplied the law, and abused its discretion in denying Mr. Bailey's Motion to Suppress and Dismiss. The Justice Court's Order should be reversed because Trooper Sutherland's detention of Mr. Bailey amounted to a formal arrest, Trooper Sutherland failed to *Mirandize* Mr. Bailey before subjecting him to custodial interrogation in violation of § 46-6-107, M.C.A., and Trooper Sutherland lacked the requisite particularized suspicion to conduct a DUI Investigation.

DATED this 12th day of March, 2021.

/s/Jeremy S. Yellin, Esq.
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CERTIFICATE OF COMPLIANCE

Pursuant to Mont R. App. P. 11(4), I certify that *Appellant's Opening Brief* is printed with a proportionally spaced Times New Roman text typeface of 14 points; double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,289, excluding caption, Table of Contents, Table of Authorities, signature block, Certificate of Service and Certificate of Compliance.

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CERTIFICATE OF SERVICE

I, Jeremy S. Yellin, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 03-12-2021:

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