

No. DA 19-0421

STATE OF MONTANA,

Plaintiff and Appellee,

v.

HOANG VINH PHAM,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Sixteenth Judicial District Court,
Custer County, the Honorable Michael B. Hayworth, Presiding

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	4
STANDARDS OF REVIEW	23
SUMMARY OF ARGUMENT.....	25
ARGUMENT	27
I. Under the totality of the circumstances, Mr. Pham was seized by law enforcement when Agent Smith requested his identification and asked if he possessed weapons, drugs, or child pornography. Even if Agent Smith had requested consent to search Mr. Pham’s car, any consent that may have been given was not voluntary.	27
A. Agent Smith illegally seized Mr. Pham.....	27
B. Mr. Pham did not voluntarily consent to the search of his car.....	35
II. Alternatively, the Court should strike the fine and related conviction surcharge in Mr. Pham’s judgment and remand for a consideration of the factors in Mont. Code Ann. §§ 46-18-231(3) and 46-18-236(2), before any fine or surcharge may be imposed..	38
III. Also alternatively, the District Court abused its discretion by imposing costs of counsel on Mr. Pham, over objection, without inquiring into his ability to pay those costs. The Court should strike these costs from the judgment and remand for an ability to pay inquiry.	43
CONCLUSION.....	49

CERTIFICATE OF COMPLIANCE.....51
APPENDIX.....52

TABLE OF AUTHORITIES

Cases

<i>City of Missoula v. Kroschel</i> , 2018 MT 142, 391 Mont. 457, 419 P.3d 1208 (<i>en banc</i>)	28, 29
<i>City of Missoula v. Metz</i> , 2019 MT 264, 397 Mont. 467, 451 P.3d 530	23
<i>Hiibel v. Sixth Jud. Dist. Ct.</i> , 542 U.S. 177, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004)	29
<i>Schneckloth v. Bustamonte</i> , 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)	36
<i>State v. Case</i> , 2007 MT 161, 338 Mont. 87, 162 P.3d 849	31
<i>State v. Daricek</i> , 2018 MT 31, 390 Mont. 273, 412 P.3d 1044	24
<i>State v. Emerson</i> , 2015 MT 254, 380 Mont. 487, 355 P.3d 763 (<i>en banc</i>)	30, 31
<i>State v. Hansen</i> , 2017 MT 280, 389 Mont. 299, 405 P.3d 625	42
<i>State v. Hill</i> , 2004 MT 184, 322 Mont. 165, 94 P.3d 752	21, 27
<i>State v. Himes</i> , 2015 MT 91, 378 Mont. 419, 345 P.3d 297	24
<i>State v. Hoover</i> , 2017 MT 236, 388 Mont. 533, 402 P.3d 1224	30

<i>State v. Hotchkiss</i> , 2020 MT 269, 402 Mont. 1, 474 P.3d 1273 (<i>en banc</i>)	24, 44, 46, 49
<i>State v. Ingram</i> , 2020 MT 327, 402 Mont. 374, 478 P.3d 799 (<i>en banc</i>)	24, 41, 42
<i>State v. Kotwicki</i> , 2007 MT 17, 335 Mont. 344, 151 P.3d 892	42
<i>State v. Lenihan</i> , 184 Mont. 338, 602 P.2d 997 (1979)	42
<i>State v. Lovegren</i> , 2002 MT 153, 310 Mont. 358, 51 P.3d 471	33
<i>State v. Madplume</i> , 2017 MT 40, 386 Mont. 368, 390 P.3d 142	passim
<i>State v. Marcial</i> , 2013 MT 242, 371 Mont. 348, 308 P.3d 69	34
<i>State v. Merrill</i> , 2004 MT 169, 322 Mont. 47, 93 P.3d 1227	21
<i>State v. Reynolds</i> , 2017 MT 317, 390 Mont. 58, 408 P.3d 503	24
<i>State v. Snell</i> , 2004 MT 269, 323 Mont. 157, 99 P.3d 191	21, 36
<i>State v. Spaulding</i> , 2011 MT 204, 61 Mont. 445, 259 P.3d 793	34
<i>State v. Strom</i> , 2014 MT 234, 376 Mont. 277, 333 P.3d 218	29
<i>State v. Wilkes</i> , 2021 MT 27, 403 Mont. 180, 480 P.3d 823	40, 41

<i>State v. Wilkins</i> , 2009 MT 99, 350 Mont. 96, 205 P.3d 795.....	31
<i>State v. Yang</i> , 2019 MT 266, 397 Mont. 486, 452 P.3d 897 (<i>en banc</i>)	passim
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)	30
<i>United States v. Mendenhall</i> , 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)	30, 31

Statutes

Mont. Code Ann. § 45-9-103.....	2
Mont. Code Ann. § 45-9-130.....	3, 39
Mont. Code Ann. § 45-9-130(1).....	38, 39, 40, 41
Mont. Code Ann. § 46-5-401(2)(a)	29
Mont. Code Ann. § 46-5-402.....	28, 31
Mont. Code Ann. § 46-8-113(3).....	45
Mont. Code Ann. § 46-8-113(4).....	43, 49
Mont. Code Ann. § 46-18-113(1).....	48
Mont. Code Ann. § 46-18-231(3).....	passim
Mont. Code Ann. § 46-18-236(1)(b)	3, 39, 41
Mont. Code Ann. § 46-18-236(2).....	38, 41, 42, 43
Mont. Code Ann. § 61-8-731(1)(a)(iii).....	41

United States Constitution

Amend. IV	passim
Amend. VIII	39
Amend. XIV.....	35, 36

Montana Constitution

Art. II, § 10.....	27
Art. II, § 11.....	27, 30
Art. II, § 22.....	39, 40

Rules

M. R. App. P. 10(7)(a), (b).....48

STATEMENT OF THE ISSUES

(1) Did the District Court rely on clearly erroneous findings of fact when it denied Mr. Pham's motion to suppress on the grounds he was not seized and voluntarily consented to officers searching his car when he stopped at a Miles City gas station during a cross-country road trip?

(2) Should the Court strike the fine and conviction surcharge imposed in Mr. Pham's sentence, which are based on the market value of the marijuana found in the trunk of Mr. Pham's car, and remand for an ability to pay inquiry and amended judgment?

(3) Did the District Court abuse its discretion by imposing costs of counsel on Mr. Pham, over objection, without inquiring into his ability to pay those costs?

STATEMENT OF THE CASE

On a late-August road trip between Butte, Montana, and Brooklyn Park, Minnesota, Hoang Vinh Pham, a Vietnamese immigrant with limited English skills, stopped at a gas station in Miles City off

Interstate I-94. (10/05/2018 Tr.¹ at 60 – 62, 67 – 68.) This appeal concerns whether Mr. Pham voluntarily consented to a warrantless search of his car that day by law enforcement officers.

In November, the State charged Mr. Pham by Information in District Court with one count of criminal possession of marijuana, a dangerous drug, with intent to distribute, a felony, in violation of Mont. Code Ann. § 45-9-103. (D.C. Docs. 3 and 4.)

Subsequently, Mr. Pham filed a motion to suppress on the ground that he did not voluntarily consent to the warrantless search of his vehicle. (D.C. Doc. 51.) Following contested briefing and an evidentiary hearing, the District Court issued a short summary order denying the motion (D.C. Doc. 69, attached hereto as App. A), followed by a detailed Order Denying Defendant’s Motion to Suppress that included findings of fact and conclusions of law. (D.C. Doc. 95, attached hereto as App. B.)

