IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0413

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT MURRAY GIBBONS,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Nineteenth Judicial District Court, Lincoln County, the Honorable Matthew J. Cuffe, Presiding

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STATEMENT OF THE ISSUES

(1) Robert Gibbons went to his parked truck to lie down and sleep after becoming intoxicated. The State does not allege he drove after getting drunk. The District Court instructed the jury it "shall" consider "the Defendant need not be conscious to be in actual physical control." Did the District Court incorrectly instruct the jury on "actual physical control" in Mont. Code Ann. § 61-8-401 (2019), driving under the influence?

(2) Did the District Court violate Mr. Gibbons's substantial rights and cause him prejudice when it permitted the prosecutor to tell the jury during closing argument about evidence given to the Defense during discovery but not introduced into evidence by the State at trial? Alternatively, did Mr. Gibbons receive ineffective assistance of counsel when his lawyer could not find the discovery to bring to trial for use during cross-examination of State witnesses?

(3) Is the mandatory minimum fine of $5,000 set out in Mont. Code Ann. § 61-8-731 (2019) facially unconstitutional?

STATEMENT OF THE CASE

The State charged Robert Gibbons with: Count 1, Driving Under the Influence of Alcohol, Fifth or Subsequent Offense, a felony, in violation of Mont. Code Ann. §§ 61-8-401, 61-8-731 (2019), or in the alternative, Count 2, Operation of Noncommercial Vehicle with Alcohol Concentration of 0.08 or More, Fifth or Subsequent Offense, a felony, in violation of Mont. Code Ann. § 61-8-406, 61-8-731 (2019).[1] (D.C. Doc. 4.) Mr. Gibbons pled not guilty. (D.C. Doc. 9.) The case proceeded to three separate jury trials.

Mr. Gibbons's primary defense was that the State could not prove beyond a reasonable doubt he was in actual physical control as he lay on the front seat sleeping because he was a passenger and did not exercise actual physical control.[2] Over the course of the three trials, the

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[1] Mont. Code Ann. §§ 61-8-401, -406, and -731 were repealed in 2021, and amended and recodified in Title 68, Part 10 of the Montana Code. Mont. Laws 2021, ch. 498, § 44 (eff. 01/01/2022). All cites herein are to the statutes in effect at the time of the alleged offense in June 2019.

[2] The State presented no evidence Mr. Gibbons drove his truck while under the influence and acknowledged as much at trial. (Trial 2 Tr. at 310; Trial 3 Tr. at 290 – 91, 314.) The Defense also argued below the State presented insufficient evidence to prove beyond a reasonable doubt Mr. Gibbons parked his truck on a way of the state open to the public. (Trial 2 Tr. at 233, 239 – 40; Trial 3 Tr. at 222 – 24. This issue is not pursued on appeal.

District Court heard considerable argument and issued multiple rulings concerning the meaning of "actual physical control." (Trial 2 Tr. at 198 – 209, 255 – 74, 276 – 80; Trial 3 Tr. at 8 – 15, 20 – 24, 135 – 40, 161 – 63, 216 – 25, 232 – 48, 250 – 51, 254 – 66, 315 – 19, 323 – 25; D.C. Docs. 28; 55 at 3; 65 – 68; 69 at 1, 3 – 4 (D.C. Doc. 68, Order on State's Motions in Limine is attached hereto as App. A).)

The first trial ended in a mistrial during voir dire. (D.C. Doc. 28 (Minutes, 02/13/2020).) The second trial also ended in a mistrial following a hung jury. (02/09-10/2021 ("Trial 2") Tr. at 352 – 64; D.C. Doc. 55 at 4.) The State finally succeeded in convicting Mr. Gibbons when a jury in the third trial found Mr. Gibbons guilty of Count 1, driving under the influence of alcohol. (04/28-29/2021 ("Trial 3") Tr. at 327 – 28; D.C. Doc. 69 at 5, 73.) In the second and third trials, the District Court instructed the jury that it "shall" consider a person need not be conscious to be in "actual physical control" of a vehicle. (D.C. Docs. 57 at Instr. 15 (from Trial 2), 72 at Instr. 15 (from Trial 3); Instruction 15 from Trial 3 is attached hereto as App. B.)

At sentencing, the District Court imposed a five-year commitment to the Department of Corrections and a $5,000 fine, pursuant to Mont.

Code Ann. § 61-8-731 (2019). The District Court declined to order vehicle forfeiture or to impose any fees, costs, or surcharges (06/21/2021 ("Sent.") Tr. at 33 – 34, attached hereto as App. C.)

The written judgment conforms with the oral pronouncement of sentence. (D.C. Doc. 77, attached hereto as App. D.) Mr. Gibbons timely appealed.

STATEMENT OF THE FACTS

The Incident

One June evening, Robert Gibbons drove his truck into Troy, parked in a designated parking space on Yaak Avenue, and walked to the nearby Home Bar and the VFW to have some drinks. After several drinks, Mr. Gibbons walked back to his truck, sat down behind the wheel, turned the ignition part-way on, and laid down across the front bench-seat to go to sleep, folding his arm under his head like a pillow, not intending to drive anywhere. (Sent. Tr. at 9 – 10; Trial 2, Exh's 1, 2 (02/09/2021) (photographs).) A retired police officer from California, Richard Starks, observed Mr. Gibbons drinking in the bars and then going to sleep in his truck. Mr. Starks took two photographs of Mr. Gibbons sleeping and called the police about a possible drunk driver.

(Trial 2 Tr. at 141 – 61; Trial 3 Tr. at 157 – 78.) Officer Travis Miller responded and ultimately arrested Mr. Gibbons after tapping on the truck's driver-side window to wake him and observing signs of intoxication. (Trial 2 Tr. at 163 – 231; Trial 2 Exh's 3, 4, 5 (02/09/2021) (body camera video); Trial 3 Tr. at 180 – 214; Trial 3 Exh's 1, 2 (04/28/2021) (much shorter excerpts of the body camera video than shown in Trial 2).)

Actual Physical Control and Sleeping in One's Vehicle

At the start of the first trial, outside the presence of potential jurors, the State orally requested an order prohibiting evidence or argument "on driving and or the intent to driving [sic]." Following argument by counsel, the District Court denied the motion. The District Court decided to allow evidence or argument concerning Mr. Gibbons's intent to drive. The District Court called a mistrial, however, less than half-an-hour after the State commenced voir dire. (D.C. Doc. 28 (Minutes).)

The second trial occurred a year later. (D.C. Docs. 33, 36, 44, 50.) During settlement of jury instructions near the close of the second trial, counsel and the judge extensively discussed the instruction defining

"actual physical control." (Trial 2 Tr. at 255 – 74; D.C. Doc. 57, Instruction 15.) After 3-1/2 hours of deliberations, the judge declared a mistrial after determining the jury was "hopelessly deadlocked" following an *Allen* instruction.[3] (Trial 2 Tr. at 352 – 64.)

