IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0064

STATE OF MONTANA,

Plaintiff and Appellee,

v.

RONALD ALAN HUMMEL,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, the Honorable Robert B. Allison, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Montana Constitution

United States Constitution

Statutes

Rules

STATEMENT OF THE ISSUES

(1) Did the District Court violate Ronald Hummel's right to confront witnesses against him when it allowed the State to present a foundational witness at trial in real time by two-way videoconference and, if so, was any error harmless?

(2) Did the District Court clearly and prejudicially abuse its discretion by impairing Mr. Hummel's right to present a defense when it denied the Defense request to call the prosecutor as a necessary witness to impeach the credibility of the State's only witness who claimed to see Mr. Hummel driving his motorcycle the evening he was arrested, where the prosecutor was the only person to interview the witness before trial and to whom the witness gave a statement during his pretrial interview that was vital to the Defense but was inconsistent with his trial testimony?

(3) Did the District Court illegally impose conditions of parole in the written judgment (a) that were inconsistent with the oral pronouncement's recommendations and (b) where one of the financial obligations may be assessed only after Mr. Hummel is granted parole by

the Board of Pardons and Parole, pursuant to Mont. Code Ann. § 46-23-1031?

STATEMENT OF THE CASE

Ronald Hummel went to trial facing two alternative charges: driving under the influence ("DUI"), in violation of Mont. Code Ann. § 61-8-401(1), or, in the alternative, operating a noncommercial vehicle with alcohol concentration of 0.08% or more ("DUI per se"), in violation of Mont. Code Ann. § 61-8-406(1). (D.C. Doc. 25.)

About two weeks before trial, the State filed a cursory motion to allow telephonic testimony by Kenneth Lard, the registered nurse who administered a blood draw from Mr. Hummel following his arrest. The State said Mr. Lard would be working in California on the dates of Mr. Hummel's trial and indicated Defense Counsel objected to the motion. (D.C. Doc. 23. State's Exh. 3.) (D.C. Doc. 23.) Nonetheless, the District Court granted the State's motion the same day, noting the Defense objection but providing no opportunity for a response. (D.C. Doc. 24, attached hereto as App. A.) The District Court's one-sentence order allowed Mr. Lard to testify by Vision Net or other medium that allowed

the witness to be viewed during his testimony by counsel, parties, and the jury. (App. A.)

The case proceeded to a two-day jury trial. (9/30/2019 to 10/01/2019 Tr. ("Trial Tr."); D.C. Docs. 31 – 38.) Robert Smith testified for the prosecution. Contrary to his pretrial statement to the Prosecutor, which had been relayed to the Defense prior to trial, Mr. Smith denied he had been drinking before observing Mr. Hummel on the day of his arrest. The District Court denied the Defense request to have the prosecutor testify concerning Mr. Smith's prior inconsistent statement. (Trial Tr. at 222 – 25.) The jury found Mr. Hummel guilty of DUI and acquitted him of DUI per se. (D.C. Doc. 38; Trial Tr. at 320.)

At sentencing, the District Court imposed a 25-year sentence to the Montana State Prison with no portion suspended, to run consecutively to a sentence Mr. Hummel was serving on parole at the time the present offense was committed.[1] (Sent. Tr. at 24, attached hereto as App. B.) The District Court waived certain financial

[1] Due to prior uncontested convictions, the State sought to designate Mr. Hummel as a persistent felony offender. (D.C. Docs. 12, 25; 11/21/2019 Tr. ("Sent. Tr.") at 7 – 12.)

obligations and recommended the other conditions contained in the presentence investigation ("PSI"). (App. B at 24 – 25.) Condition 15 requires Mr. Hummel to prepay supervisory fees for his parole while he remains incarcerated. The District Court cited Mont. Code Ann. § 46-23-1031 as authority for the condition. (App. C at 4.) The Defense did not object to any sentencing conditions. The written judgment conforms with the oral pronouncement of sentence, with the significant exception that the conditions were imposed not recommended. (D.C. Doc. 43 at 2, attached hereto as App. C.)

STATEMENT OF THE FACTS

At about 3:30 p.m. on April 7, 2019, Mr. Hummel left his home in Kalispell to take a ride on his motorcycle and visit people, including his sister and her boyfriend who lived near Whitefish. Instead of heading toward Whitefish right away, he drove on Highway 2 to West Glacier and Columbia Falls. Along the way, he stopped at Packer's Roost for a beer about 6 p.m. After drinking three-quarters of his mug of tap beer, he left the bar and continued toward Whitefish through Columbia Falls. (Trial Tr. at 251 – 53, 266 – 67.)

As he drove through Columbia Falls, he pulled into Dairy Queen to use the restroom. But when he got off his bike in the parking lot and started to put the kickstand down, he urinated on himself. Mr. Hummel explained he suffers from a prostrate condition that causes him to need to urinate frequently and urgently, particularly when he does not take his prescribed medication to manage the condition. (Trial Tr. at 251 – 54, 267 – 69.). On the day of the incident, he had not taken his prostrate medicine for two days. (Trial Tr. at 254 – 56, 271 – 72.) Embarrassed and upset, Mr. Hummel did not go into the Dairy Queen. Instead, at about 7:45 p.m., he drove the motorcycle around back, parked it by a dumpster, and called his sister and her boyfriend to say he would probably need a ride. (Trial Tr. at 256, 269 – 72.)

Mr. Hummel locked his bike and walked to the Town Pump to buy something to clean himself up. He bought a can of Lysol because the store did not have a large selection of cleaning supplies. He also bought beer, which he candidly acknowledged "was not the right thing to do[.]" (Trial Tr. at 257, 272 – 73.)

Mr. Hummel admitted he has a drinking problem but had been sober for eight months. He was mad at himself for breaking his

sobriety and testified, "I don't know, I can't really explain it except for, you know, maybe because I, you know, I like the beer." (Trial Tr. at 257 – 58.) So, he bought some tall boys with an 8%, "pretty strong" alcohol content at the Town Pump along with a can of Lysol, walked about halfway back to where his motorcycle was parked, sat on a cement slab where he could see the cars on the street, drank beer, and thought about things. (Trial Tr. at 258 – 59.) When the beer was gone, he walked back to the dumpster where his bike was parked, threw his empty bottles in the trash, used the Lysol to spray the seat of his bike and wiped it down. (Trial Tr. at 259 – 60, 273 – 74.)