¹ A motion to suppress hearing occurred on October 5, 2018. The transcript is cited “10/05/2018 Tr.”.

The case proceeded to a two-day jury trial. (Trial Tr. April 16 & 17, 2019; D.C. Doc. 121.) The jury found Mr. Pham guilty of the charged offense and further found that the amount of marijuana possessed with intent to distribute was more than 60 grams. (D.C. Doc. 122.)

At sentencing, the District Court imposed a 15-year sentence to the Montana State Prison with no portion suspended. (Sent. Tr. at 20, attached hereto as App. C.) The District Court ordered a fine of \$16,625, pursuant to Mont. Code Ann. § 45-9-130, but declared the fine suspended. (App. B at 20.) The District Court also imposed other costs and surcharges, including a 10 percent conviction surcharge hinged on the amount of the fine, pursuant to Mont. Code Ann. § 46-18-236(1)(b). (App. C at 20.) Additionally, the District Court ordered Mr. Pham to pay \$3,038 for the cost of assigned counsel, rejecting without inquiry Defense Counsel's contention that Mr. Pham may have great difficulty paying those costs. (App. C at 20; Sent. Tr. at 17.) The written judgment conforms with the oral pronouncement of sentence. (D.C. Doc. 139, attached hereto as App. D.)

STATEMENT OF THE FACTS

Events at the Miles City Gas Station

In August 2017, Hoang Pham drove to Butte from his home in Brooklyn Park, Minnesota, to check on a car he had wrecked there that had been towed. (App. B at 10, ¶ 54.) During the trip back home to Minnesota on August 31, Mr. Pham stopped at the Conoco station off the interstate in Miles City. While there, he went into the station's convenience store to use the restroom, pay for gas, and heat up a bowl of noodles in the store's microwave. (10/05/2018 Tr. at 61 – 62.)

As he waited for his noodles to cook, Agent Richard Smith from the Montana Division of Criminal Investigations entered the store and noticed Mr. Pham. (10/05/2018 Tr. at 8.) Agent Smith was on his way to Billings from Miles City with two Montana Highway Patrol troopers. They stopped at the Conoco station before starting their journey. (10/05/2018 Tr. at 6 – 7.) The only other vehicle in the parking lot at the time was Mr. Pham's car. (10/05/2018 Tr. at 7 – 8.)

The troopers were in uniform and were driving a marked, MHP "crime scene van" that contained 960 pounds of vacuum-sealed marijuana seized the previous day. (10/05/2018 Tr. at 7, 10, 40.) The

van was a three-quarter-ton, full-size, utility van with panels and windows on the side. (10/05/2018 Tr. at 42.) Trooper Barry Kipela explained, “Anyone outside of the van would probably be able to easily see that the van was stuffed all the way full to the ceiling with bulk marijuana.” (10/05/2018 Tr. at 40.) Trooper Kipela conceded that “to the average individual” a van packed high inside with bundled marijuana “would not be a normal sight[.]” (10/05/2018 Tr. at 51.)

Agent Smith was driving an unmarked, grey, pickup truck and wearing plain clothes, though he did have a gun visibly holstered onto the outside of his pantleg. He also was wearing an identification badge on a necklace in front of his shirt and had handcuffs hanging in a case under the back of his shirt. (10/05/2018 Tr. at 6, 10 – 11.)

Agent Smith observed Mr. Pham looking outside the window at the three vehicles in the parking lot as he waited for his noodles to heat. Agent Smith determined Mr. Pham’s behavior was unusual. (10/05/2018 Tr. at 8 - 9.) After using the store’s restroom and purchasing a bottle of water, Agent Smith walked outside and spoke to the two other officers about Mr. Pham staring into the parking lot. (10/05/2018 Tr. at 9.)

After speaking with Agent Smith, Trooper Kipela observed Mr. Pham inside the store looking outside through the window at their van packed full of marijuana. Trooper Kipela testified that Mr. Pham's behavior was "out of the ordinary" and he interpreted that behavior as "overt nervousness." (10/05/2018 Tr. at 45.)

After Mr. Pham exited the store Agent Smith approached him in the parking lot. (10/05/2018 Tr. at 9, 12.) About 10 to 15 minutes total had passed from the time the officers drove into the Conoco parking lot until Agent Smith approached Mr. Pham. This time included the officers fueling up their two vehicles and Agent Smith's trip into the store. (10/05/2018 Tr. at 51.)

Agent Smith contended, "A lot of people are afraid to approach the highway patrol. He could have been lost or there could have been offense that had been occurring based on his behavior." (10/05/2018 Tr. at 9.) Agent Smith denied that Mr. Pham's Vietnamese ethnicity factored into his decision to talk to him. (10/05/2018 Tr. at 21 – 24.)

Agent Smith asserted he approaches people of all races and would have approached anyone that day who was staring out the convenience store window at the officers' vehicles in the parking lot. (10/05/2018 Tr.

at 21 – 22.) Agent Smith admitted, however, that he was aware of “significant drug trafficking” all along Interstate 90² and that “a number of Vietnamese individuals” have been arrested for trafficking drugs between Washington and Minnesota. (10/05/2018 Tr. at 22 – 23.) Agent Smith stated he investigates “all offenses regarding outside factors like ethnicity, color, gender. I investigate crimes pro moe (ph.s.) if it’s occurring.” (10/05/2018 Tr. at 23 (parenthetical indicator of phonetic spelling in original).)

The parties disagree about what happened in the parking lot.

Mr. Pham’s testimony

Mr. Pham testified through an interpreter who appeared under oath by speaker phone. (10/05/2018 Tr. at 3 – 4.) Mr. Pham explained he has been in the United States since 1983 and his primary language is Vietnamese, not English. (10/05/2018 Tr. at 59, 68.) On a day-to-day basis with his family and friends, Mr. Pham speaks Vietnamese. (10/05/2018 Tr. at 71.)

² Throughout his testimony, Agent Smith repeatedly discussed drug trafficking on the I-90 corridor. Miles City is located on I-94, not I-90.

To demonstrate Mr. Pham's struggle with English, Defense Counsel had the following interchange with Mr. Pham:

Q. Hoang, can you please repeat the following sentence to me in English: My name is Hoang Pham and I have lived in Washington and Minnesota.

A. (The Defendant) My name is Hoang Pham. I am from Minnesota and Washington.

(10/05/2018 Tr. at 59.)

Mr. Pham explained that on the day in question he was traveling to Minnesota from Butte in a car he had borrowed from a friend.

(10/05/2018 Tr. at 60, 61.) When asked why he had been in Butte, Mr. Pham replied, in-full, through the interpreter:

Because before that – towards the end of June my car got flipped towards the hills at the end of June so my car was towed. There the police – the police came and so I – at the time they asked me – they asked me whether or not I would be coming to have the car repaired or what I am going to do about it.

At the time they asked – I asked them whether or not I would be able to have the car repaired, and I asked them how much it was going to be. They told me that it was too much to have the car repaired. So when I feel better then I would come out and to check out. So when I found out the car repair was too much, it was \$10,000, but I pay only \$4,000 for the car – but

that's why I came down here and to release the car to somebody – to give to somebody.
Correction.

(10/05/2018 Tr. at 60. *See also* 10/05/2018 Tr. at 68 – 70, 71 – 73.)

When asked if he tried to explain this story to the officers at the gas station, Mr. Pham responded, “He did not ask.” (10/05/2018 Tr. at 61.)