Prior to the third trial, the State filed a motion in limine to exclude evidence, argument, or suggestion Mr. Gibbons "did not intend to drive his vehicle when he assumed actual physical control of it" on the day in question. The State also sought to exclude argument or suggestion Mr. Gibbons's "position in the vehicle (seated in the driver's seat with feet near the pedals but slumped over to his right on the bench seat) rendered him incapable of exercising physical control." (D.C. Doc. 65 at 1.) The Defense pushed back, contending the State would not be able to meet its burden to convince the jury beyond a reasonable doubt that Mr. Gibbons was in actual physical control of his truck while under the influence on the night in question, which is the question the jury must decide based on the totality of the circumstances test set out in *State v. Sommers*, 2014 MT 315, 377 Mont. 203, 339 P.3d

[3] *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

65. The Defense argued motivation to drive is an appropriate factor for the jury to consider under the totality of the circumstances. (D.C. Doc. 66 at 2 – 3.)

The day before trial started, the District Court granted the State's motion in part, disallowing any evidence, argument, or suggestion Mr. Gibbons did not intend to drive. However, the District Court ruled Mr. Gibbons could argue his position in his truck was relevant to whether he was capable of being in actual physical control of the truck. (App. A at 2 – 3.) On the morning of trial, outside the presence of potential jurors, the Defense renewed Mr. Gibbons's objection to the District Court's ruling prohibiting argument about his motivation when he got into his truck after becoming intoxicated. (Trial 3 Tr. at 8 – 15.) The District Court reaffirmed its order on the State's motion in limine and took judicial notice of the Defense arguments from Trial 2 about actual physical control, finding the record on the issue of intent or motivation was preserved for appeal. (Trial 3 Tr. at 14 – 15.) The Defense clarified Mr. Gibbons's contention is "the evidence supports the fact that the Defendant's motivation was not to assume actual physical control."

(Trial Tr. at 23.) The District Court noted its disagreement with Mr. Gibbons's argument. (Trial Tr. at 24.)

During discussion to settle jury instructions, the Defense objected to Instruction 15, defining "actual physical control," given at the second trial. (*See* D.C. Doc. 57, Instr. 15.) In relevant part, the Defense contended the District Court incorrectly interpreted the factors for determining whether Mr. Gibbons was in actual physical control of his truck as he slept in it and incorrectly added a factor into the *Sommers* test. Specifically, the Defense argued that paragraph (5) is not among the factors listed in *Sommers*. While the Defense acknowledged *Sommers* stated a defendant need not be conscious to be in actual physical control, the Defense argued the cases *Sommers* cited for that proposition were inapplicable here. Further, the Defense contended this case was not a "driving" case. It was a case where the defendant was using his vehicle as a passenger, to sleep. (Trial 3 Tr. at 234, 239 – 42.)

Over Defense objection, the District Court instructed the jury as follows, retaining paragraph (5) from the jury instruction in Trial 2:

> The Defendant is "in actual physical control" of a motor vehicle if the individual is not

> a passenger, and is in a position to cause the vehicle to move, or control the vehicle's movement in some manner or direction. The jury shall consider the totality of the circumstances, including, but not limited to, following factors [sic]:
>
> (1) where in the vehicle the defendant was located;
>
> (2) whether the ignition key was in the vehicle, and where the key was located;
>
> (3) whether the engine was running;
>
> (4) where the vehicle was parked and how it got there; and
>
> (5) that the Defendant need not be conscious to be in actual physical control.

(Trial 3 Tr. at 245 – 48; App. B.)

Closing Argument Regarding Missing Evidence

In the second trial, the State introduced two photographs Mr. Starks took of Mr. Gibbons sleeping on the front seat of his truck showing his arm folded like a pillow under his head. (Trial 2 Tr. at 147 – 48; Trial 2 Exh's. 1, 2.) The State chose not to introduce those photographs during its direct examination of Mr. Starks in the third

trial.[4] During cross-examination in the third trial, Defense Counsel asked Mr. Starks if he took photographs of Mr. Gibbons as he lay sleeping in his truck while he was waiting for law enforcement to arrive. Mr. Starks admitted he took two photographs and that those photos would show Mr. Gibbons's position on the front seat. (Trial 3 Tr. at 169, 175 – 77.) Mr. Starks testified he did not have the photographs he took with him at trial, explaining the county attorney would have them. (Trial 3 Tr. at 175.)

Later, during cross-examination of Officer Miller, Defense Counsel asked about the photos taken by Mr. Starks. Officer Miller testified he looked at the photos quickly when he arrived at the scene but did not collect them from Mr. Starks. Further, Officer Miller described the photos showing Mr. Gibbons sleeping with his arm under his head like a pillow on the front seat. (Trial 3 Tr. at 199 – 202, 210 – 12.)

[4] In addition, the State introduced only a small segment of Officer Miller's body-camera video from his encounter with Mr. Gibbons during the third trial. By contrast, during the second trial the State played a significant portion of the body-cam video, including a portion where Mr. Gibbons told Officer Miller he was sleeping in his truck after drinking and had no intention to drive anywhere.

At the beginning of the second day of trial, before closing arguments and outside the presence of the jury, the State moved "to preclude argument about photographs that were not introduced into evidence or suggestion that the State was in sole possession of photographs." (Trial 3 Tr. at 254.) The State contended:

> The defense asked questions yesterday suggesting that the State was in sole possession or control of that evidence and was thus trying to hide something from the jury by not introducing that evidence. However, Your Honor, [Defense Counsel] is well aware that the evidence in this case, including those photographs, was disclosed to the defense over a year ago during discovery.
>
> The defense has had ample opportunity to prepare their case and to present evidence, and they did not introduce any photographs. They should not be allowed to argue that it's the State's fault that they didn't introduce that evidence or that they didn't have an opportunity to introduce it when they clearly have had the same access to that evidence and the same opportunity to introduce it at trial if they felt it relevant to their case.

(Trial 3 Tr. at 254 – 55.)

The Prosecutor asserted allowing the Defense to argue about the unintroduced photographs would mislead the jury "as to the nature of the evidence suggesting that it's more important than it actually is and

as to who had access to the evidence and the opportunity to present it to the jury." (Trial 3 Tr. at 255.) According to the State, such an argument would "invite the jury to decide the case based on conjecture about evidence that was not introduced rather than the evidence that was admitted at trial." (Trial 3 Tr. at 255.) Alternatively, if the District Court allowed the Defense to mention the photographs during closing argument, the Prosecutor requested the District Court to instruct the jury the Defense has possessed the photos "since early in the case and has had the same opportunity to present it to the jury." (Trial 3 Tr. at 255.)