After Mr. Hummel cleaned the seat, he bumped into the bike and the bike fell over onto him. (Trial Tr. at 261, 274 – 75.) Soon afterward, Mr. Smith and his wife pulled up beside him in a white pickup truck and Mr. Smith got out of the truck and asked Mr. Hummel if he wanted help. Mr. Hummel responded, "[N]o, everything's okay, I'm okay. But I had it [the bike] up, I was putting the kickstand back[.]" (Trial Tr. at 262, 275 – 76.) About five minutes after the Smiths left in their truck, Officer English pulled up in his cruiser. (Trial Tr. at 261 – 62.)

Mr. Smith provided a different account of his encounter with Mr. Hummel. Mr. Smith testified that on the day in question he was with his wife and nine-year-old daughter in the drive-through lane at the Dairy Queen in Columbia Falls getting dinner.[2] (Trial Tr. at 155.) As the Smiths waited in the drive-through to pick up their food, Mr. Smith saw a person on a motorcycle, whom he identified at trial as Mr. Hummel, enter the parking lot through the exit. (Trial Tr. at 156 – 57.) Mr. Smith watched Mr. Hummel park and then, as he lifted his left leg over the seat to get off the bike, the motorcycle fell over on him onto his right leg. (Trial Tr. at 157.) Apparently leaving their young child alone and unattended in the drive-through lane in their car, Mr. Smith contended he and his wife walked over to Mr. Hummel to see if he needed help. Mr. Smith lifted the motorcycle off Mr. Hummel's leg and put the kickstand down for him. (Trial Tr. at 157 – 58.) Mr. Smith did not see Mr. Hummel get on or try to get on his motorcycle after helping him get up. (Trial Tr. at 165.)

[2] Mr. Smith's testimony is confusing about whether he and his wife were in one or two cars. (Trial Tr. at 157 – 59.)

When Mr. Smith asked Mr. Hummel if he was okay, Mr. Hummel said, "yes, I'm fine". (Trial Tr. at 158, 165.) Mr. Smith testified he could smell alcohol on Mr. Hummel and had never seen Mr. Hummel before. After walking back to his car, Mr. Smith claimed he observed Mr. Hummel urinating against the fence. Mr. Smith and his wife decided to call the police as they waited for their food. After about five minutes, they got their food and, as they were pulling out of Dairy Queen to leave, Mr. Smith stated he saw the patrolman arrive at Dairy Queen and proceed to the area behind the store where Mr. Hummel was located. (Trial Tr. at 158 – 60.)

Officer Tyler English of the Columbia Falls Police Department arrived at Dairy Queen about 8:05 p.m. to respond to Mr. Smith's report of a possible driver under the influence.[3] (Trial Tr. at 176.) He found Mr. Hummel standing near his motorcycle behind Sundrop Health Foods, near the Dairy Queen. (Trial Tr. at 176 – 78, 187.) As Officer English approached Mr. Hummel and spoke with him, Mr. Hummel's pants were unzipped and not all the way pulled up; Mr. Hummel was

[3] The video of Officer English's body cam footage was admitted as Exhibit 2 and played for the jury.

trying to button and zip them. (Trial Tr. at 178, 262 – 63, 276 – 77.) Officer English noticed that Mr. Hummel smelled of alcohol, his speech was slurred, and his movements were slow. (Trial Tr. at 178.) Mr. Hummel also had dirt on the right side of his clothes because the bike had fallen over on him as he attempted to put the kickstand down. (Trial Tr. at 187, 191.)

Mr. Hummel had a can of Lysol in one of the saddlebags on his bike that he had used to clean himself after urinating on his pants. (Trial Tr. at 178 – 79.) Officer English did not ask Mr. Hummel whether he drove into the parking lot or where he was coming from and Mr. Hummel did not mention driving the motorcycle. (Trial Tr. at 187 – 88.) The motorcycle was not running and Mr. Hummel was not sitting on the bike at any time during the encounter. (Trial Tr. at 187.)

Officer English asked Mr. Hummel what his plan was, stating he believed Mr. Hummel was intoxicated. Mr. Hummel responded he could leave his bike and wanted to go home. (Trial Tr. at 277 – 78.) Mr. Hummel did not tell Officer English he had called his sister and boyfriend for a ride home because Officer English did not ask for that information and Mr. Hummel did not think of explaining how he was

going to get home. (Trial Tr. at 278 – 79.) Mr. Hummel testified, "I just tried to answer the questions that he was asking me, I didn't try to, you know, give him – I didn't try to think of maybe what he would have wanted to know or something, you know, I was just answering his questions." (Trial Tr. at 278 – 79.)

Mr. Hummel testified he had a traumatic brain injury 12 years ago and was in a coma for four months and 17 days. He continues to take seizure medication, has memory problems, and his speech is slurred. (Trial Tr. at 263, 276.) He explained that due to his traumatic brain injury, he must think about what is being said to him and then respond. (Trial Tr. at 281.) Mr. Hummel also said he was nervous being found by Officer English with his pants down, acknowledging "it looked bad". (Trial Tr. at 281 – 82.)

Mr. Hummel declined to perform field sobriety tests and was placed under arrest. (Trial Tr. at 184, 191 – 92.) At trial, Mr. Hummel explained that due to his health conditions, he could not pass a field sobriety test under any circumstances. (Trial Tr. at 264 – 65.) Officer English removed the keys from the ignition of Mr. Hummel's motorcycle

before driving Mr. Hummel to the police station in the back of his patrol car. (Trial Tr. at 179 – 180.)

At the station, Mr. Hummel declined to provide breath or blood samples for alcohol testing. (Trial Tr. at 180.) Officer English requested and obtained a telephonic search warrant to draw a blood sample from Mr. Hummel and drove him to Kalispell Regional Medical Center ("KRMC") for the blood draw. (Trial Tr. at 180 – 184.) The blood draw occurred at 10:24 p.m. and was administered by Kenneth Lard, RN. (Trial Tr. at 183, 192, 198 – 99; Exh. 3.) Michell Duffus, a toxicologist at the State Crime Lab, testified she tested the sample on April 15, and determined Mr. Hummel's blood alcohol content ("BAC") was 0.14 at the time of the draw. (Trial Tr. at 234 – 45; Exh. 4.[4])

Additional facts related to each argument are provided below.

STANDARDS OF REVIEW

"This Court exercises plenary review of constitutional questions and applies de novo review to a district court's constitutional interpretations of the Sixth Amendment of the United States

[4] Contrary to her testimony, the toxicology report signed by Ms. Duffus is dated April 19, 2019. (Trial Tr. at 239 – 41; Exh. 4.)