Mr. Pham stopped at the gas station because, “I had been driving for four or five hours and the car almost ran out of gas and I was tired and I needed to eat.” (10/05/2018 Tr. at 61.) Mr. Pham went inside the store to use the restroom and paid \$20 for fuel. He also asked the owner to use the microwave to cook a bowl of noodles that he would take back outside to eat in his car. (10/05/2018 Tr. at 62.) When the noodle bowl was heated, Mr. Pham walked back outside, put the bowl on top of the car, and began pumping gas. Within a minute or two, an officer walked over to him, followed by two more officers. (10/05/2018 Tr. at 62.)

Mr. Pham recounted what happened next:

A. So there was an officer in uniform came close to me and asked me, “Well, you managed to run away.”

So I didn't know who the officer was talking to. So it was just myself because I was pumping

the gas but I did not know the questions that the officer was – had asked. So I did not know.

Q. Hoang, at some point did you open the back door?

(10/05/2018 Tr. at 62.) At that point, the interpreter “had a hard time following what Mr. Pham was saying[,]” and requested permission from the court to clarify Mr. Pham’s answer with him in Vietnamese.

(10/05/2018 Tr. at 63.) Following clarification, Mr. Pham answered that he only opened the front driver’s door, in order to open the gas tank.

(10/05/2018 Tr. at 63.)

Defense Counsel continued:

Q. Did you ever open the door so that law enforcement could search your vehicle?

A. No.

Q. Did you ever open your trunk so that law enforcement could search your vehicle?

A. No.

Q. Was the trunk or door ever opened by anyone when law enforcement were there?

A. No, except for Mr. Smith. He opened it by himself.

Q. Did Agent Smith open the door or the trunk?

(10/05/2018 Tr. at 63 – 64.) Once again, the interpreter conveyed to the court, “I’m having a real hard time following Mr. Pham[,]” and requested permission to clarify Mr. Pham’s answer with him in Vietnamese. (10/05/2018 Tr. at 64.) Following clarification, Mr. Pham responded, “So Agent Smith searched not only the inside of the car but also the trunk as well.” (10/05/2018 Tr. at 64.)

Defense Counsel proceeded:

Q. Hoang, did you give any of the law enforcement individuals present permission to search your vehicle?

A. He did not ask me and I did not consent and he kept me there and he did it by himself.

Q. Hoang, did you believe that you were free to leave?

A. They did not let me go anywhere. They kept me in there and they pulled me away even though I tried to pump the gas. So I did not do anything against them. I know I didn’t do anything wrong. As a result I wasn’t able to come get in and he went inside, got the money and give it back to me.

(10/05/2018 Tr. at 64 – 65.)

During cross-examination, Mr. Pham explained the situation in more detail:

Q. Mr. Pham, is it your testimony today that Agent Smith opened the trunk?

A. Yes.

Q. Mr. Pham, did you give Agent Smith the keys to your car?

A. No.

Q. Mr. Pham, was your trunk locked?

A. No.

Q. Mr. Pham, how did Agent Smith open your trunk?

A. Whatever way Agent Smith opened my trunk. I don't know. With the key or popped the whatever, I don't know because they pulled me aside with the other two officers, and then whatever they did I do not know.

(10/05/2018 Tr. at 65 – 66.) Mr. Pham stated he saw Agent Smith open his trunk. (10/05/2018 Tr. at 67.)

In the Motion to Suppress itself, Defense Counsel relied on the State's assertion in the Motion and Affidavit for Leave to File Information that Mr. Pham consented to Agent Smith's request to search his car. Counsel argued Mr. Pham did not reasonably believe he

could refuse consent under the circumstances. (D.C. Doc. 51 at 3 – 6. *See also* D.C. Doc. 1 at 2.) Mr. Pham’s testimony, however, clarifies that Agent Smith did not request, nor did Mr. Pham grant, consent to search his car. (See App. B at 2.)

The State’s Testimony

Agent Smith testified that he approached Mr. Pham as he walked to his car after exiting the store. (10/05/2018 Tr. at 12.) He contended that he and Mr. Pham had a “very cordial” conversation lasting about three to five minutes, during which they discussed whether Mr. Pham was lost and talked about Mr. Pham’s family. (10/05/2018 Tr. at 14. *See also* 10/05/2018 Tr. at 44 – 45 (same) (Trooper Kipela testimony).) According to Agent Smith, Mr. Pham appeared to have no trouble understanding him and responded appropriately to his questions, including when he asked for Mr. Pham’s driver’s license. (10/05/2018 Tr. at 13 – 15.) Agent Smith questioned Mr. Pham about the reason he was traveling in Montana. Mr. Pham had difficulty explaining that he had traveled to Butte to check on a vehicle he had left there for repairs. (10/05/2018 Tr. at 15.) Agent Smith testified that Mr. Pham said he had been in “Beauty, Montana”, and “he kept saying, ‘Like my hat.

Like my hat. Big Sky.’ Okay.” (10/05/2018 Tr. at 15 – 16. *Accord* 10/05/2018 Tr. at 45 (Kipela).)

Following this allegedly cordial conversation, Agent Smith asked Mr. Pham if he could search his car for “specific items, guns, knives, any forms of drugs, child pornography contained within his vehicle[.]” (10/05/2018 Tr. at 13 – 16.) Agent Smith provided no reason for suspecting any of those items might have been in Mr. Pham’s car. But, according to Agent Smith, Mr. Pham opened the rear door and said, “Yes, you can.” (10/05/2018 Tr. at 16. *See also* 10/05/2018 Tr. at 44 (Kipela).) Trooper Kipela, who had been sitting in the passenger seat of the MHP van, testified he got out of the van and walked over to Agent Smith and Mr. Pham when he saw Mr. Pham open the rear door of his car. (10/05/2018 Tr. at 52 – 53.)

Agent Smith claimed he requested Mr. Pham to open the trunk and Mr. Pham did so. According to Agent Smith, Mr. Pham complied with every request without asking him to repeat or explain it in a different fashion. (10/05/2018 Tr. at 16. *Accord* 10/05/2018 Tr. at 46 – 47, 52 (Kipela).)

As averred by the State in the affidavit supporting its motion for leave to file the information, but not addressed in the suppression hearing, once the trunk was open, “Agent Smith was overwhelmed by the odor of raw marijuana emitting from . . . boxes located in the trunk. Agent Smith asked the Defendant for permission to open the boxes. The Defendant agreed, stating that the boxes were not his. Agent Smith opened the boxes and observed several vacuum sealed bags of marijuana.” (D.C. Doc. 1 at 2.) Agent Smith arrested Mr. Pham, and processed Mr. Pham’s car for evidence. Ultimately, the State seized approximately 19 pounds of marijuana from the trunk of the car. (D.C. Doc. 1 at 2.)

During the hearing, Agent Smith did not address the implausibility of Mr. Pham voluntarily facilitating the search of his car if he knew it possessed a large amount of marijuana. Instead, Agent Smith simply claimed Mr. Pham was not under arrest or in custody when he requested consent to search Mr. Pham’s car. (10/05/2018 Tr. at 18.) Agent Smith realized during the conversation that English was not Mr. Pham’s primary language but did not ask Mr. Pham if he

understood what he, i.e., Agent Smith, was saying. (10/05/2018 Tr. at 25. *Accord* 10/05/2018 Tr. at 52 (Kipela).)

During cross-examination, Agent Smith told Defense Counsel that as he was speaking with Mr. Pham, he remembered him from an earlier incident:

A. Well, when I asked for his reason to travel he said that he was having a car fixed – mechanically fixed in Beauty.

I asked him, “Was there no mechanics in Minnesota?”

