IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0028

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DUSTIN LEE SEYLER,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Twentieth Judicial District Court,
Lake County, the Honorable Luke M. Berger, Presiding

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STATEMENT OF THE ISSUES

1. Did the District Court err when it denied Dustin's motion to dismiss the charges due to an unreasonably delayed post-arrest judicial review of probable cause by incorrectly ignoring judicial delay and failing to consider the relevant factors in making that determination?

2. Did the court impose an illegal sentence by adding conditions in the judgment not orally imposed, including a double charge for the costs of prosecution?

STATEMENT OF THE CASE

On January 27, 2022, Appellant Dustin Seyler (Dustin) was arrested without a warrant for suspected burglary. (District Court Document (D.C. Doc.) 2 at 2.) He later moved to dismiss the two charges of burglary against him, contending that the fourteen days he spent incarcerated after arrest and before receiving a judicial review of probable cause constituted an unreasonable delay under § 46-10-105, MCA. (D.C. Doc. 16.) The District Court denied this motion. (Order on Motion to Dismiss with Prejudice, D.C. Doc. 19, attached hereto as Appendix A.) Dustin later pled guilty to both charges pursuant to a

plea agreement, specifically reserving the right to appeal that adverse ruling. (D.C. Doc 20 at 8.)

Pursuant to the plea agreement, the District Court committed Dustin to the custody of the Department of Corrections (DOC) for ten years, five of which were suspended on various conditions on Count One. (D.C. Doc. 20 at 6; Transcript of 10/24/2022 Sentencing Hearing, attached hereto as Appendix B at 4-5; Judgment, D.C. Doc. 29, attached hereto as Appendix C, at 1.) On Count Two, he was committed to DOC's custody for five years, none suspended. (D.C. Doc. 29 at 1.) The court ordered the two sentences to run consecutively, for a total 10-year custodial sentence followed by five years of probation. (App. B at 5; App. C at 1.)

During Dustin's sentencing hearing, the court imposed specific financial obligations as conditions of his suspended sentence, expressly stating the listed items were "going to be the extent of [Dustin's] financial obligations." (App. B at 5.) The court did not orally order Dustin to pay a presentence investigation (PSI) preparation fee or any costs of prosecution. (*Id*.) The written judgment, however, included a $50 PSI fee and $200 in prosecution costs. (App. C at 4.)

Dustin timely appealed. (D.C. Doc. 32.)

STATEMENT OF THE FACTS

On January 27, 2022, Dustin was arrested without a warrant and charged by citation with two counts of burglary. (D.C. Doc. 1, TK 22-109 Notices to Appear and Complaints; D.C. Doc. 19 at 1.) Neither document contained any facts describing the charges or supporting a finding of probable cause to believe Dustin had committed such offenses. (*Id.*) Dustin appeared in Justice Court for an initial appearance the following day, January 28. (D.C. Doc. 1, Initial Appearance Form.) While the Justice Court record indicates that Dustin was advised he was charged with two counts of burglary and of his right to a judicial determination of probable cause, nothing in the Justice Court record indicates the justice of the peace determined there was probable cause to believe Dustin committed those offenses. (D.C. Doc. 1, Initial Appearance Form; *see generally* D.C. Doc. 1.) Instead, the Justice Court ordered Dustin appear at a preliminary hearing for that purpose on February 7, 2022. (D.C. Doc. 1, Initial Appearance Form, Notice of Preliminary, and Order for Release and Conditions.) Bail was set at $100,000, but Dustin was unable to post that amount and

remained incarcerated throughout his criminal proceeding. (D.C. Doc. 1, Initial Appearance Form and Order for Release and Conditions. *See* Apps. B at 5 & C at 1 re: credit for time served.)

On February 3, 2022, the State filed a motion and affidavit for leave to file an information in Montana Twentieth Judicial District Court, Lake County, seeking to charge Dustin with two counts of burglary. (D.C. Doc. 2.) The State alleged that, on January 27, 2022, a Lake County Sheriff's deputy responded to a report of an unknown male attempting to start a lawn mower in the complainant's garage. (D.C. Doc. 2 at 2.) The individual was gone by the time the deputy arrived. (*Id.*) The deputy then responded to another complaint at a different residence about a mile away, where he allegedly confronted and arrested Dustin carrying on his person several items identified as personal property belonging to the resident. (*Id.*; D.C. Doc. 23 at 14.). The deputy alleged Dustin admitted to previously being present at a different house but denied stealing anything. (D.C. Doc. 2 at 2.)

February 7 came and went without either the scheduled preliminary hearing occurring or the district court issuing an order

granting the State leave to file the information.[1] (D.C. Record; D.C. Doc. 1; D.C. Doc. 16 at 1; D.C. Doc. 19 at 1.). The District Court did not grant the State's motion for leave to file an information until February 10, 2022. (D.C. Doc 3.) Thirteen days had passed since Dustin's initial appearance, and Dustin had been incarcerated fourteen days without any judicial review of the State's assertion of probable cause. The State filed the information later that day. (D.C. Doc. 4.)