Constitution and Article II, Section 24 of the Montana Constitution." *State v. Mercier*, 2021 MT 12, ¶ 11, 403 Mont. 34, 479 P.3d 967 (*en banc*) (citations omitted). "All other legal conclusions of law are evaluated for correctness subject to de novo review." *Mercier*, ¶ 12, *citing City of Missoula v. Duane*, 2015 MT 232, ¶ 10, 380 Mont. 290, 355 P.3d 729.

A district court ruling on a motion seeking testimony from the participating prosecutor on a case will not be reversed "'absent a clear and prejudicial abuse of discretion.'" *State v. Eighteenth Judicial District Court*, 2021 WL 872322, *1, 403 Mont. 548, 483 P.3d 475 (citation omitted). "Abuse of discretion occurs if the district court acted arbitrarily and without the employment of conscientious judgment or in a manner that exceeds the bounds of reason, resulting in substantial injustice." *Mercier*, ¶ 12 (citations omitted).

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. Thompson*, 2017 MT 107, ¶ 6, 387 Mont. 339, 394 P.3d 197 (*en banc*).

SUMMARY OF ARGUMENT

Two independent bases require reversal of Mr. Hummel's conviction and remand for a new trial.

First, the District Court violated Mr. Hummel's right to confront witnesses under the United States and Montana Constitutions when it allowed Kenneth Lard to testify by video instead of appearing in-person at trial. The only reason the State provided for Mr. Lard's remote testimony was that he was working in California and could not be present in Kalispell for a trial. The State made no claim that Mr. Lard's remote appearance at trial was necessary to protect an important public policy interest or that travel to Montana would be impractical or impossible.

Mr. Lard was allowed to testify by video because it was more convenient for him. Witness convenience is not a proper ground for violating Mr. Hummel's fundamental right to confrontation. Without

Mr. Lard's testimony, there was insufficient foundation to admit the legal blood draw request form he completed or to introduce the testimony of the State Crime Lab toxicologist, Michelle Duffus, or her toxicology report, to establish Mr. Hummel's blood alcohol content at the time his blood was drawn.

The State will not be able to demonstrate the erroneous admission of the Lard and Duffus testimony and their corresponding exhibits was harmless beyond a reasonable doubt. No other evidence established Mr. Hummel's blood alcohol content, which was the primary evidence upon which the State relied to establish Mr. Hummel was under the influence of alcohol, a necessary element of the DUI charge. A new trial is required to remedy the confrontation violation.

Second, the District Court clearly and prejudicially abused its discretion when it denied Defense Counsel's motion to call the Prosecutor as a necessary witness to impeach the credibility of Robert Smith. No other witness could testify to Mr. Smith's inconsistent statements about whether he had been drinking on the day in question. Mr. Smith's denial under oath that he had been drinking is a different thing than letting the jury know he told different stories to the

Prosecutor within three weeks of each other, with the second time being after trial began. The State had no witness besides the Prosecutor who could testify about Mr. Smith's inconsistent statements.

Being denied impeachment evidence from the Prosecutor was clearly prejudicial. The State's case hinged on proving Mr. Hummel was in physical control of his motorcycle while he was under the influence. Mr. Smith was the only witness who claimed to see Mr. Hummel driving his motorcycle on the day in question. Mr. Smith also bolstered Officer English's testimony that Mr. Hummel exhibited signs of possible intoxication at the time of his arrest.

That Mr. Smith's perception and memory may have been impaired by alcohol was critical to Mr. Hummel's trial strategy. Denying the Defense the ability to impeach Mr. Smith's testimony with his prior inconsistent statement to the Prosecutor that he had been drinking on the day in question clearly and prejudicially undercut Mr. Hummel's right to present a defense. A new trial is required to remedy this error.

Alternatively, if the Court does not find reversible error justifying a new trial, it should remand the judgment with instructions to restate the parole conditions as recommendations and to strike Condition 15 in

its entirety because there is no statutory authority to impose parole supervision fees on an incarcerated person.

ARGUMENT

I. The District Court violated Ronald Hummel's right to confront witnesses by allowing the State to present a foundational witness at trial in real time by two-way videoconference. The State will not be able to prove the error was harmless beyond a reasonable doubt.

A. The District Court violated Mr. Hummel's right to confront witnesses under the Sixth Amendment of the United States Constitution and Article 2, Section 24 of the Montana Constitution by allowing Kenneth Lard to testify by video.

"The Confrontation Clause of the Sixth Amendment of the United States Constitution provides that 'in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.' U.S. Const. amend. VI. The Montana Constitution provides that '[i]n all criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face[.]' Mont. Const. art. II, § 24." *Mercier*, ¶ 15. *Accord State v. Bailey*, 2021 MT 157, ¶ 41, ___ Mont. ___, 489 P.3d 889 (*en banc*).

To determine whether a defendant's right to confront witnesses has been violated by use of a two-way video procedure, this Court

applies the two-prong analysis from *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). *Mercier*, ¶¶ 18 – 22. *Accord Bailey*, ¶ 42 n.5. The first prong of *Craig* requires the State to establish "that denial of physical face-to-face confrontation is necessary to further an important public policy." *Mercier*, ¶ 18 (citations omitted). The second prong requires "requires the trial court to determine that reliability of the testimony is otherwise assured." *Mercier*, ¶ 18 (citations omitted).

"Something more than generalized findings of policy concerns" are required to establish the necessity of video testimony. *Mercier*, ¶ 19 (citation and internal quotation marks omitted). Rather, "a defendant's right to physical, face-to-face confrontation at trial may be compromised by the use of a remote video procedure only upon a case-specific finding that the denial of physical confrontation is necessary to further an important public policy." *Mercier*, ¶ 19 (citation and internal quotation marks omitted). "[A] criminal defendant's constitutional rights cannot be neglected merely to avoid 'added expense or inconvenience'". *Mercier*, ¶ 19 (citation omitted). Similarly, judicial economy and cost saving are insufficient reasons to extend *Craig*. *Mercier*, ¶ 19 (citations

omitted). A showing of "impossibility" or "impracticality" pursuant to *Duane* does not obviate the State's burden to demonstrate dispensing with face-to-face confrontation would be "necessary to further an important public policy". *Bailey*, ¶ 42 .