In response, Defense Counsel pointed out, accurately, that he did not contend the State was solely in possession of the photographs. The Defense asserted, "The issue is, who's got the burden? There is a sole burden. One side has the burden, and the other side doesn't. They have the burden to prove their case." (Trial 3 Tr. at 256.) Counsel explained he could not find the photographs the State produced in discovery, but contended it was not Mr. Gibbons's burden to present evidence. (Trial 3 Tr. at 257, 260.) Defense Counsel argued he should be able to argue to the jury the State chose not to present photographs

that their own two witnesses testified existed. Counsel argued, "that is absolutely fair game." (Trial 3 Tr. at 257.)

The District Court ruled that Defense Counsel could "comment on the failure to present the photos . . . he can do that, but the jury is going to be advised [Defense Counsel] had those photos. Because it's a true statement[.]" (Trial 3 Tr. at 263.) The District Court reasoned, "The fact that you didn't bring them with you or you couldn't – for whatever reason couldn't find them doesn't change the fact they've been available to you and that you could have used it as part of your cross-examination, like every other defense attorney when they present their case brings in what they're going to cross people with, whether it's the DUI manual, whether it's alternative photos, the results of their investigation." (Trial 3 Tr. at 263 – 64.) The judge then cryptically remarked, "because when you read the jury instruction on this very issue, the jury instruction talks about evidence solely in the possession of the State. This evidence was not solely in the possession of the State." (Trial 3 Tr. at 264.) As to the State's alternative motion, the District Court ruled if Defense Counsel mentions the photos during his

closing argument, then the Prosecutor may argue "he had the opportunity to present it." (Trial 3 Tr. at 265.)

The Defense argued in closing:

> Starks took photos of the Defendant, photos from the other [passenger] side. He said, I can't remember exactly where his hands are. I guess they could have been up underneath his head, but I don't know.
>
> The State's had those photos. Officer Miller testified, I saw them in the last month. They didn't even bring them in even after I asked about them.
>
> It's their burden to prove their case. I'm not going to bring in evidence. That's not my burden. We talked about the burden of proof and that it's entirely at this [the prosecutors'] table.
>
> You know, for them to have clear photos of exactly this Defendant's position, where exactly his head was, they're not going to bring that in. Instead, they're just going to get up here and argue, He was in the driver's seat.
>
> Well, is that really intellectually honest when you've got someone – clearly even in the video we saw that the officer raps on the window. The Defendant gets up. We don't know exactly where his butt is. We know where the head is. His head isn't in the driver's seat. His shoulders ain't in the driver's seat. The driver's seat ain't that wide for you to be laying down completely in the driver's seat.

> He's laying down in the vehicle in the front seat, not in a position to cause that vehicle to move or control the vehicle's movement in some manner or direction. He never controlled the movement of that vehicle. He was never in a position to control the movement of that vehicle. This is not a DUI.
>
> I would still argue that you don't even need to get that far, because do you know what? He is a passenger. When somebody does exactly what Mr. Gibbons did, he is a passenger. He is using that vehicle exactly as a passenger would.

(Trial 3 Tr. at 299 – 300 (bracketed material added).) In summation near the end of his closing argument, Defense Counsel returned to the un-introduced photographs, averring "they didn't even introduce their own photographs of where the Defendant was in the front seat." (Trial 3 Tr. at 311.)

In rebuttal, the Prosecutor talked to the jury about the photos, asserting the photographs were unnecessary for the State to prove its case. (Trial Tr. 3 at 314 – 15.) The Prosecutor continued:

> [A]t any rate, it's not our job to make the Defendant's case for him.
>
> Ladies and gentlemen, what [Defense Counsel] did not tell you is that he has been in possession of those photographs all along.

> [DEFENSE COUNSEL]: Objection. Shifting the burden.
>
> THE COURT: Overruled.
>
> [THE PROSECUTOR]: The State is required to provide all evidence to the defense in every single case. Those photographs were handed over to [Defense Counsel] approximately a year ago.
>
> If [Defense Counsel] truly believed that those photographs would be helpful to his client, he had every opportunity during his cross-examination of Mr. Starks and of Officer Miller to put those photographs into evidence.
>
> [DEFENSE COUNSEL]: Objection. Shifting the burden.
>
> THE COURT: Overruled.
>
> [THE PROSECUTOR]: Think about that as you deliberate in this case.
>
> Now, [Defense Counsel] opined that the State's failure to introduce these photographs was intellectual dishonesty. Ask yourselves when you go back to that room who is being intellectually dishonest.

(Trial 3 Tr. at 315 – 16.)

Mandatory Fine

Robert Gibbons is an Air Force veteran who served our country from 1962 during the Cuban missile crisis until his honorable discharge

in 1968. Following his military service, he earned a bachelor degree in Forestry and had been employed by Weyerhaeuser. When he was sentenced in June 2021, Mr. Gibbons was 77 years old. He lived in a camper hitched to his truck, spending summers in northwest Montana and winters in Arizona with his sister. (Sent. Tr. at 14 – 15, 29.) He had retired from Weyerhaeuser and drew a pension of $130/month. He also received $1,300/month in social security benefits. (D.C. Doc. 75 at 1 – 2.)[5]

Mr. Gibbons acknowledged a history of alcohol overuse and multiple prior DUI arrests and convictions going back to 1986 (Sent. Tr. at 18.) However, before his conviction, Mr. Gibbons had stopped drinking and attended church. (Sent. Tr. at 11, 14 – 15.) Mr. Gibbons testified about his poor health. He has a bad back and suffers from liver and kidney disease. (Sent. Tr. at 13 – 15.)

[5] Mr. Gibbons'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 Mr. Gibbons's has consented to its disclosure. Mr. Gibbons 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.

At the beginning of the sentencing hearing, the District Court asked Defense Counsel if any of the recommended terms and conditions of community supervision outlined in the PSI do not apply to Mr. Gibbons, the crime for which he was convicted, or are unreasonable as they apply to him. Counsel responded, "No, Judge. I don't believe so, I think we would be asking the Court to not fully impose some of the fines and fees due to an inability to pay, but that's all." (Sent. Tr. at 6.) Mr. Gibbons testified during the hearing concerning his decision to go to trial and his medical conditions. His testimony did not address his ability to pay any of the recommended financial obligations, nor did the District Court inquire about his ability to pay.

In its sentencing recommendation, the State requested a five-year DOC commitment, with no time suspended, a fine of $5,000, and forfeiture of any vehicles Mr. Gibbons owned at the time of the offense. (Sent. Tr. at 24 – 25.) Defense Counsel recommended a "five year DOC suspended sentence" and objected to the State's request to forfeit Mr. Gibbons's truck and camper. (Sent. Tr. at 28 – 29.) Counsel did not address the State's request for a $5,000 fine or mention any other financial obligations.