Financially that would have been a reason not to travel to Montana when they have mechanics there. And six months prior to that stop, I remembered after looking at his name on his driver’s license that there was an accident in Butte where a black male and an Asian male had run from the scene. I remember his name belonging on that registration in the Butte area which led me to believe that there might be something going on.

Q. Well, that’s pretty significant information, isn’t it, Agent Smith?

A. It’s just something that I kept in the back of my mind. I didn’t fully realize that that could be related until after – I even asked the Defendant, “I think I know you, don’t I?” I just couldn’t place – I wasn’t 100 percent positive of the name so I didn’t bring that up to him.

Q. Agent Smith you are trained to write important information in your report, correct?

A. Yes, sir, I am.

Q. You didn't write that in your report, did you?

A. No, sir, I did not.

(10/05/2018 Tr. at 28 – 29.)

Agent Smith further testified that he did not stop asking Mr. Pham questions after ascertaining that he was not lost or under the influence of drugs because they were having “a consensual conversation. I’m still talking to him. If he wanted to walk away, he could, but or I could have, but I still had additional questions that I would have liked to have asked.” (10/05/2018 Tr. at 26 – 27.) Agent Smith said his questions “were fluid”; when Mr. Pham answered one question, Agent Smith would ask another, explaining, “So I continued to ask my questions and I had the conversation and I continually had a conversation with him.” (10/05/2018 Tr. at 27.)

Defense Counsel pressed Agent Smith:

Q. Right. But that's exactly my question. I think this is important. If you ruled out the possibility that he was lost, the only reason to continue to talk to him would be because you

thought that maybe he'd committed an offense. So I'm wondering why you kept talking to him.

A. I don't believe you can draw a conclusion as to what's going on in one or two questions. The conversation – upon the completion of the conversation, I would have had a better picture of exactly what I was looking at. So I wasn't finished or had an idea of what was going on at that time. Not based on two questions, sir.

(10/05/2018 Tr. at 27 – 28.)

Trooper Kipela speculated about Mr. Pham's understanding of the situation:

Q. Based on the interaction between Agent Smith and the Defendant and the questions or discussions that you had with the Defendant, do you believe he understood what was going on?

A. I heard Agent Smith ask the gentleman where he was coming from, where he was going, and why he was there, and based on my conversations he fully understood the questions. He had – his answers didn't really make a whole lot of sense, and I believed that's because he was making them up and he was lying.

The man had stated that he was in Beauty or Butt[e], Montana, and he lives in Minnesota and he was traveling back home after he had driven there to have his car worked on and fixed.

And when Agent Smith asked him those questions, I observed the answers – the answers. He understood the questions, however, and the answers to said questions were not logical responses. And like I said, I believed that’s because he was lying and he made them up. That’s what I believed at the time and that’s what I still believe now.

(10/05/2018 Tr. at 48 – 49.) Both Agent Smith and Trooper Kipela rejected the suggestion that Mr. Pham’s difficulties with the English language could have been the reason for not clearly explaining why his car was being repaired in Butte. (10/05/2018 Tr. at 30 (Smith), 48 – 49 (Kipela).) The record contains no evidence that either officer had training or credentials to assess the communication patterns or difficulties of people from other countries who are not fluent in English.

Neither Agent Smith’s truck nor the MHP van was equipped with a video camera. (10/05/2018 Tr. at 7, 11 – 12, 41 – 42.) None of the officers wore body cameras; nor did they make any audio recording of Mr. Pham’s interview. (10/05/2018 Tr. at 11, 41.) The Conoco station apparently had no surveillance footage of the incident. (10/05/2018 Tr. at 19.) None of the officers had written consent forms available for Mr. Pham to review and sign before he allegedly agreed verbally to Agent Smith’s search of his car. (10/05/2018 Tr. at 11 – 12, 47.) Agent Smith

admitted he had a phone in the truck he was driving that he could have used to record his conversation with Mr. Pham but did not do so.

(10/05/2018 Tr. at 25.)

The hearing concluded without argument by counsel.

The District Court's Order Denying Defendant's Motion to Suppress

The District Court issued a 19-page order denying the motion to suppress. (App. B.) At the end of the Findings of Fact section, which summarized the briefing and testimony in detail, the District Court wrote:

68. Mr. Pham's testimony contrasted with the events as testified-to by the officers. The accounts differed regarding consent; but also, the actions of Mr. Pham (opening vehicle).

69. Mr. Pham's testimony contrasted with the arguments in the Defense briefing. The contrast eroded the credibility of facts argued through the Defense briefing, and Mr. Pham's account of the events.

(App. B at 12.)

In its Conclusions of Law, the District Court first addressed whether Mr. Pham had been seized or whether he engaged in a voluntary exchange with Agent Smith. (App. B at 12 – 16.) Relying on

State v. Merrill, 2004 MT 169, 322 Mont. 47, 93 P.3d 1227; *State v. Hill*, 2004 MT 184, 322 Mont. 165, 94 P.3d 752; and *State v. Snell*, 2004 MT 269, 323 Mont. 157, 99 P.3d 191, the District Court ruled:

13. Here the exchange with Mr. Pham did not initiate with an investigative stop. The voluntary exchange did not require a point of transition between not-free-to-leave investigative stop, and free-to-leave, and finally voluntary exchange.

14. No evidence indicates that Agent Smith ordered Mr. Pham to speak to Agent Smith, or to engage in continued conversation.

15. Reviewing the case law and objective standard, and in consideration of the circumstances in this case, Mr. Pham was not seized during the encounter because a reasonable person would have felt he was free to leave without engaging in conversation with Agent Smith.

(App. B at 16.)

Next, the District Court considered whether Mr. Pham consented to the search of his vehicle. (App. B at 16 – 17.) The District Court ruled that based on its findings of fact, Agent Smith requested Mr. Pham's consent to search his car and Mr. Pham consented to the search. (App. B at 16, ¶ 16.) In support of its ruling, the District Court recited

only Agent Smith's and Trooper Kipela's testimony and none of Mr. Pham's testimony. (App. B at 17, ¶¶ 17 – 18.)

Lastly, the District Court examined whether Mr. Pham's consent was valid. (App. B at 17 – 18.) Relying on the well-settled totality of the circumstances test applied by this Court and the United States Supreme Court, the District Court ruled that Mr. Pham was not in custody and had not been the subject of an investigative stop. (App. B at 18, ¶ 23.) The District Court further determined Agent Smith requested consent to search Mr. Pham's vehicle, which Mr. Pham gave and assisted in the search by opening up the rear passenger door and the trunk. (App. B at 18, ¶ 24.)

The District Court found no coercion by the officers, stated that the conversation was conversational and cordial while everyone was at a gas station, and remarked that Mr. Pham appeared intelligent and able to understand, noting he had lived in the United States for 35 years. (App. B at 18, ¶¶ 25 – 26.) Under these circumstances, the District Court held that the State met its burden under the totality of the circumstances that Mr. Pham voluntarily consented to the search of his car. (App. B at 18, ¶ 27.)

Based on its findings and conclusions, the District Court denied Mr. Pham’s motion to suppress. (App. B at 19.)

STANDARDS OF REVIEW

This Court reviews a trial court’s denial of a motion to suppress “to determine whether the court's findings are clearly erroneous and whether those findings were applied correctly as a matter of law. . . . A lower court's finding that particularized suspicion exists is a question of fact which we review for clear error. . . . A finding is clearly erroneous if it is not supported by substantial evidence, if the lower court has misapprehended the effect of the evidence, or if our review of the record leaves us with the firm conviction that a mistake has been made.” *City of Missoula v. Metz*, 2019 MT 264, ¶ 12, 397 Mont. 467, 451 P.3d 530 (citations and internal quotation marks omitted).