In *Mercier*, the trial court allowed a federal technician who extracted data from the victim's cell phone to testify by live two-way video from Colorado over objection from the Defense. As grounds for its request, the State offered that the $670 for roundtrip airfare and other travel expenses "for purely foundational testimony was impractical." *Mercier*, ¶ 7. This Court rejected the State's argument and remarked that even if, as the State contended, "many Montana attorneys would have readily stipulated to the foundation or permitted the video testimony[,] . . . one defendant's waiver of constitutional right does not establish a precedent or waiver of the right by subsequent defendants, and neither does the practice of other attorneys." *Mercier*, ¶ 26 (internal quotation marks omitted).

> [N]owhere in the text of the Confrontation Clause is there language limiting the type of testimonial evidence to which the right to physical confrontation applies. *See* U.S. Const. amend. VI; Mont. Const. art II, § 24; *State v. Clark*, 1998 MT 221, ¶ 22, 290 Mont. 479, 964 P.2d 766 (reversible

> error to allow a forensic report to be admitted by the written deposition of a technician absent the physical presence of the technician because neither the nature of the witness nor the evidence which may be entered based upon the witness's testimony impacts the right to confront the witness).

Mercier, ¶ 27.

Like *Mercier*, Mr. Hummel's appeal concerns whether *Craig*'s necessity prong has been satisfied. *Mercier*, ¶ 25. Here, the State justified Mr. Lard's remote testimony by stating he was "working in California on the dates of the trial and cannot be here in person", without arguing it was impossible or impractical for Mr. Lard to travel to Montana to testify, let alone that Mr. Lard's video testimony was necessary to further an important public policy. (D.C. Doc. 23.) In fact, Mr. Lard testified although he sometimes works in California, he continues to work at KRMC. (Trial Tr. at 195.) Thus, he must travel back and forth with some regularity.

At the end of Mr. Lard's video testimony, the Prosecutor expressed his appreciation and thanked Mr. Lard "for undergoing all that trouble" to testify from California. Mr. Lard replied he was "happy to" and thanked the Prosecutor "for letting me do it this way." (Trial Tr. at 199

– 200.) The mere convenience of the person who extracted blood-draw evidence from Mr. Hummel lacks constitutional significance. In contrast, Mr. Hummel possessed a fundamental right to confront Mr. Lard at trial face-to-face. *Mercier*, ¶ 19.

Moreover, witness convenience is not an important public policy basis to justify remote testimony. The District Court made no attempt to articulate case-specific reasons to allow Mr. Lard to testify by video and the State provided none. Instead, the District Court approved the State's motion without waiting for the Defense to respond, knowing that Mr. Hummel opposed the State's request for Mr. Lard's remote appearance at trial.

Mr. Lard's video testimony was improperly admitted. *Mercier*, ¶ 28. Its necessary exclusion means there was insufficient foundation for admission of the Blood Test Request Form in State's Exh. 3. Without the Blood Test Request Form or Mr. Lard's testimony, the State lacked a foundation to introduce the testimony of Michelle Duffus, State Crime Lab Toxicologist (Trial Tr. at 234 – 45), or her Toxicology Report (State's Exh. 4), on which the State relied to demonstrate Mr. Hummel's blood alcohol content. Mont. R. Evid. 803(6), (8), 901(a);

State v. Weber, 2016 MT 138, ¶¶ 15, 18, 24 – 28, 383 Mont. 506, 373 P.3d 26 (failing to lay a foundation for the admission of necessary evidence is proper grounds for excluding the evidence and constitutes ineffective assistance of counsel).

B. The State cannot demonstrate the error was harmless beyond a reasonable doubt.

> A constitutional deprivation of the defendant's confrontation right is a trial error and is subject to harmless error review. . . . We consider "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, [and] the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points[.]"

Mercier, ¶ 31 (citations omitted). *Accord Bailey*, ¶ 46. To determine whether trial error is harmless, the Court employs a "cumulative evidence" test, which "looks not to the quantitative effect of other admissible evidence, but rather to whether the fact-finder was presented with admissible evidence that proved *the same facts as the tainted evidence proved*." *State v. Van Kirk*, 2001 MT 184, ¶ 43, 306 Mont. 215, 32 P.3d 735 (original emphasis).

"[O]nce a convicted person raises and establishes that the evidence in question was erroneously admitted and has alleged prejudice . . . it then becomes incumbent on the State to demonstrate that the error at issue was not prejudicial. . . . [T]he test of prejudicial error is whether there is a reasonable possibility that the inadmissible evidence might have contributed to a conviction." *Van Kirk*, ¶ 42. In "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[,] . . . then reversal will be compelled." *Van Kirk*, ¶ 45. "However, in those cases where the tainted evidence does *not* go to the proof of an element of the crime charged, and there is no other admissible evidence tending to prove the particular fact at issue, the admission of the tainted evidence will be deemed harmless only if the State demonstrates that no reasonable possibility exists that the admission of the tainted evidence might have contributed to the defendant's conviction." *Van Kirk*, ¶ 46 (emphasis in original).

"There is a natural propensity among jurors to accord greater weight to objective scientific evidence than to subjective observations

that are open to differing interpretations." *State v. Snell*, 2004 MT 334, ¶ 42, 324 Mont. 173, 183, 103 P.3d 503, 510, *quoting State v. Crawford*, 2003 MT 118, ¶ 18, 315 Mont. 480, 68 P.3d 848 (internal formatting modified), *modified on other grounds in State v. Maine*, 2011 MT 90, ¶ 34, 360 Mont. 182, 255 P.3d 64. Under a *Van Kirk* analysis, "the State must prove that, qualitatively, the tainted evidence . . . would not have contributed to the conviction." *Snell*, ¶ 43. The State cannot meet its burden here.

No evidence establishes Mr. Hummel's blood alcohol content, except that presented through Lard and Duffus. Without their testimony or exhibits, the State's case against Mr. Hummel is anchored only on the testimony of Officer English and Mr. Smith and on State Exhibits 1 (an aerial view of the Dairy Queen and surrounding area) and 2 (Officer English's body cam video). (D.C. Doc. 37, Jury Instructions 16, 17, 23.)

Both English and Smith observed Mr. Hummel around 8 p.m., shortly after Mr. Hummel testified that he drank the high-alcohol-content tallboys after parking his motorcycle. The blood draw was not taken until after 10 p.m., when the alcohol from the tallboys could have

been detected. The Prosecutor emphasized the BAC evidence during closing argument to try to prove Mr. Hummel was "under the influence". (Trial Tr. at 315 (arguing "the only way" to "know what is in this guy's system is to bring him in to get blood . . . and it came back a .14").) Under these circumstances, a reasonable possibility exists the inadmissible evidence contributed to Mr. Hummel's conviction.