The District Court sentenced Mr. Gibbons to a five-year DOC commitment with no time suspended, and stated, "I am going to fine him the minimum of $5,000, the statutory minimum. I am not imposing any other financial obligations on him with respect to this case." (App. B at 33.) The District Court declined to order vehicle forfeiture. (App. B at 34.)

STANDARDS OF REVIEW

"This court reviews for correctness the legal determinations a lower court makes when giving jury instructions, including whether the instructions, as a whole, fully and fairly instruct the jury on the applicable law. . . . District courts are given broad discretion when instructing a jury; reversible error occurs only if the instructions prejudicially affect a defendant's substantial rights. . . . A district court's decision on jury instructions is presumed correct, and the appellant has the burden of showing error." *State v. Lackman*, 2017 MT 127, ¶ 8, 387 Mont. 459, 461, 395 P.3d 477 (citation omitted).

The Court exercises plenary review over evidentiary issues presenting questions of constitutional law. *State v. Flowers*, 2018 MT 96, ¶ 12, 391 Mont. 237, 416 P.3d 180 (citation omitted).

"Ineffective assistance of counsel claims are mixed questions of law and fact which we review de novo." *State v. Wright*, 2021 MT 239, ¶ 7, 405 Mont. 383, 495 P.3d 435 (citations omitted).

This Court reviews a claim that a sentence violates a constitutional provision de novo. *State v. Yang*, 2019 MT 266, ¶ 8, 397 Mont. 486, 452 P.3d 897, citing *State v. Le*, 2017 MT 82, ¶ 7, 387 Mont. 224, 392 P.3d 607.

SUMMARY OF ARGUMENT

The District Court incorrectly instructed the jury about "actual physical control." The District Court *sua sponte* added clause (5) into Instruction 15, providing "the Defendant need not be conscious to be in actual physical control." That clause is inapplicable to Mr. Gibbons's case because it pertains to situations where evidence has established the defendant became intoxicated, drove, and then passed out unconscious in the vehicle after driving. There is no evidence here, nor did the State allege, Mr. Gibbons drove after becoming intoxicated. The District Court abused its discretion when adding clause (5). The District Court further abused its discretion by not allowing the Defense

to argue Mr. Gibbons's motive or intent when he went to his truck was to sleep, not to drive.

Additionally, the District Court prejudicially violated Mr. Gibbons's constitutional rights when it permitted the State to tell the jury it had provided photographs to the Defense before trial that Mr. Gibbons could have used to support his defense. The Defense is permitted to highlight missing evidence from which the jury could infer a reasonable doubt of guilt. But when the Defense does so, that does not permit the State to shift the burden to the Defendant to produce evidence of his innocence. The District Court's erroneous decision to allow the Prosecutor to tell the jury it had provided the photographs to Defense Counsel before trial prejudiced Mr. Gibbons's substantial rights to due process, to remain silent, to a presumption of innocence, to present a defense, to effective assistance of counsel, and to a fair trial by an impartial jury under the Fifth and Sixth Amendments to the United States Constitution and Article II, Sections 24 and 25 of the Montana Constitution. Alternatively, Mr. Gibbons received record-based ineffective assistance of counsel when his lawyer was unprepared at the

third trial with the photographs to use in cross-examination of the State's witnesses because Counsel could not find them.

If the Court does not find reversible error justifying a new trial, it should strike the $5,000 mandatory fine set by Mont. Code. Ann. § 61-8-731 as facially unconstitutional and remand for an ability to pay inquiry before any costs may be imposed.

ARGUMENT

I. The District Court incorrectly instructed the jury on the totality of the circumstances to consider when determining whether Mr. Gibbons was in "actual physical control" of his truck and abused its discretion in giving the incorrect instruction.

A district court possesses broad discretion when instructing the jury, but that discretion "is ultimately restricted by the overriding principle that jury instructions must fully and fairly instruct the jury regarding the applicable law. . . . The purpose of jury instructions is to guarantee decisions consistent with the evidence and the law, which can be accomplished when the instructions are as plain, clear, concise, and brief as possible." *State v. Christiansen*, 2010 MT 197, ¶ 7, 357 Mont. 379, 239 P.3d 949 (citations omitted). In this case, the District Court misinterpreted the jury instruction on actual physical control

permitted by *Sommers*. In doing so, the District Court failed to fully and fairly instruct the jury on the primary issue at trial, which was whether Mr. Gibbons exercised actual physical control of his truck while he slept in it, where there was no evidence he drove the truck under the influence before falling asleep.

In *Sommers*, the Court concluded the district court failed to fully and fairly instruct the jury on actual physical control when it instructed the jury by taking a statement from a prior decision of this Court out of context and telling the jury to ignore relevant facts in the evidence presented. *Sommers*, ¶ 19 and n.2. The State presented no evidence in *Sommers* the defendant drove while under the influence; instead, the State intended to prove Sommers was in actual physical control of his truck when an officer "found him passed out at the wheel." *Sommers*, ¶ 17. Sommers's defense was that his truck was disabled in such a way that he could not move it, making "actual physical control" impossible. Sommers objected to the portion of the jury instruction on "actual physical control" that stated, "It does not matter that the vehicle is incapable of moving[,]" contending it deprived him of a valid defense. *Sommers*, ¶ 18.

This Court reversed, ruling, "Although the District Court's instruction is a direct quote from a prior opinion of this Court, that statement did not fully and fairly instruct the jury on the applicable law[.]" *Sommers*, ¶¶ 3, 19, 40, referencing *State v. Taylor*, 203 Mont. 284, 287, 661 P.2d 33, 34 (1983). The Court explained that although *Taylor* and a similar case, *Gebhardt v. State*, 238 Mont. 90, 775 P.2d 1261 (1989), involved situations where vehicles were disabled when the respective defendants were apprehended, "the evidence in both cases also indicated the vehicle became disabled as a direct result of the defendant driving or being in actual physical control of the vehicle while under the influence." *Sommers*, ¶ 23. In other words, *Taylor* and *Gebhardt* both involved defendants who had driven while under the influence: "Thus, the appropriate reading of *Taylor* and *Gebhardt* is that the condition of the car when the defendant is apprehended is not dispositive. Where the evidence permits, the jury may draw the logical inference that the defendant was previously in actual physical control while under the influence of alcohol." *Sommers*, ¶ 27. *Accord State v. Peterson*, 236 Mont. 247, 248 – 52, 769 P.2d 1221, 1222 – 24 (1989) (affirming DUI conviction where law enforcement found defendant in

the driver's seat, slumped over to the right, with his feet near the pedals, because, even though the vehicle was not running at that time, defendant had the keys in his pocket and other evidence established defendant had driven the vehicle while intoxicated before officers found him in a ditch off the side of the road); *State v. Hudson*, 2005 MT 142, ¶¶ 5 – 6, 15 – 16, 327 Mont. 286, 114 P.3d 210 (affirming DUI conviction where law enforcement found defendant asleep, sitting upright in a vehicle with the motor running, window partially rolled down, headlights shining, radio playing, parked the wrong way in a ditch along a highway, and once arounds by paramedics attempted to put the car in drive and exhibited signs of intoxication).