“This Court reviews fines as sentencing conditions. In reviewing a sentencing condition, we first review the condition for legality, to determine whether it falls within statutory parameters. A sentence outside the statutory parameters is illegal. Our standard of review of that question of law is de novo. If the condition is legal, we then review its reasonableness to determine whether the district court abused its

discretion.” *State v. Reynolds*, 2017 MT 317, ¶ 15, 390 Mont. 58, 408 P.3d 503 (citation omitted). “A district court's determination of a defendant's ability to pay is essentially a finding of fact that this Court will reverse only if it is clearly erroneous.” *Reynolds*, ¶ 16 (citations and internal quotation marks omitted). *Accord State v. Hotchkiss*, 2020 MT 269, ¶ 13, 402 Mont. 1, 474 P.3d 1273 (*en banc*).

Whether a sentence is legal is a question of law subject to de novo review. *State v. Daricek*, 2018 MT 31, ¶ 7, 390 Mont. 273, 412 P.3d 1044. The Court’s review of legality is generally confined to determining whether the sentence falls within the statutory parameters, whether the district court had statutory authority to impose the sentence, and whether the district court followed the affirmative mandates of the applicable sentencing statutes. *State v. Himes*, 2015 MT 91, ¶ 22, 378 Mont. 419, 345 P.3d 297. *Accord State v. Ingram*, 2020 MT 327, ¶ 8, 402 Mont. 374, 478 P.3d 799 (*en banc*).

The Court undertakes de novo review of a claim that a sentence violates the constitution. *State v. Yang*, 2019 MT 266, ¶ 8, 397 Mont. 486, 452 P.3d 897 (*en banc*).

SUMMARY OF ARGUMENT

The District Court's order denying Mr. Pham's motion to suppress is based on a clearly erroneous finding that Mr. Pham was not seized. Agent Smith seized Mr. Pham when he requested his identification and began asking Mr. Pham why he was in Montana and whether he possessed child pornography, weapons, or drugs. Agent Smith lacked any particularized suspicion to suspect Mr. Pham had committed or was about to commit any crime before asking these questions. Agent Smith's questions were a fishing expedition that exceeded the permissible scope of an investigative stop or a welfare check after determining that Mr. Pham was not lost, under the influence of drugs, or in need of help.

Likewise, the District Court's finding that Mr. Pham's testimony was eroded because it conflicted with what Defense Counsel wrote in the motion to suppress was clearly erroneous. The motion was based entirely on Agent Smith's affidavit of probable cause in support of the Information. Defense Counsel had trouble communicating with Mr. Pham. Even the Vietnamese interpreter had difficulty understanding Mr. Pham in Vietnamese.

The fact that Mr. Pham's communications were confusing is not tantamount to lacking credibility. Instead, it is evidence that whatever communications Mr. Pham had with Agent Smith were not based on a reasonable, native-born American's understanding of the situation. Any consent that Mr. Pham may have given to search his car – and he denies that Agent Smith requested, or that he gave, consent – must be viewed through the lens of a reasonable Vietnamese immigrant born in 1970 during the Vietnam War, not fluent in English, and came to the United States during refugee resettlement when he was 13 years old.

The District Court's clearly erroneous findings of fact led to incorrect conclusions of law. Accordingly, the denial of Mr. Pham's motion to suppress should be reversed and his case remanded for additional proceedings in conformance with the Court's decision.

Alternatively, if the Court affirms the denial of Mr. Pham's motion to suppress, it should strike from Mr. Pham's judgment the \$16,625 fine based on the market value of the marijuana, the \$1,662.50 conviction surcharge that is 10% of the fine, and the \$3,038 cost of counsel. The District Court imposed these amounts without particularized facts in the record or testimony from Mr. Pham that he can afford to pay them.

The Court should remand for the District Court to consider Mr. Pham's ability to pay the fine, conviction surcharge, and costs of counsel and enter an amended judgment thereafter.

ARGUMENT

I. Under the totality of the circumstances, Mr. Pham was seized by law enforcement when Agent Smith requested his identification and asked if he possessed weapons, drugs, or child pornography. Even if Agent Smith had requested consent to search Mr. Pham's car, any consent that may have been given was not voluntary.

A. Agent Smith illegally seized Mr. Pham.

The Fourth Amendment to the United States Constitution and Article II, Sections 10 and 11 of the Montana Constitution protect people against unreasonable searches and seizures. *Hill*, ¶ 19 (citations omitted). This Court examines the legality of a search or seizure by determining whether there has been an unlawful intrusion into one's privacy. *Hill*, ¶ 19 (citation omitted).

Here, Agent Smith approached Mr. Pham in the parking lot after deciding Mr. Pham's behavior was "unusual" inside the convenience store. (10/05/2018 Tr. at 8 – 9.) Trooper Kipela also thought Mr. Pham's behavior was "out of the ordinary" and demonstrated "overt nervousness". (10/05/2018 Tr. at 45.) Agent Smith contended Mr.

Pham could have been afraid or lost or there could have been a crime occurring. (10/15/2018 Tr. at 9.) Agent Smith was aware of “significant drug trafficking” all along Interstate 90³ by “a number of Vietnamese individuals”; he confirmed investigating “all offenses regarding outside factors like ethnicity, color, gender . . . pro moe (ph.s.) if it’s occurring.” (10/15/2018 Tr. at 21 – 23.)

“Upon making an investigative stop, law enforcement officers must act with reasonable diligence to quickly confirm or dispel the predicate suspicion for the stop. . . . The duration and scope of an investigative stop must be carefully limited to its underlying justification . . . [and] may not exceed what is reasonably necessary to confirm or dispel the predicate suspicion of the stop.” *City of Missoula v. Kroschel*, 2018 MT 142, ¶ 13, 391 Mont. 457, 419 P.3d 1208 (*en banc*) (citations and internal quotation marks omitted.) *Accord* Mont. Code Ann. § 46-5-402 (limiting a temporary investigative stop from lasting longer than is necessary to effectuate the purpose of the stop). “To that end, ‘asking questions is an essential part of police investigations[.] . . . [Q]uestions concerning a suspect’s identity are a routine and

³ Miles City, of course, is not located on the I-90 corridor.

[permissible] part’ of a temporary, investigative stop.” *Kroschel*, ¶ 14, quoting *Hiibel v. Sixth Jud. Dist. Ct.*, 542 U.S. 177, 185, 186, 124 S.Ct. 2451, 2458, 159 L.Ed.2d 292 (2004). Montana law enforcement officers may request a person’s name, current address, and an explanation of the person’s conduct in relation to the officer’s particularized suspicion for the stop, as well as “other questions permissible under the Fourth Amendment within the limited scope of the stop (i.e., reasonably related in scope to the particularized suspicion that justified the stop).” *Kroschel*, ¶ 15, citing Mont. Code Ann. 46-5-401(2)(a).

To have particularized suspicion for an investigative stop, ‘the peace officer must be possessed of: (1) objective data and articulable facts from which he or she can make certain reasonable inferences; and (2) a resulting suspicion that the person to be stopped has committed, is committing, or is about to commit an offense. . . . Whether or not particularized suspicion exists is a question of fact determined by looking at the totality of the circumstances. . . . In evaluating the totality of the circumstances, a court must consider the quality and quantity of the information available to the officer.

State v. Strom, 2014 MT 234, ¶ 15, 376 Mont. 277, 333 P.3d 218
(citations omitted).