Furthermore, although Officer English observed possible indicators of intoxication, he did not see Mr. Hummel driving or sitting on the motorcycle. Nor did he see Mr. Hummel attempt to get on the motorcycle to drive home. Additionally, though Mr. Smith claimed to have seen Mr. Hummel drive into Dairy Queen, Mr. Smith provided inconsistent statements to the Prosecutor before and during trial about whether he had been drinking that day. Without the perceived objectivity of the blood draw and its result supplementing Officer English's and Mr. Smith's testimony, the State cannot meet its burden to prove the Confrontation Clause violation was harmless beyond a reasonable doubt. *Mercier*, ¶ 33; *Bailey*, ¶ 48; *Snell*, ¶¶ 42 – 43.

The confrontation violation was not harmless trial error. The Court should reverse Mr. Hummel's DUI conviction and remand for a

new trial consistent with its decision. *Bailey*, ¶ 49 n.7, *citing State v. Laird*, 2019 MT 198, ¶ 113, 397 Mont. 29, 447 P.3d 416.

II. The District Court clearly and prejudicially abused its discretion by denying Defense Counsel's request to call the prosecutor as a necessary witness to impeach Robert Smith's credibility with his prior inconsistent statement.

A. The Motion to Call the Prosecutor as a Witness.

During cross-examination, Mr. Smith admitted he has been intoxicated to the point where he did not later "have a full grasp of every event and conversation and observation" he made but denied he had been drinking on the day in question. (Trial Tr. at 167 – 68.) Defense Counsel inquired:

> Q [DEFENSE COUNSEL]. Okay. Now, today's not the first day that you've spoken with anybody about this case, right? You've spoken with the County Attorney?
>
> A [MR. SMITH]. Yes.
>
> Q. You advised the County Attorney that you had actually been drinking that day, hadn't you?
>
> A. No, I had not.
>
> Q. So is it your understanding that [the Prosecutor] was under the impression that you had told him he [sic] was drinking?

A. I don't know where he – he might have been. I don't drink.

Q. Okay. So if [the Prosecutor] had told me he told me he was drinking, would that be dishonest of him?

A. I can tell you that I don't –

[THE PROSECUTOR]. Your Honor, I object to this.

MR. SMITH. I don't drink.

[THE PROSECUTOR]. I would like to have a sidebar, Judge.

(Sidebar conference.)

[THE PROSECUTOR]. So, Judge – you're aware of this, Judge, I had interviewed Mr. Smith, I had thought I heard that he said he was drinking that day and then I communicated this with [Defense Counsel] in my email.[5] Then I talked to him today and he said no, I hadn't, that I had misheard something.

So the fact that he's trying to say that I'm misrepresenting things, that's not relevant.

THE COURT. What you said was, was that dishonest.

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[5] The record does not reveal how or when the Judge became aware the Prosecutor had interviewed Mr. Smith. Be that as it may, a lawyer must correct a false statement of material fact made to a court. Mont. R. Prof. Cond. 3.3(a)(1).

. . .

[DEFENSE COUNSEL]. I'm not impugning his credibility, I think I have a right to ask about the credibility of a witness. Until – up until moments ago I was advised by [the Prosecutor] that the witness had been –

THE COURT. Well, he just testified that he doesn't drink. He said I don't drink moments ago was, he stated he no longer drinks. From the stand he said I don't drink.

[DEFENSE COUNSEL]. I'm clarifying. It goes to credibility.

[THE PROSECUTOR]. What I'm saying is–

[DEFENSE COUNSEL]. I can move on.

[THE PROSECUTOR]. – to say that I'm dishonest, that's exactly what he said.

THE COURT. I think it is. You said is [the Prosecutor] being dishonest.

[DEFENSE COUNSEL]. But I don't see –

THE COURT. What do you want me to do?

[THE PROSECUTOR]. Ask that question – strike that question and that response. Because he's suggesting that I'm dishonest, he's saying I'm dishonest.

[DEFENSE COUNSEL]. I think it goes to credibility.

THE COURT. Whose?

[DEFENSE COUNSEL]. The witness's.

THE COURT. But you said something about [the Prosecutor].

[DEFENSE COUNSEL]. Right, I asked the witness if [the Prosecutor] was being dishonest when he tells me what he had told him initially, which his impression is that he had drank alcohol that day. I'm not impugning [the Prosecutor], Your Honor. I'm going to move on, so –

THE COURT. Okay.

(End of sidebar conference.)

THE COURT. Okay. I'm going to strike those last one or two questions relative to whether the witness had been drinking that day – well, not that question, but whether [the Prosecutor] was in some way being dishonest. That was a misinterpretation. I ask that the jury disregard those particular discussions.

Move on to another area, [Defense Counsel].

[DEFENSE COUNSEL]. Thank you, Your Honor.

(Trial Tr. at 168 – 71.)

On the morning of the second day of trial before the jury entered the courtroom, counsel addressed the issue with the District Court

concerning whether Mr. Smith had been drinking on the day in question and what he told the Prosecutor during his interview. (Trial Tr. at 207.) Defense Counsel explained on about September 6, the Prosecutor emailed him that Mr. Smith told the Prosecutor "he had consumed alcohol" on the day he called the police about Mr. Hummel. (Trial Tr. at 208.) This email was significant because Mr. Smith is the only witness who claimed to have seen Mr. Hummel driving his motorcycle, testimony on which the State relied to establish Mr. Hummel's physical control of the bike, an essential element of DUI and DUI per se. The Prosecutor's interview of Mr. Smith was not recorded. (Trial Tr. at 208.)

On the first day of trial during a recess, only minutes before opening statements occurred, the Prosecutor informed Defense Counsel that during a hallway conversation that very morning Mr. Smith told the Prosecutor he had not been drinking on the day in question. The Prosecutor said, "I must have got that wrong." (Trial Tr. at 209.) Defense Counsel argued he relied in good faith on the Prosecutor's assertion in the September 6 email to prepare for trial. After Mr. Smith told the Prosecutor he had not been drinking, the Defense contended

that Mr. Smith was changing his testimony and without a transcript from a recorded interview the Defense needed to use Mr. Smith's prior inconsistent statement to the Prosecutor to impeach his credibility. (Trial Tr. at 210 – 11.) The Defense moved to call the Prosecutor as a necessary witness or at least to have the Prosecutor's email admitted as an exhibit to allow Counsel to argue to the jury Mr. Smith testified inconsistently to his pretrial statement. (Trial Tr. at 211, 215, 220.)