Critically, the Court ruled "the fact finder should consider the totality of the circumstances rather than focusing only upon the circumstances of the vehicle and the defendant at the time they are discovered. Where circumstantial evidence indicates that the vehicle arrived at the location it was discovered as a result of the defendant driving or physically controlling the vehicle while under the influence, the jury may infer the defendant exercised actual physical control." *Sommers*, ¶ 28. The Court determined the instruction given broadened

the definition of "actual physical control" to include circumstances beyond those prohibited by the statute. *Sommers*, ¶ 30. *Accord State v. Robison*, 281 Mont. 64, 68 – 69, 931 P.2d 706, 709 (1997) (holding an instruction misstated the law and impermissibly broadened the judicial definition of "actual physical control" by including every intoxicated occupant of a vehicle within its scope, even people who were merely passengers).

The Court concluded by adopting a "totality of the circumstances test" for determining whether "a disabled vehicle" may be encompassed within the definition of "actual physical control." *Sommers*, ¶ 33. "[W]hether an individual had actual physical control of a vehicle is a fact-intensive inquiry which may require consideration of a wide variety of circumstances. This approach allows the fact finder to consider *all* relevant factors in determining whether the defendant had actual physical control." *Sommers*, ¶ 33 (emphasis added). The Court observed "actual physical control of a vehicle does not always lend itself to a bright-line, one-size-fits-all determination. A totality-of-the-circumstances test allows the jury to consider difficult-to-foresee situations[.]" *Sommers*, ¶ 34.

The Court specified those factors may include, as appropriate:

> (1) where in the vehicle the defendant was located;
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> (2) whether the ignition key was in the vehicle, and where the key was located;
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> (3) whether the engine was running;
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> (4) where the vehicle was parked and how it got there;
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> (5) whether the vehicle was disabled (broken down, mechanically inoperable, stuck, or otherwise immovable); and
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> (6) how easily the defendant could have cured the vehicle's disability.

Sommers, ¶ 35. The Court emphasized the list "is not meant to be all-inclusive; the parties may present evidence of, and the jury may consider, relevant factors not on this list. No single factor will necessarily determine whether a person is in actual physical control of a vehicle, and it is up to the jury to decide what weight to give to each factor." *Sommers*, ¶ 35.

Here, although the District Court instructed the jury to consider the totality of the circumstances regarding the actual physical control element, it then told the jury that one circumstance did not really

matter: whether Mr. Gibbons was conscious, i.e., awake. In doing so, the District Court did exactly what the *Sommers* Court faulted the district court for doing there: taking a statement out of context from a case involving very different facts and making it a jury instruction.

In *Sommers*, the Court disapproved of the "stand-alone use" of *Taylor*'s statement, "It does not matter that the vehicle is incapable of movement[,]" and *Gebhardt*'s statement, "A motorist does not relinquish control over a vehicle simply because it is incapable of moving[,]" as jury instructions. "Taken out of context, . . . , they could lead to the absurd result that a person in a vehicle up on blocks, with no wheels, could be found guilty of a DUI. We do not believe the legislature intended such a result." *Sommers*, ¶ 28.

The Court also discussed its first case addressing the meaning of "actual physical control." *State v. Ruona*, 133 Mont. 243, 248 – 49, 321 P.2d 615, 618 (1958). *Sommers*, ¶ 21. Though the Court approvingly cited *Ruona* for the proposition that a defendant need not be conscious to be in actual physical control, *Sommers*, ¶ 35, the Court noted its rejection of *Ruona*'s "actual physical control" instruction in *Christiansen*, in which the Court held the *Ruona* definition affected the

defendant's rights because it was confusing to the jury and did not clearly state the law, leading the Court to reverse and remand for a new trial. *Sommers*, ¶ 21, n. 3.

In *Christensen*, the district court instructed the jury, "the Defendant is in actual physical control of a motor vehicle if the Defendant is not a passenger, and has an existing or present bodily function that exercises restraint or directs influence, domination, or regulation of a vehicle." *Christensen*, ¶ 5. The Court held the *Ruona*-like instruction "resulted in the jury being confused about what it meant for Christiansen to be in actual physical control of his vehicle. This prejudicially affected Christiansen's substantial right to a fair trial." *Christiansen*, ¶¶ 10 – 12 (reversing and remanding for a new trial).

Subsequently, in *Sommers*, the district court used the same sentence from *Ruona* the Court rejected in *Christensen*. Even though Sommers did not object to that portion of the instruction, this Court doubled down on the holding in *Christensen*, declaring "the *Ruona* decision affected the defendant's rights because it was confusing to the jury and did not clearly state the law." *Sommers*, ¶ 21, n.3, citing

Christiansen, ¶ 10. Interestingly, as it did in *Robison* in 1997, the Court encouraged the Criminal Jury Instructions Committee to reconsider the pattern instruction defining "actual physical control" in light of *Sommers*. *Sommers*, ¶ 37, n.4. *See Robison*, 281 Mont. at 67 – 68, 931 P.2d at 708. Model Instruction 10-106, defining "actual physical control," was last updated in 2009, five years before the Court published *Sommers*.

The Court elaborated:

> Where appropriate, the jury should also be instructed that the focus need not be only upon the circumstances of the vehicle and the defendant when they were discovered. Where circumstantial evidence indicates that the vehicle arrived at the location it was discovered as a result of the defendant driving or physically controlling the movement of the vehicle while intoxicated, the jury may properly infer the defendant exercised actual physical control in getting the vehicle to that place.
>
> When instructing the jury, trial courts are not bound by the suggested instruction language in this opinion. The trial court remains free to craft instructions appropriate to the specific facts of the case in front of it using language that fully and fairly instructs the jury on the applicable law.

Sommers, ¶¶ 35 – 36 (citations, footnote omitted, underscore added). *See also Rogers v. State*, 105 Nev. 230, 233 – 34 and nn. 3, 4, 5, 773 P.2d 1226, 1228 and nn. 3, 4, 5 (1989) (*per curiam*) (citing *Ruona* and ruling that whether the defendant is awake or asleep is relevant to "actual physical control").

As evident in the record of this case, the meaning of "actual physical control" continues to vex judges and counsel. The District Court took three different positions on "actual physical control" in each of Mr. Gibbons's three trials. In the first trial, the District Court was going to permit Defense Counsel to argue to the jury that Mr. Gibbons's intent or motivation to drive or to sleep in his truck was relevant, but a mistrial occurred during voir dire. (D.C. Doc. 28.) Then, in the second trial, the District Court declined to use the State's proposed instruction for "actual physical control", which was the same as Model Instruction 10-106, and instead used a modified version of Defendant's instruction, which Defense Counsel attempted to withdraw in favor of the State's proposed, model instruction.[6] (D.C. Doc. 57, Instruction 15; Trial 2 Tr.