“A constitutional seizure of a person occurs when a government officer ‘in some way’ restrains a person’s liberty ‘by means of physical force” or a ‘show of authority’ that, under the totality of the circumstances, would cause an objectively reasonable person to feel not free to leave the presence of the government officer.” *State v. Hoover*, 2017 MT 236, ¶ 15, 388 Mont. 533, 402 P.3d 1224 (citations omitted). *Accord United States v. Mendenhall*, 446 U.S. 544, 552 – 54, 100 S.Ct. 1870, 1876 – 77, 64 L.Ed.2d 497 (1980); *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877, 20 L.Ed.2d 889 (1968). “Even a brief restraint of a person’s liberty constitutes a seizure subject to the Fourth Amendment and Montana Constitution, Article II, section 11.” *Hoover*, ¶ 15 (citations omitted).

Examples of circumstances that may indicate a person has been seized include: “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.” *State v. Emerson*, 2015 MT 254, ¶ 14, 380 Mont. 487, 355 P.3d 763 (*en banc*), *citing Mendenhall*, 446 U.S. at 554, 100 S.Ct. at 1877. These

Mendenhall factors may be helpful in certain cases, but they are not exhaustive. *Emerson*, ¶ 14, citing *State v. Wilkins*, 2009 MT 99, ¶ 12, 350 Mont. 96, 205 P.3d 795. “If there has been a seizure, the State must prove it was reasonable by showing circumstances that create ‘a particularized suspicion that the person is or has been engaged in wrongdoing or was a witness to criminal activity.’” *Emerson*, ¶ 15, citing *State v. Case*, 2007 MT 161, ¶ 21, 338 Mont. 87, 162 P.3d 849 (citation omitted).

Agent Smith and Trooper Kipela had no particularized suspicion to investigate Mr. Pham. All they had were generalized suspicions – more aptly, biases – that Mr. Pham looked “unusual”, “out of the ordinary” and “nervous”. Nevertheless, Agent Smith requested Mr. Pham’s driver’s license and proceeded to question him about why he was in Montana and whether he possessed child pornography, drugs, or weapons. (10/05/2018 Tr. at 13 – 15.) The officers’ actions and questions amounted to an investigative stop under Mont. Code Ann. § 46-5-402 and this Court’s precedent.

Agent Smith denied Mr. Pham’s Vietnamese had anything to do with his stop, but then negated his own testimony by admitting he

investigates “pro moe” all crimes regarding “outside factors like ethnicity, color, and gender.” (10/05/2018 Tr. at 23.) Apparently to Agent Smith, Vietnamese ethnicity in Miles City is worth a criminal investigation to try to unearth a varied assortment of felonies.

Agent Smith asserted for the first time at the suppression hearing he recognized Mr. Pham from an accident in Butte where “a black male and an Asian male had run from the scene.” This statement rests on the repugnant proposition that “Asian males” and “Black males” all look alike, for Agent Smith provided no context or explanation about the Butte accident or why he thought Mr. Pham might be the “Asian male” who “had run from the scene.”

There is no evidence that Agent Smith looked for warrants against Mr. Pham or arrested him for any reason related to the Butte accident. Instead, as he testified, Agent Smith investigates crime “pro moe if it’s occurring”, including “outside factors like ethnicity, color, gender”, as though these immutable characteristics have some relation to whether a crime has been committed. They do not.

The District Court erred by giving Mr. Pham’s testimony no credibility because his attorney briefed the motion to dismiss based on

the State's allegations in the affidavit supporting its motion for leave to file information. That finding sweeps too broadly. Had the District Court been concerned about this discrepancy, it should have requested argument from counsel at the end of the motion to suppress hearing about the differences.

A reasonable person in Mr. Pham's situation, with limited English capabilities and born and raised in Vietnam during a war, would not have felt free to leave or to ignore Agent Smith and the two state troopers who approached him while wearing their service weapons. In fact, Mr. Pham testified that two state troopers physically seized him while Agent Smith searched his car. Agent Smith pressed Mr. Pham with questions concerning weapons, drugs, and even child pornography. Any reasonable person would be alarmed by such questions and would not believe they were free to ignore them or drive away even without being physically restrained.

Agent Smith's questions plainly were not motivated by concern over whether Mr. Pham was afraid, lost, or somehow needing assistance under the community caretaker doctrine. *State v. Lovegren*, 2002 MT 153, ¶ 25, 310 Mont. 358, 51 P.3d 471. "The community care doctrine is

operative where law enforcement initiates contact with a citizen, not to investigate the commission of a crime, but to investigate a potential vehicle accident or otherwise to ensure the safety of citizens.” *State v. Spaulding*, 2011 MT 204, ¶ 18 and n.3, 361 Mont. 445, 259 P.3d 793 (citations omitted). *Cf. State v. Marcial*, 2013 MT 242, ¶ 15 – 16, 371 Mont. 348, 308 P.3d 69. Rather, as Agent Smith and Trooper Kipela testified, they were investigating Mr. Pham because they determined he was unusual, out of the ordinary, and overtly nervous as he stared through the store window while his bowl of noodles cooked.

The District Court clearly erred in finding Mr. Pham was not seized. The officers decided to investigate or question Mr. Pham that day in Miles City because he was not white. They tethered their reasons for investigating Mr. Pham upon stereotypes of Asian Americans and an unfounded, offensive belief that race, ethnicity, and gender bear some relation to criminal conduct. Agent Smith testified that Mr. Pham’s story of why he was in Montana – as though Mr. Pham needed a reason to be in Montana – “wasn’t adding up” and “raised suspicion.” (10/05/2018 Tr. at 29.) Trooper Kipela went further, claiming Mr. Pham’s “answers didn’t really make a whole lot of sense . .

. because he was making them up and he was lying.” (10/05/2018 Tr. at 49.)

The stop was an illegal seizure because it lacked particularized suspicion that a crime was occurring and continued long after any possible basis for a caretaker stop had ended. The officers articulated no facts that created a reasonable suspicion that Mr. Pham had committed, was committing, or was planning to commit a crime. Had Mr. Pham been a middle-aged white guy heating up a doughnut in the convenience store’s microwave, it is improbable that officers would have paid him much attention as he stared out the window, let alone questioned him for looking unusual, demonstrating out of the ordinary behavior, or seeming nervous. Mr. Pham’s motion to suppress should have been granted because he was illegally seized.

B. Mr. Pham did not voluntarily consent to the search of his car.

[W]hen the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge

of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

Schneckloth v. Bustamonte, 412 U.S. 218, 248–49, 93 S. Ct. 2041, 2059, 36 L. Ed. 2d 854 (1973). “While the Fourth and Fourteenth Amendments limit the circumstances under which the police can conduct a search, there is nothing constitutionally suspect in a person's voluntarily allowing a search.” *Schneckloth*, 412 U.S. at 242–43, 93 S. Ct. at 2056. *Accord Snell*, ¶ 9.

In finding that Mr. Pham validly consented to Agent Smith’s search, the District Court addressed none of Mr. Pham’s testimony, having dismissed it as not credible. (App. B at 12.) But accepting solely for the sake of argument that the officers’ testimony accurately described the confrontation, Mr. Pham’s responses to Agent Smith, as well as Mr. Pham’s own testimony in court, make obvious that Mr. Pham has significant difficulty understanding completely and communicating clearly.