Following argument and off-the-record discussions, the District Court denied the Defense requests:

> So the Court finds that this is a little bit irregular, but I don't think it rises to the level of altering the outcome of the trial significantly.
>
> I believe that the witness testified under oath that he did not consume alcohol that day and that in fact he doesn't drink. He did testify earlier under oath that he had been intoxicated on prior occasions in his life.
>
> It sounds to me like maybe he's someone who used to drink but no longer does for any number of reasons.
>
> I find that the witness – and I understand there are tactical and strategic reasons for interviewing witnesses pretrial or not, but I think not doing so then – you know, it's something called discovery, and not doing so means you have

no discovery and you're trying to do it on the fly in trial, and that's risky business too.

I realize that it might lead to catching a witness unawares and having them make an admission that they might not have made had they been interviewed ahead of time and knew what questions might be coming, but again, that's a tactical decision that a lawyer makes.

I don't – even if he had drank earlier in that day it doesn't necessarily disqualify his testimony or make it unreliable. As I said, a person having a small quantity of alcohol earlier in the day isn't unable to observe and notice things that happen in the world around him.

We oftentimes in criminal trials have witnesses who were impaired with drugs or alcohol at the time certain events happened, and that is – doesn't automatically disqualify their testimony, although it might be a question for the jury.

But this witness in particular testified under oath that he did not drink that day. There was an objection made by [the Prosecutor] to the fact that counsel for the Defense was asking the witness whether [the Prosecutor] was being dishonest. I asked him to – I struck that and asked him to move on. I wasn't in any way saying he couldn't ask the witness more questions about consuming alcohol that day.

So with that, the motion is denied.

(Trial Tr. at 223 – 25.)

The District Court allowed the Defense to make an offer of proof concerning the information the Prosecutor's testimony would provide the jury but did not allow the Defense to question the Prosecutor as part of the offer. (Trial Tr. at 225 – 29.) In the offer, Defense Counsel explained they relied on the Prosecutor's emailed description of Mr. Smith's testimony during plea negotiations and contended Mr. Smith's changed testimony was material to Mr. Hummel's defense at trial. Counsel also argued the Prosecutor had an ethical obligation to apprise the District Court of the material change in the State's case but did not do so. (Trial Tr. at 227.) *See* Mont. R. Prof. Cond. 3.3(a)(1).

Subsequently, the Defense called Mr. Smith back to the stand as a defense witness. (Trial Tr. at 248.) Defense Counsel asked Mr. Smith how much he had to drink on the day in question and Mr. Smith responded, "I don't drink; I had none." (Trial Tr. at 248.) Mr. Smith admitted he used to drink in the past to the point where his perception was blurred. (Trial Tr. at 248.) Mr. Smith testified that he recalled speaking with the Prosecutor before trial but did not recall telling the Prosecutor he was drinking before going to Dairy Queen with his family to pick up dinner. (Trial Tr. at 249.) Mr. Smith admitted he was

driving that evening, but denied he had any reason to lie, stating, "No, I don't drink and drive, I've never drank." (Trial Tr. at 249 – 50.) Defense Counsel continued:

> Q. You certainly wouldn't want to pick up a DUI charge?
>
> A. Well, you can say whatever you want, I don't drink.
>
> Q. I'm asking.
>
> A. I don't drink.
>
> Q. Okay. You have in the past.
>
> A. Yeah, when I was in my twenties.
>
> Q. Okay. And you didn't quit drinking after April 7th, did you?
>
> A. No. I have kids, I don't drink.
>
> Q. Okay. So then [the Prosecutor's] just mistaken?
>
> A. He must have. I never told him I had a beer in my hand, I was drinking or driving.

(Trial Tr. at 250.)

B. The District Court clearly and prejudicially abused its discretion by denying Defense Counsel's request to call the Prosecutor as a necessary witness to impeach Mr. Smith's testimony that he had not been drinking on the day in question with his statement to the Prosecutor before trial that he had been drinking.

A defendant has a right to present evidence in his defense under the Sixth Amendment of the United States Constitution and Article 2, Section 24 of the Montana Constitution. *State v. Colburn*, 2016 MT 41, ¶ 24, 382 Mont. 223, 366 P.3d 258, *citing State v. Johnson*, 1998 MT 107, ¶ 22, 288 Mont. 513, 958 P.2d 1182.

In *Davis v. Alaska*, 415 U.S. 308, 317, 94 S. Ct. 1105, 1111, 39 L. Ed. 2d 347 (1974), defense counsel sought to show the existence of possible bias and prejudice of a primary state witness to try to undermine the witness's identification of the defendant, but was denied the ability to cross-examine the witness as to his juvenile probationary status at the time of the events and at trial. The Supreme Court concluded,

> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the

> weight to place on Green's testimony which provided 'a crucial link in the proof . . . of petitioner's act.' . . . The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner.

Davis, 415 U.S. at 317, 94 S. Ct. at 1111 (citation omitted). The Supreme Court held:

> We cannot accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury. While counsel was permitted to ask Green whether he was biased, counsel was unable to make a record from which to argue why Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a 'rehash' of prior cross-examination. **On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."**

Davis, 415 U.S. at 318, 94 S. Ct. at 1111 (citations omitted) (emphasis added).

"Criminal prosecutors have an affirmative duty to disclose all information and materials known to the prosecutor that are favorable to the accused and constitutionally material to the determination of his or her guilt or punishment." *City of Bozeman v. Howard*, 2021 MT 230, ¶ 14, ___ Mont. ___, ___ P.3d ___ (citations and internal quotation marks omitted). "Nonexculpatory evidence is constitutionally material only where the subject witness provides key evidence linking the defendant(s) to the crime, or where the likely impact on the witness's credibility would ... undermine[ ] a critical element of the prosecution's case." *Howard*, ¶ 15 (citations and internal quotation marks omitted).

An out-of-court statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the prior statement is inconsistent with the declarant's testimony. Mont. R. Evid. 801(d)(1)(A). A trial court abuses its discretion and prejudices a defendant by denying the defense an opportunity to present rebuttal testimony from a witness who could impeach the credibility of the State's primary witness by testifying to

the witness's prior inconsistent statements. *State v. Stewart*, 253 Mont. 475, 480, 833 P.2d 1085, 1088 (1992) (*en banc*).