[6] The parties' proposed instructions were not filed in District Court, but they are discussed in the transcripts for the second and third jury trials.

at 255 – 74.) In the third trial, the District Court modified Instruction 15 from the second trial, again over Defense objection. (D.C. Doc. 72, Instruction 15; Trial 3 Tr. at 233 – 48.) In both the second and third trials, the Defense specifically objected to the District Court's *sua sponte* inclusion of a fifth factor to four *Sommers*'s factors, which said "the Defendant need not be conscious to be in actual physical control." (Trial 2 Tr. at 258, 274; Trial 3 Tr. at 234, 239 – 40.) Even though the language came directly from *Taylor* and *Ruona*, it was confusing and inaccurate in the context of Mr. Gibbons's case. *Taylor* and *Ruona* involved people who had actually driven their vehicles while they were intoxicated and then passed out while under the influence.

Mr. Gibbons's situation involved precisely the opposite set of facts. No evidence suggested, as the State expressly acknowledged, Mr. Gibbons had driven while under the influence. Instead, after becoming intoxicated at two different bars in Troy he walked back to his truck, lay down as best as he could position himself on the front seat, and fell asleep. Defense Counsel contended the language from *Taylor* and *Ruona* about being unconscious while in actual physical control was inappropriate and confusing in Mr. Gibbons's case. (Trial 3 Tr. at 247.)

The District Court included the language anyway, determining it is one of the factors for the jury to consider in the totality of the circumstances. (Trial 3 Tr. at 247 – 48.)

The Defense was correct. This Court has never held someone using a vehicle simply to sleep, without having driven the vehicle while under the influence before sleeping, is guilty of DUI. *Taylor* and *Ruona* are inapposite here. The District Court incorrectly interpreted the meaning of "actual physical control" and abused its discretion when including paragraph (5) in Instruction 15, which stated "that the Defendant need not be conscious to be in actual physical control." This incorrect instruction caused the jury not to be fully and accurately instructed on relevant law.

Due to the District Court's incorrect instruction on "actual physical control," Mr. Gibbons respectfully requests the Court to reverse his conviction and remand this matter for a new trial with a correct instruction.

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II. The District Court violated Mr. Gibbons's substantial rights by permitting the prosecutor to tell the jury during closing argument about discovery given to the Defense but not introduced into evidence by either party at trial. Alternatively, Mr. Gibbons received ineffective assistance of counsel when his attorney could not find the discovery the State provided and thus was unable effectively to cross-examine State witnesses about the alleged offense.

A. The District Court violated Mr. Gibbons's rights.

"At trial, the prosecutor may not assert or comment on facts not in evidence in the case. . . . M. R. P. Cond. 3.4(e) (2004) ("[a] lawyer shall not ... allude to any matter ... not supported by admissible evidence"). Nor may the prosecutor assert or attest to personal knowledge of a pertinent fact. . . . M. R. P. Cond. 3.4(e) (2004) ("[a] lawyer shall not ... assert personal knowledge of facts in issue")." *State v. Miller*, 2022 MT 92, ¶ 23, 408 Mont. 316, 510 P.3d 17 (citations omitted). Here, the District Court authorized the Prosecutor to advise the jury the Defense possessed photographs the State provided in discovery but did not introduce at trial. And so, the Prosecutor did just that in her rebuttal argument after Defense Counsel argued the failure of the State to introduce evidence favorable to Mr. Gibbons showing his position asleep in the truck raised reasonable doubt that he was in actual physical control of the vehicle.

The Defense had no obligation to assist the State in convicting Mr. Gibbons. It is irrelevant that Mr. Gibbons *could* have used photographs to try to impeach Officer Miller or Mr. Starks. What matters is that the Defense was permitted to cross-examine the State's witnesses on their failure to introduce evidence at trial to support their testimonies. Mr. Gibbons's right to effective cross-examination of State witnesses did not open the door for the Prosecutor to tell the jury the Defense possessed evidence that might have bolstered Mr. Gibbons's cross-examination.

"The presumption of innocence and state burden of proof beyond a reasonable doubt are related fundamental fair trial rights implicit in the Fourteenth Amendment Due Process Clause." *Miller*, ¶ 28 (citations omitted). The District Court's ruling incorrectly allowed the State to comment on discovery not presented in evidence at trial. Those extra-record facts prejudiced Mr. Gibbons's substantial rights to due process, to a presumption of innocence, to present a defense, to effective assistance of counsel, and to a fair trial by an impartial jury under the Fifth and Sixth Amendments to the United States Constitution and Article II, Sections 24 and 25 of the Montana Constitution. The Defense did not have to produce any evidence at trial and could comment on the

State's failure to produce evidence to corroborate its witnesses' testimony.

The Court should reverse Mr. Gibbons's conviction and remand for a new trial.

B. Alternatively, Mr. Gibbons received ineffective assistance of counsel.

> To prevail on an IAC claim, a petitioner must show both that counsel's performance was deficient, and that the deficient performance prejudiced the defense. . . . This Court applies a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" contemplated by the Sixth Amendment. . . . To show prejudice, the defendant must show that there is a reasonable probability the verdict would have been different but for counsel's deficient performance.

State v. Tipton, 2021 MT 281, ¶ 17, 406 Mont. 186, 497 P.3d 610 (citations omitted).

The two photographs taken by Mr. Starks were critical to Mr. Gibbons's defense during the second trial, which resulted in a deadlocked jury. The Defense mistakenly relied on the State presenting the same case at the third trial, using the identical evidence from the same witnesses. Defense Counsel's incorrect assumption prevented him from adequately preparing for Mr. Gibbons's third trial. "A lawyer

shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Mont. Rules Prof. Cond. 1.1. Failure to competently represent a client at trial is deficient performance. But for Counsel's unprofessional errors, a reasonable probability exists that Mr. Gibbons would not have been found guilty by the jury in the third trial.

If the Court does not reverse and remand for a new trial due to the District Court's flawed ruling that allowed the Prosecutor to tell the jury about discovery not presented in evidence, the Court should reverse and remand for a new trial because Mr. Gibbons received ineffective assistance of counsel in his third trial.

III. The $5,000 mandatory, minimum fine upon conviction of Mont. Code Ann. § 61-8-731 is facially unconstitutional under the excessive fines clause of the Eighth and Fourteenth Amendments to the United States Constitution and Article II, Section 22 of the Montana Constitution. In every case it bars the sentencing court from considering the proportionality of the fine to a defendant's conduct or the defendant's ability to pay the minimum fine. The Court's decision in *Mingus* is manifestly wrong.

The Montana and United States Constitutions prohibit the government from imposing excessive fines on people. U.S. Const.