Under the totality of the circumstances, Mr. Pham could not have voluntarily consented to the search. Mr. Pham explained he did not comprehend what was happening when Agent Smith approached him in

the parking lot with his gun holstered on his leg. Indeed, Mr. Pham did not understand why Agent Smith was questioning him; he had done nothing wrong and did not need help. Agent Smith, accompanied by two, uniformed state troopers, overcame Mr. Pham's ability to decline a requested search.

Moreover, according to Mr. Pham, Agent Smith requested no consent; he simply started searching Mr. Pham's car as the two state troopers restrained Mr. Pham and pulled him away from his car while he was pumping gas. Conveniently, none of the officers had any audio or video evidence to support their version of what happened. It was their word against that of a tired and confused traveler who was a Vietnamese immigrant at a gas station in Miles City, Montana – hardly familiar territory for Mr. Pham or a place of his voluntary choosing to confront three armed officers about child pornography, weapons, drugs, and what he was doing in Montana. He just was trying to pump gas and eat his noodles.

Mr. Pham made a necessary stop on an interstate highway in a small town in eastern Montana when his car needed gas and he needed to rest and eat. Once there, he was given the third degree by officers

who thought he looked “unusual”, “out of the ordinary”, and “nervous” because he appeared to be staring out of a convenience store window into the parking lot at their van visibly packed full of 960 pounds of marijuana. Trooper Kipela himself acknowledged this was not a normal sight to the average individual. (10/05/2018 Tr. at 51.)

This Court should reverse the District Court’s denial of Mr. Pham’s motion to suppress, vacate his conviction, and remand for proceedings in conformance with the Court’s opinion.

II. Alternatively, the Court should strike the fine and related conviction surcharge in Mr. Pham’s judgment and remand for a consideration of the factors in Mont. Code Ann. §§ 46-18-231(3) and 46-18-236(2), before any fine or surcharge may be imposed.

At the State’s request during sentencing, the District Court imposed a fine of \$16,625, pursuant to Mont. Code Ann. § 45-9-130(1). (05/25/2019 Tr. at 13.) The Defense agreed “that the State’s recommendation on the fine is correct,” but requested the Court to suspend all or a portion of the fine. (05/29/2019 Tr. at 17.) In the oral pronouncement, the District Court stated, “Fine is established at \$16,625, but the fine is suspended. You shall pay a 10% conviction surcharge, and the other surcharges that are stated in [paragraph] 13 of

the PSI.” (App. C at 20.) The written judgment specifies that the conviction surcharge is \$1,662.50, which is 10% of the fine, as required by Mont. Code Ann. § 46-18-236(1)(b). (App. D at 2.)

Mont. Code Ann. § 45-9-130(1) provides, “In addition to the punishments and fines set forth in this part, the court shall fine each person found to have possessed or stored dangerous drugs 35% of the market value of the drugs as determined by the court.” In turn, Mont. Code Ann. § 46-18-236(1)(b) requires a sentencing court to impose on everyone convicted of a felony a charge of \$20 or 10% of the fine, whichever is greater.

This Court has addressed the constitutionality and interpretation of Mont. Code Ann. § 45-9-130. In *Yang* the Court held that Mont. Code Ann. § 45-9-130(1) is facially unconstitutional because it violates the excessive fines clauses in Article II, Section 22 of the Montana Constitution and the Eighth Amendment to the United States Constitution. *Yang*, ¶ 14 – 18. The Court observed,

Section 46-18-231(3), MCA, protects an offender's constitutional right to be free from excessive fines by requiring the sentencing judge to consider the circumstances of the particular case before imposing a fine: “In determining the amount and method of payment, the sentencing

judge shall take into account the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine will impose.”

Yang, ¶ 19.

The Court found Mont. Code Ann. § 45-9-130(1) facially unconstitutional to the extent it requires a sentencing judge to impose a mandatory fine without ever permitting the judge to consider whether the fine is excessive by considering the factors set out in Mont. Code Ann. § 46-18-231(3). *Yang*, ¶ 23. Those factors help ensure that the fine imposed is proportional to the gravity of the offense committed, the offender’s ability to pay the fine, and the nature of the burden that paying the fine will impose. *Yang*, ¶ 23. Therefore, the Court clarified that “Article II, Section 22, of the Montana Constitution requires that the sentencing judge be able to consider ‘the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine will impose’ before ordering the offender to pay the 35%-market-value fine contained in § 45-9-130(1), MCA. See § 46-18-231(3), MCA. *Yang*, ¶ 24.

Thereafter, in *State v. Wilkes*, 2021 MT 27, 403 Mont. 180, 480 P.3d 823, the Court applied *Yang*’s proportionality analysis to strike the

35% market rate fine applied to the defendant because the district court had not considered the gravity of her offense in relation to the fine or her ability to pay the fine. *Wilkes*, ¶¶ 26 – 28. Because there was no finding by the jury as to how much methamphetamine the defendant was guilty of possessing, therefore making it impossible to determine whether the fine required by Mont. Code Ann. § 45-9-130(1) applied, the Court did not remand for a proportionality determination required by Mont. Code Ann. § 46-18-231(3). *Wilkes*, ¶ 28. Here, as Defense Counsel acknowledged during sentencing, the market value fine in § 45-9-130(1) is applicable to Mr. Pham.

Similarly, the Court has held the conviction surcharge set out in Mont. Code Ann. § 46-18-236(1)(b), requires an ability to pay analysis pursuant to Mont. Code Ann. § 46-18-236(2), before it can be imposed. *Ingram*, ¶¶ 19 – 20. In *Ingram*, under the circumstances presented, the Court affirmed the imposition of the minimum fine of \$5,000 for a felony driving under the influence conviction, as mandated in Mont. Code Ann. § 61-8-731(1)(a)(iii). *Ingram*, ¶ 12. Nevertheless, the Court reversed a \$500 conviction surcharge that was 10% of the \$5,000,

because the sentencing court failed to consider the defendant's ability to pay the surcharge, in violation of Mont. Code Ann. § 46-18-236(2).

“The *Lenihan* rule^[4] provides a sentence not objected to in the district court that is ‘illegal or exceeds statutory mandates,’ *Lenihan*, 184 Mont. at 343, 602 P.2d at 1000, and not merely an ‘objectionable’ statutory violation, *State v. Kotwicki*, 2007 MT 17, ¶ 13, 335 Mont. 344, 151 P.3d 892 (citations omitted), may be reviewed on appeal.” *State v. Hansen*, 2017 MT 280, ¶ 12, 389 Mont. 299, 405 P.3d 625. Here, the market value fine imposed on Mr. Pham, without an ability to pay analysis, was subsequently declared facially unconstitutional in *Yang*. Further, the conviction surcharge based on the market-value fine is unsupported by an ability to pay analysis, as required in *Ingram*. Thus, the Court may review the legality of the fine and the surcharge on appeal, even though there was no objection below.

Lenihan review remains available although the District Court suspended the fine in accord with Defense Counsel's request. Presumably, the “suspended” fine could be “un-suspended” later, for example, in a revocation proceeding. The market-based fine imposed on

⁴ *State v. Lenihan*, 184 Mont. 338, 602 P.2d 997 (1979)

Mr. Pham is unconstitutional, regardless of its suspended status, as already decided in *Yang*. The fine and related surcharge must be struck and remanded to determine what fine and surcharge, if any, Mr. Pham has the ability to pay, pursuant to Mont. Code Ann. §§ 46-18-231(3) (fine) and 46-18-236(2) (conviction surcharge).

Consequently, if the Court declines to reverse the denial of Mr. Pham's motion to suppress, it should strike the \$16,625 fine and \$1,662.50 conviction surcharge in his judgment and remand for a hearing on Mr. Pham's ability to pay.