This Court recently articulated standards a defendant must meet to compel a prosecutor's testimony at trial: "A party seeking the testimony of the prosecutor trying the case 'must demonstrate that the evidence is vital to his case, and that his inability to present the same or similar facts from another source creates a compelling need for the testimony.'" *Eighteenth Judicial District*, *1 (citations omitted). Further,

> [A] defendant has an obligation to exhaust other available sources of evidence before a court should sustain a defendant's efforts to call a participating prosecutor as a witness. . . .
>
> . . .
>
> Regardless of the prosecutor's view of the utility of his own testimony, the district judge is charged with the responsibility of making determinations as to the materiality of witness testimony.

Eighteenth Judicial District, * 1 (internal formatting modified and citations omitted).

In *Eighteenth Judicial District*, the defendant was charged with sexual intercourse without consent with a 14-year-old girl. He admitted

they had sex, but asserted he reasonably believed she was 18 at the time. The alleged victim told the police she and the defendant were dating but denied they had sex; she also asserted she had lied to the defendant about her age and convinced him she was 18 years old. During a subsequent, unrecorded interview with the prosecutor and her mother, however, the alleged victim stated she had sex with the defendant and had told the defendant her true age during their relationship but convinced him to continue dating her. The alleged victim explained she had not previously disclosed this information because she wanted to protect the defendant. Further, the alleged victim expressed anger about spending more time in jail than the defendant after stealing her mother's car to run away from home. *Eighteenth Judicial District*, *2.

After learning about the alleged victim's statements to the prosecutor, defense counsel subpoenaed the prosecutor for trial. The State moved for an affirmative ruling that the prosecutor was not a necessary witness under Mont. R. Prof. Cond. 3.7 and to quash the subpoena for the prosecutor's testimony. Defense counsel filed a motion to disqualify the prosecutor as trial counsel. The district court denied

the State's motion to quash and granted the defense's motion to disqualify. The State sought a writ of supervisory control to reverse the district court rulings. *Eighteenth Judicial District*, *2. This Court denied the State's petition. *Eighteenth Judicial District*, *4.

"A determination that an individual is a 'necessary witness' is not amenable to firm rules but depends on the unique circumstances of each case." *Eighteenth Judicial District*, *3. The Court remarked even though the prosecutor did not initially intend to interview the alleged victim when he met with her, intending instead to introduce himself and establish a rapport with her after learning of her imminent departure from Montana, the fact remained the alleged victim told the prosecutor a version of events that contradicted her earlier statements. *Eighteenth Judicial District*, *3. The defense maintained and the district court agreed the alleged victim's mother was not in the same position as the prosecutor to testify about the interview at trial.

The Court agreed with the State that "a prosecutor should not be subject to automatic disqualification simply for meeting in advance of trial with a child sexual assault victim." *Eighteenth Judicial District*, *3. Nevertheless, the Court commented, "Unfortunately, [the

prosecutor] did not have an investigator or other neutral witness with him." *Eighteenth Judicial District*, *3. In "[t]he unique situation presented here," the Court determined the district court did not abuse its discretion in deciding the prosecutor was the only witness able to testify about the circumstances and substance of his interview of the alleged victim, should her testimony differ at trial. *Eighteenth Judicial District*, *3. Pertinent here, the Court rejected the State's contention that alternatives to the prosecutor's testimony were acceptable, including the State's suggestions that defense counsel or a defense investigator could interview the alleged victim or that the defense could call the alleged victim's mother to testify about the conversation. *Eighteenth Judicial District*, *3.

In closing, the Court found the State did not demonstrate the prosecutor's disqualification would pose a substantial hardship. "It is not preferable to switch counsel in the middle of a case and undoubtedly will pose inconvenience for the prosecution. But the State does not argue that no one else is available to try the case; the Gallatin County Attorney's Office has other deputies who could competently assume the role of prosecutor for this matter, which is currently set for trial several

months away[.]" *Eighteenth Judicial District*, *4, *citing* M. R. Pro. Cond. 3.7(a)(3) ("a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless disqualification of the lawyer would work substantial hardship on the client").

The unique situation in *Eighteenth Judicial District* is nearly identical to the circumstances in this case. After trial began, the Prosecutor informed Defense Counsel that Robert Smith, the State's only witness who claimed to see Mr. Hummel driving his motorcycle shortly before his arrest, had changed his story. Mr. Smith initially told the Prosecutor he had consumed alcohol that day and the Prosecutor promptly – and correctly – informed the Defense of Mr. Smith's intended testimony. But after trial began, after the jury was impaneled and opening statements were about to proceed, Mr. Smith told the Prosecutor he had not been drinking that day. The Prosecutor informed the Defense about Mr. Smith's changed story but did not bring it to the District Court's attention. As Defense Counsel explained, they had relied on the Prosecutor's initial description of Mr. Smith's testimony to prepare for trial and during plea negotiations.

True, Defense Counsel attempted to cross-examine Mr. Smith about his inconsistent statements to the Prosecutor. But Counsel's efforts were stymied by the District Court's perception the Defense was impugning the Prosecutor's honesty. The record reveals unmistakably that Defense Counsel did *not* attack the Prosecutor's honesty. To the contrary, Defense Counsel was trying to rely on the Prosecutor's perceived integrity and position of authority by calling him as a witness *to impeach Mr. Smith's credibility*.

Ultimately, the Defense was able to obtain conflicting testimony from Mr. Smith about whether he drank alcohol in the past. But Mr. Smith consistently denied on the stand he told the Prosecutor he had consumed alcohol the day in question. Notably, the Prosecutor declined to cross-examine Mr. Smith's testimony for the Defense in which Mr. Smith denied giving the Prosecutor two different stories. By denying Defense Counsel's motion to call the prosecutor as a witness, the District Court prohibited the Defense from impeaching Mr. Smith with a prior inconsistent statement. Mont. R. Evid. 801(d)(1)(A); *Stewart*, 253 Mont. at 480, 833 P.2d at 1088 (trial court abused its discretion and prejudiced defendant by denying the defense an opportunity to present

rebuttal testimony from a witness who could impeach the credibility of the State's primary witness by testifying to the witness's prior inconsistent statements).