Amends. VIII, XIV; Mont. Const. Art. 2, § 22; *Timbs v. Indiana*, ___ U.S. ___, 139 S.Ct. 682, 686 – 87, 203 L.Ed.2d 11 (2019); *U.S. v. Bajakajian*, 524 U.S. 321, 327 – 28, 118 S.Ct. 2028, 2033, 141 L.Ed.2d 314 (1998); *Yang*, ¶ 15; *State v. Wilkes*, 2021 MT 27, ¶ 26, 403 Mont. 180, 480 P.3d 823. "The proportionality of a fine to the gravity of the subject offense is the touchstone to whether a fine is constitutionally excessive." *Wilkes*, ¶ 26, citing *Yang*, ¶¶ 16 – 17 (quoting *Bajakajian*, 524 U.S. at 334, 118 S.Ct. at 2036). Mont. Code Ann. § 46-18-231(3) implements the proportionality requirement by ensuring that "'a fine is not grossly disproportionate to the gravity of the offense.'" *Wilkes*, ¶ 27, quoting *Yang*, ¶ 19. That statute provides:

> The sentencing judge may not sentence an offender to pay a fine unless the offender is or will be able to pay the 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.

Mont. Code Ann. § 46-18-231(3).

In *Yang*, the Court held the mandatory fine required by Mont. Code Ann. § 45-9-130(1), which sets a 35% market-value fine for

dangerous-drug convictions, must be read in conjunction with § 46-18-231(3).

> A sentencing judge may not impose the 35% market-value fine contained in § 45-9-130(1), MCA, without considering the factors in § 46-18-231(3), MCA, thereby ensuring that the offender's fine is not grossly disproportional to the offense committed and protecting an offender's federal and state constitutional rights to be free from excessive fines. Because the District Court imposed the mandatory 35% market-value fine under § 45-9-130(1), MCA, without considering the nature of the crime Yang committed, Yang's financial resources, or the nature of the burden the imposed fine would have on Yang, we remand this case to the District Court for recalculation of Yang's fine consistent with this Opinion.

Yang, ¶ 28.

Similarly, in *Wilkes*, the Court ruled,

> In considering the gravity of the defendant's offense under § 46-18-231(3), MCA[,] sentencing courts may consider all relevant factors of record including, *inter alia*: (1) the nature and extent of the crime[;] (2) whether the violation was related to other illegal activities[;] (3) the other penalties that may be imposed for the violation[;] and (4) the extent of the harm caused" by the crime.

Wilkes, ¶ 27 (citations, quotation marks omitted; brackets in original).

When considering the facial constitutionality of the market-value fine in *Yang*, the Court quoted Mont. Code Ann. § 45-9-130(1), "[T]he 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." *Yang*, ¶ 18. The Court then reasoned:

> The statute's "shall" language makes the fine non-discretionary—a court *must* impose the fine upon a person found to have possessed or stored dangerous drugs. Section 45-9-130(1), MCA, removes any ability of the trial court, through its mandatory nature, of protecting against an excessive fine. Accordingly, it is inconsequential that in *some* situations—following consideration of the nature of the crime committed, the financial resources of the offender, and the nature of the burden of payment of the fine—imposition of the 35%-market-value fine is not excessive. What is consequential, however, and which occurs in *every* case as a result of the mandatory nature of the fine, is the inability of the trial court to even consider whether the fine is excessive. Here, the important distinction is that in *all* situations a trial court is precluded from considering the factors the Montana legislature has expressly mandated be considered when it enacted § 46-18-231(3), MCA, to ensure that fines are not excessive as guaranteed in both the United States Constitution and Montana's Constitution.

Yang, ¶ 18 (emphasis original).

Notwithstanding *Yang*'s holding that a mandatory-fine statute which prohibits a sentencing court from even considering whether the fine is excessive is facially unconstitutional, combined with the Court's subsequent application of that holding in *Wilkes*, the Court has taken a different path when considering the mandatory fine imposed for DUI convictions under Mont. Code Ann. § 61-8-731. The DUI-fine decisions, however, have not involved a facial constitutionality challenge. For example, in *State v. Yeaton*, 2021 MT 312, 406 Mont. 465, 500 P.3d 583, and *State v. Ingram*, 2020 MT 327, 402 Mont. 374, 478 P.3d 799 (*en banc*), the Court held even though federal law prohibited the State from *collecting* a fine imposed under § 61-8-731, federal law did not bar the State from *imposing* the fine in a judgment.[7] *Yeaton*, ¶ 12; *Ingram*, ¶ 11. The Court remarked "income sources can change over time" and

[7] Mont. Code Ann. § 61-8-731 imposes a mandatory, minimum fine of $5,000 in three subsections: 1. subsection (1)(a)(iii) (for three or more DUIs or other stated offenses when sentenced to a DOC commitment or to prison); 2. subsection (1)(b)(ii) (for three or more DUIs or other stated offenses when sentenced to treatment court); and 3. subsection (3) (for four or more DUIs or other stated offenses under certain circumstances). Ingram's fine was imposed under § 61-8-731(1)(a)(iii). *Ingram*, ¶ 9. Yeaton's fine was imposed under § 61-8-731(3). *Yeaton*, ¶ 14. Mr. Gibbons's fine is imposed under § 61-8-731(3). (D.C. Doc. 4 at 2.) The arguments herein apply to the mandatory fine required in all three locations within § 61-8-731.

drew a distinction between creating a debt and requiring social security benefits be used to satisfy a debt. The former does not violate federal law, while the latter does." *Yeaton*, ¶ 11, citing *Ingram*, ¶¶ 11 – 12.

In *State v. Mingus*, 2004 MT 24, 319 Mont. 349, 84 P.3d 658 (*en banc*), the Court rejected a statutory-interpretation argument the mandatory DUI fine under an earlier version of § 61-8-731 could not be imposed without first determining the defendant had the ability to pay the fine under § 46-18-231. *Mingus*, ¶¶ 14 – 15. The Court instead held § 46-18-231 "does not apply to mandatory fines. When a fine is statutorily mandated, the court has no discretion as to whether to impose the fine, irrespective of the defendant's ability to pay." *Mingus*, ¶ 15. *Accord State v. Reynolds*, 2017 MT 317, ¶ 19, 390 Mont. 58, 408 P.3d 503 (same).