III. Also alternatively, the District Court abused its discretion by imposing costs of counsel on Mr. Pham, over objection, without inquiring into his ability to pay those costs. The Court should strike these costs from the judgment and remand for an ability to pay inquiry.

“A district court may sentence a defendant to pay the costs of assigned counsel only if the defendant can pay or will be able to pay those costs. Section 46-8-113(4), MCA.” *State v. Madplume*, 2017 MT 40, ¶ 37, 386 Mont. 368, 390 P.3d 142. A district court must consider whether the record contains “particularized, non-speculative facts” that indicate the defendant has “a reasonable ability to pay[.]” and if the record lacks those facts, the District Court should ask the defendant

directly and make a record of the ability to pay. *Madplume*, ¶ 40.

Accord Hotchkiss, ¶ 24.

In *Madplume*, the sentencing court had imposed costs of counsel and other costs, over objection, reasoning that the defendant could rely on his earnings in prison and “perhaps . . . any payments from the Tribe to which he’s entitled” to pay for the costs. *Madplume*, ¶ 38. The written judgment explained the district court’s “determination of Madplume’s ability to pay was “based on [his] prior work history earnings in prison and eligibility for tribal benefits.” *Madplume*, ¶ 38. That determination was grounded solely upon statements the defendant made to the PSI author during an interview that he expected to receive \$10,000 from the Confederated Salish and Kootenai Tribes ““pretty soon.”” *Madplume*, ¶ 39.

This Court held,

The record before us does not reflect an adequate inquiry into Madplume’s ability to pay. Before it imposed defense, prosecution, and jury costs, the District Court was required to consider whether the record contained particularized, non-speculative facts that indicated Madplume had a reasonable ability to pay the assessed costs. If the record lacked those facts, the District Court should have asked Madplume directly and made

a record of Madplume’s ability to pay.

Madplume, ¶ 40 (citing Mont. Code Ann. § 46-8-113(3), which provides a sentencing court “shall question the defendant” about ability to pay costs of counsel).

The Court found that the PSI report gave no indication that Madplume could pay the costs and the record did not indicate the district court “asked Madplume directly about his ability to pay.” *Madplume*, ¶ 40. Notably, the Court ruled, “Moreover, the Tribal payments cited by the State and the District Court seem to be supported by nothing more than speculative small talk between Madplume and [the PSI author].” *Madplume*, ¶ 40. *See also Madplume*, ¶ 39 (noting the PSI indicated Madplume “had some outstanding student loan debt, but no income or assets”).

In rejecting the State’s request to apply the doctrine of implied findings to uphold the imposition of costs, the Court stated, “The record before us does not contain sufficient, non-speculative information about Madplume’s assets or income to apply the doctrine of implied findings. We therefore conclude that the District Court erred in imposing costs based on purely speculative information about Madplume’s ability to

pay.” *Madplume*, ¶ 41. Accordingly, the Court remanded for the district court to conduct the appropriate inquiry. *Madplume*, ¶ 42.

Similarly, in *Hotchkiss* the Court reversed the imposition of counsel costs and remanded for an ability to pay inquiry. *Hotchkiss*, ¶ 25 (ruling the district court’s two questions about defendant’s past work and whether he would work upon release from incarceration fell below the requisite “scrupulous and meticulous” inquiry) (citations omitted).

Here, at sentencing, Defense Counsel stated, “If the Court does suspend all or a significant portion of the fine, we believe that Mr. Pham would be able to pay the surcharges. The only other question is the public defender fee, which in this case was \$3,038, which Mr. Pham may have great difficulty paying that as well.” (05/24/2019 Tr. at 17.)

In the oral pronouncement, the District Court ruled:

As for the cost of assigned counsel, the total was \$3,038 – that cost is imposed. Total costs are approximately \$5,000. I do not anticipate you will be incarcerated at MSP for 15 years, and I anticipate that you will be on supervision and required to be employed by the States of Montana and Minnesota and, perhaps, Washington. So you are able to meet that substantially reduced financial obligation.

(App. C at 20. *Accord* App. D at 2.) The District Court did not ask Mr. Pham directly if he would be able to pay \$5,000 in counsel costs and other charges.

The written judgment is similar:

The Court specifically find that based on review of the Defendant's financial resources and obligations, including the Defendant's assurances of an ability to obtain employment upon release from commitment, and the adjustments to the financial obligations made herein, the Defendant can meet the financial obligations imposed herein reasonably and without undue hardship.

(App. D at 3, ¶ 5.) Although unclear, it appears that “the adjustments to the financial obligations” made by the District Court are (1) the suspension of the market-value fine of \$16,625 and (2) not assessing costs of the OPD contract counsel who represented Mr. Pham from April 17, 2018 through the change of plea hearing on November 7, 2018.

(App. D at 2 – 3, ¶¶ 2, 3; 11/07/2018 Tr. at 12 – 14; D.C. Docs. 36, 82, 83.)

When he was sentenced, Mr. Pham was 49 years old and had spent most of the preceding two years incarcerated. (05/24/2019 Tr. at

17; D.C. Doc. 131 at 1 – 2 (Presentence Investigation Report) (“PSI”).⁵) He had no income, \$3,500 in assets (i.e., a 16-year-old Lexus GS300), and \$11,000 in credit card debt. (D.C. Doc. 131 at 1 – 2.) There is no record of Mr. Pham’s ability to pay \$3,038 in counsel costs, other than statements by Defense Counsel who relied on information provided by Mr. Pham to the PSI author, who did not appear at sentencing to testify. (05/24/2019 Tr. at 16 – 17.)

The PSI author wrote that Mr. Pham is capable of working, has held many types of jobs in the past, and is happiest when he is employed full-time and working hard. (D.C. Doc. 131 at 6.) Considering Mr. Pham’s three-to-one debt to asset ratio when he was sentenced, after two years of incarceration without income and then followed by the 15-year MSP sentence with no time suspended, the PSI’s author’s unsworn statements, not subject to cross-examination, do

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

not constitute particularized, non-speculative facts establishing Mr. Pham's reasonable ability to pay costs of counsel. Rather, they are akin to the speculative small talk the Court found inadequate to support an ability to pay finding in *Madplume*. *Madplume*, ¶¶ 39 – 40.

The District Court erred in imposing costs based on purely speculative information without an adequate ability to pay inquiry. *Madplume*, ¶ 41; *Hotchkiss*, ¶ 25. The Court should strike the \$3,038 cost of assigned counsel from Mr. Pham's judgment and remand for an ability to pay inquiry that is sufficient under Mont. Code Ann. § 46-8-113(4). *Madplume*, ¶ 42; *Hotchkiss*, ¶ 25.

CONCLUSION

For the foregoing reasons, Mr. Pham respectfully requests the Court to reverse the District Court's denial of his motion to suppress, vacate his conviction, and remand for proceedings not inconsistent with this Court's decision. Alternatively, the Court should strike from Mr. Pham's judgment the fine, conviction surcharge, and costs of counsel and remand for an ability to pay inquiry and amended judgment.

Respectfully submitted this 31st day of March, 2021.

OFFICE OF STATE PUBLIC DEFENDER
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By: /s/ Deborah S. Smith
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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 9,922, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Deborah S. Smith
DEBORAH S. SMITH

APPENDIX

Summary Order Denying Defendant’s Motion to Suppress.....App. A

Order Denying Defendant’s Motion to Suppress.....App. B

Oral Pronouncement of Sentence.....App. C

Judgment and Sentencing Order.....App. D

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 03-31-2021:

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Dated: 03-31-2021