In this case, the Prosecutor spoke twice to Mr. Smith without an investigator or other neutral witness present who could testify in the event an issue arose about Mr. Smith's statements. As in *Eighteenth Judicial District*, Mr. Smith's first statement (i.e., he had been drinking) differed from his second statement (i.e., he had not been drinking). Mr. Smith had motive to change his story to avoid a criminal charge or other repercussions from admitting to driving to Dairy Queen with his wife and child after drinking. The Prosecutor did not claim he was the only deputy county attorney who could competently try the remainder of Mr. Hummel's case; but even if he had, no part of the burden would fall on the Defendant to remedy the problem caused by the Prosecutor who interviewed Mr. Smith alone, twice, to ascertain what his testimony would be. Any continuance or mistrial that might have been necessary by the Defense calling the Prosecutor as an impeachment witness was caused exclusively by the Prosecutor.

Under the unique circumstances of this case, Mr. Hummel's request to call the prosecutor as a witness was reasonable and necessary to present a defense. The District Court clearly and prejudicially abused its discretion when it denied the Defense motion to call the Prosecutor as a witness. As in *Davis*, Mr. Hummel was denied the right of effective cross-examination, which was a "constitutional error of the first magnitude" that no purported showing of a lack of prejudice may cure. *Davis*, 415 U.S. at 318, 94 S.Ct. at 1111. This Court should reverse Mr. Hummel's conviction and remand for a new trial with a different prosecutor. *Stewart*, 253 Mont. at 480, 483, 833 P.2d at 1088, 1090.

III. Alternatively, the Court should remand the judgment with instructions to restate the parole conditions as recommendations and to strike Condition 15 in its entirety because there is no statutory authority to impose parole supervision fees on an incarcerated person.

This Court has "repeatedly held that the oral pronouncement of sentence controls where a conflict exists between the oral and written judgments." *State v. Hammer*, 2013 MT 203, ¶ 27, 371 Mont. 121, 305 P.3d 843 (citations omitted). Further, "sentencing judges have the power only to impose those parole conditions which are specifically and

explicitly authorized by statute. Sentencing judges do not have a residual or inherent authority under Title 46, Chapter 18, Part 2, to generally impose parole conditions." *State v. Burch*, 2008 MT 118, ¶ 36, 342 Mont. 499, 182 P.3d 66. "A district court's authority to impose a sentence is defined and constrained by statute. . . . Indeed, 'a district court has no power to impose a sentence in the absence of specific statutory authority.'" A sentence not based on statutory authority is an illegal sentence. *State v. Ruiz*, 2005 MT 117, ¶ 12, 327 Mont. 109, 112 P.3d 1001 (citations omitted).

"The *Lenihan* rule[6] 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, *overruled in part on other grounds Gardipee v. Salmonsen*, 2021 MT 115, 486 P.3d 689 (pro se petition for writ of habeas corpus). Accordingly, this Court

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

may review Mr. Hummel's sentencing claims under *Lenihan*, notwithstanding the lack of an objection.

At sentencing, the District Court imposed a 25-year sentence to the Montana State Prison, pursuant to Mont. Code Ann. § 46-1-202. The District Court ordered the sentence to run consecutively to a sentence from Gallatin County that Mr. Hummel was serving on parole at the time of the present incident and granted him credit for time served of 228 days. (App. B at 2; App. C at 2, 5; Sent. Tr. at 8 – 11.) At the State's request, the Court recommended all the conditions included in the PSI, except it struck the fines and fees requested in paragraphs 13 and 14 of the PSI. (App. B at 24 – 25.) The Defense did not object to the sentence or the recommendations in the PSI. (App. B at 25. Sent. Tr. at 7.)

The written judgment accurately reflects the oral pronouncement, with one significant exception. (App. C.) Instead of recommending parole conditions, the judgment states, "As conditions of probation/parole, Defendant must comply with the following:[.]" (App. C at 2 (underscore added).) This boilerplate sentence is inconsistent with the oral pronouncement.

If the Court does not reverse Mr. Hummel's conviction and remand for a new trial, the written judgment should be remanded with instructions for the District Court to conform it with the oral pronouncement of sentence by striking the phrase, "As conditions of probation/parole, Defendant must comply with the following:" and inserting instead, "The following conditions of parole are recommended:".

In addition, Condition (15) requiring monthly parole supervision fees to be assessed by a parole officer and authorizing DOC to "take a portion of the Defendant's inmate account if the Defendant is incarcerated" must be struck in its entirety, even once other conditions are restated as recommendations. Condition 15 requires Mr. Hummel to pay supervision fees during any period of parole. But the Board of Probation and Parole possesses sole authority to impose supervision fees and to determine whether Mr. Hummel has the ability to pay them once he is approved for parole, pursuant to Mont. Code Ann. § 46-23-1031.

The last sentence of Condition (15), mandating the Department of Corrections to "take a portion of the Defendant's inmate account if the

Defendant is incarcerated", lacks statutory authority or logical inference. Supervision fees do not apply to incarcerated people. Indeed, parole is discretionary and may not even be granted. *State v. Bullplume*, 2011 MT 40, ¶ 18, 359 Mont. 289, 251 P.3d 114. "Parole is a privilege, not a right. *McDermott v. McDonald,* 2001 MT 89, ¶ 19, 305 Mont. 166, 24 P.3d 200. It is a matter of grace, granted by the Parole Board pursuant to § 46-23-201, MCA. *Id.*" *Bullplume*, ¶ 20.

The State currently is seizing Mr. Hummel's money to pay for a possible future benefit that he may not receive. Nothing in the Montana Code allows a sentencing court to order a convicted defendant to prepay supervision fees as a condition of their sentence before being discharged to parole. Nor may a District Court recommend a defendant to prepay supervision fees. Not even the Board of Pardons and Parole possesses such authority under Mont. Code Ann. § 46-23-1031. Condition (15) constitutes an *ultra vires* confiscation of Mr. Hummel's money during his period of incarceration. It must be struck from the judgment and not recommended. *Burch*, ¶ 23 (citations omitted).

Accordingly, if the Court declines to reverse Mr. Hummel's conviction and remand for a new trial, it should remand the judgment

with instructions to change the imposed parole conditions to recommendations only and to strike Condition (15) in its entirety.

CONCLUSION

For the foregoing reasons, Mr. Hummel respectfully requests the Court to reverse his conviction and remand for a new trial because his right to confront witnesses was violated by Mr. Lard's video appearance at trial and because he was denied an opportunity to call the Prosecutor as a witness to impeach Mr. Smith's credibility. Alternatively, the Court should remand the judgment to restate the parole conditions as recommendations and to strike Condition 15 in its entirety.

Respectfully submitted this 7th day of October 2021.

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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 9,787, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Deborah S. Smith
DEBORAH S. SMITH

APPENDIX

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 10-07-2021:

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