Notably, two years before deciding the mandatory dangerous-drug fine was facially unconstitutional in *Yang*, the Court cited *Mingus* in *Le* for the proposition that the mandatory, dangerous-drug fine in § 45-9-130(1) "is not subject to the discretionary authority provided to courts under the general sentencing statutes. Sections 46-18-201 *et seq*., MCA; [*Mingus*, ¶ 15] (holding discretionary sentencing statutes do not apply

to mandatory fines)." *Le*, ¶ 12. *Le*, however, did not involve a statutory interpretation claim that § 45-9-130(1) was subject to the ability to pay requirements in § 46-18-231(3). Rather, Le argued, in relevant part, the 35% mandatory fine was a sentence enhancement that violated Mont. Code Ann. § 46-1-401 and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), because the State did not allege the enhancement as part of the charged offense. *Le*, ¶ 9. The Court rejected Le's contention, ruling the fine was a penalty applied at sentencing, not an element of the offense to be proven at trial or admitted by the defendant in a change of plea. *Le*, ¶¶ 13 – 14. Thus, the Court's discussion of *Mingus* in *Le*, ¶ 12, is *dicta* unnecessary for *Le*'s holding. Paragraph 12 could be overruled without affecting the remainder of the decision.

Also noteworthy in *Le* is the Court's rejection of Le's facial constitutional challenge under the excessive fines clause of the Montana Constitution, Article 2, Section 22, to the mandatory fine in § 45-9-130(1). *Le*, ¶ 15. The Court ruled:

> Here, the Legislature incorporated the concept of proportionality into § 45-9-130, MCA, by requiring that the amount of the fine be based upon the market value of the dangerous drugs

> that a defendant illegally possessed. Thus, the greater the value of the illegally possessed drugs, or "gravity" of the offense, the greater the fine. Le's fine of $15,000 resulted from carrying 23 pounds of illegal drugs, and the calculation of the value of those drugs. Further, $15,000 is significantly less than the maximum discretionary fine of $50,000 that the sentencing court was authorized to impose for Le's conviction. Le has not demonstrated that the fine is "grossly disproportional" to the gravity of his offense and violates the Excessive Fines Provision.

Le, ¶ 15. The Court expressly retreated from *Le*'s interpretation of § 45-9-130 as a matter of state and federal constitutional law in *Yang*, recognizing the statute does not allow the sentencing judge to consider proportionality factors, other than the amount of illegal drugs the defendant possessed, that are important under the Eighth Amendment and Article 2, Section 22. *Yang*, ¶ 24.

Mingus's statutory analysis of the mandatory DUI fine in § 61-8-731 is irreconcilable with this Court's constitutional analysis in *Yang* of the mandatory drug fine in § 45-9-130(1). The crux of the holdings in *Yang*, determining § 45-9-130(1) was facially unconstitutional because it prohibited a sentencing judge from considering the ability to pay factors listed in § 46-18-231(3), and in *Wilkes*, determining the

proportionality factors of § 46-18-231(3) include "all relevant factors of record", apply with equal force to the mandatory DUI fine. It is irrelevant from a constitutional perspective that the mandatory drug fine is a set percentage of the value of the drugs with no maximum cap, while the mandatory DUI is set in a specified range here from no less than $5,000 to no more than $50,000. Both statutes bar the sentencing court from considering any proportionality factors.

The DUI mandated fine is no less offensive to the constitutional proportionality requirement than the un-capped drug fine simply because it is banded between $5000 and $50,000. *See Yang*, ¶ 23 (comparing the mandatory drug fine to the mandatory DUI fine). The problem is the non-discretionary application of fines that are disproportional to the offense or the offender. The minimum DUI fine might be grossly disproportional to the conduct underlying the offense or to the defendant's ability to pay the minimum $5,000 fine. By comparison, the mandatory drug fine would be less onerous for an indigent person convicted of felony possession of dangerous drugs by having a $50 baggie of methamphetamine in their pants pocket ($50 x .35 = $17.50 market-value fine) than if they were convicted of a felony

DUI for sleeping in the front seat of their car while intoxicated with no intention of driving ($5,000 minimum fine). The dollar amount of the fine is just one piece of the proportionality analysis under the excessive fines clause, as this Court pointed out in *Yang* and *Wilkes*.

Similarly to the mandatory, 35%-market-value drug fine, the mandatory $5,000-minimum DUI fine "could be disproportionately high in certain situations, [but] there exists no way for a sentencing judge to consider those situations and decrease the amount. Depending on the nature of the crime committed, the offender's financial resources, and the nature of the burden that the fine will impose," a minimum fine of $5,000 "may very well be excessive under both the Eighth Amendment to the United States Constitution and Article II, Section 22 of the Montana Constitution. *Yang*, ¶ 23. To the extent that *Mingus* prohibits a district court from considering the proportionality factors in § 46-18-231(3) when imposing a fine under § 61-8-731, it is manifestly wrong and must be overruled. Applying the logic of *Yang*, "No set of circumstances exist under which [§ 61-8-731(1)(a)(iii), (1)(b)(ii), or (3),] MCA is valid – the statute is unconstitutional in all of its applications because it completely prohibits a district court from considering

whether the [$5,000 minimum] fine is grossly disproportionate to the offense committed. *Yang*, ¶ 23. Additionally, Mont. Code Ann. § 61-8-731(5)(a) allows a district court to impose a proportional fine under Mont. Code Ann. § 46-18-231 on top of the mandatory fine plus other costs. This statutory scheme violates the excessive fines clause in all cases.

A litigant challenging the facial constitutionality of a statute must establish that either no set of circumstances exists under which the statute would be valid, meaning that it is unconstitutional in all its applications, or the statute lacks a plainly legitimate sweep. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, 128 S.Ct. 1184, 1190, 170 L.Ed.2d 151 (2008); *Yang*, ¶ 14; *State v. Sedler*, 2020 MT 248, ¶ 17, 401 Mont. 437, 473 P.3d 406. The mandatory, minimum fine of $5,000 in Mont. Code Ann. § 61-8-731(1)(a)(iii), (1)(b)(ii), and (3), is unconstitutional in *all* applications because it prohibits a sentencing court from considering its proportionality to a defendant's particular DUI offense, including but not limited to the defendant's ability to pay the minimum fine. This Court should reverse and vacate the $5,000 fine imposed in Mr.

Gibbons's judgment and remand for recalculation of the fine consistent with the Court's opinion. *Yang*, ¶ 25.

CONCLUSION

For the foregoing reasons, Mr. Gibbons respectfully requests the Court to reverse his conviction and remand for a new trial. The District Court did not fully and accurately instruct the jury on "actual physical control." Additionally, the District Court violated Mr. Gibbons's substantial rights when it permitted the Prosecutor to tell the jury during rebuttal argument about discovery provided to the Defense that was not introduced into evidence; alternatively, Mr. Gibbons received ineffective assistance of counsel when his attorney could not find the discovery to use during cross-examination of State witnesses.

If the Court does not discern a basis for reversing Mr. Gibbons's conviction and remanding for a new trial, it should strike the $5,000 fine and remand for a hearing in which the District Court undertakes a proportionality and ability to pay analysis.

Respectfully submitted this 24th day of March 2023.

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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 9,939, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Deborah S. Smith
DEBORAH S. SMITH

APPENDIX

Order Re: State's Motions in Limine .....App. A

Jury Instruction 15 (Trial 3) .....App. B

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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 03-24-2023:

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