Dustin moved to dismiss the charges with prejudice, arguing neither a preliminary examination nor a court grant of leave to charge Dustin by information had occurred within a "reasonable time," as required by § 46-10-105, MCA. (D.C. Doc. 16.) Dustin noted he had been incarcerated during this delay and established practice in the Twentieth Judicial District requires sufficient justification for a delay of greater than ten days. (D.C. Doc 16.) The State agreed a numerical time limit was appropriate but argued that a total of 15 days (ten for the prosecution to file the motion and another five for the court to rule)

[1] The record is silent as to why the preliminary hearing did not occur. Trial counsel suggested below that the preliminary hearing was cancelled in expectation that the hearing would cease to be necessary pursuant to § 46-10-105, MCA, if and when the District Court granted the State's pending motion. (D.C. Doc. 16 at 1.)

was per se reasonable. (D.C. Doc. 17.) The State did not attempt to justify the delay based on any case-specific facts. (D.C. Doc. 17.) The District Court[2] denied Dustin's motion. (App. A.) Notwithstanding the clear statutory requirement that the *court order* be issued within a "reasonable time," the court instead based its ruling primarily upon the amount of time it took the prosecution to file its motion, which fell within the court's ten-day benchmark. (App. A at 3.) As discussed above, Dustin pled guilty to the charges in the information, specifically reserving his right to appeal the denial of his motion to dismiss. (D.C. Doc. 20 at 8; 8/2/22 Change of Plea Hearing Transcript at 7-8.)

STANDARD OF REVIEW

The grant or denial of a motion to dismiss in a criminal case is a question of law which this Court reviews de novo. *State v. Robison*, 2003 MT 198, ¶ 6, 317 Mont. 19, 75 P.3d 301; *State v. Diesen*, 2000 MT 1, ¶ 11, 297 Mont. 459, 992 P.2d 1287. A district court's interpretation and application of a statute is reviewed de novo. *State v. McElderry*, 284 Mont. 365, 369, 944 P.2d 230, 232-33 (1997).

[2] Judge Luke Berger assumed jurisdiction over the case from Judge Deborah Kim Christopher on April 7, 2022. (D.C. Doc. 11-12.)

In *McElderry*, this Court stated that whether the defendant was afforded independent review of the State's asserted basis for probable cause within a reasonable time is reviewed for an abuse of discretion. *McElderry*, 284 Mont. at 370, 944 P.2d at 233 (citation omitted). *McElderry* cited to *State v. Higley*, 190 Mont. 412, 621 P.2d 1043 (1980), which *McElderry* characterized as "h[o]lding that a determination of a 'reasonable time' pursuant to § 46-10-105, MCA, is within the discretion of the district court." *McElderry*, 284 Mont. at 370, 944 P.2d at 233 (citing *Higley*, 190 Mont. 412, 621 P.2d 1043). But *Higley* simply "f[ou]nd that a 10-day delay in determining probable cause was not unreasonable." *Higley*, 190 Mont. at 420, 621 P.2d at 1048. While *Higley* expressly applied the abuse of discretion standard on numerous other issues in the opinion, it did not do so with regard to the "reasonable time" issue. *See Higley*, 190 Mont. at 420, 621 P.2d at 1048. Thus, *McElderry* (as later adopted by *Robison*, ¶ 6) erroneously morphed a question of law into a discretionary standard.

In a related context, the ultimate determination of whether the defendant was afforded a speedy trial under the constitution or statutory provisions is a question of law reviewed de novo. *Compare*

Robison, ¶ 6 (probable cause review) *with State v. Steigelman*, 2013 MT 153, ¶ 10, 370 Mont. 352, 302 P.3d 396 (constitutional speedy trial right); *and State v. Case*, 2013 MT 192, ¶ 5, 371 Mont. 58, 305 P.3d 812 (statutory speedy trial right). The analysis of unreasonable delay under § 46-10-105, MCA, is substantially similar to that for speedy trial determinations. *Compare State v. Allery,* 2023 MT 25, ¶ 17, 411 Mont. 219, 523 P.3d 1088 (speedy trial analysis (citing *State v. Ariegwe*, 2007 MT 204, ¶ 113, 338 Mont. 442, 167 P.3d 815)) *with Robison*, ¶ 12 (§ 46-10-105, MCA, reasonable time inquiry). *See also State v. Taylor*, 1998 MT 121, ¶ 18, 289 Mont. 63, 960 P.2d 773 ("A speedy trial analysis, which focuses on post-indictment delay, involves an inquiry similar to that which we engage in for pre-indictment delay" in a constitutional context). While underlying factual findings must be reviewed for clear error, "[w]hether the factual circumstances establish" an unreasonable delay under § 46-10-105, MCA, is—just as for a speedy trial determination—a question of law that should be reviewed for correctness. *See Steigelman*, ¶ 10; *Case*, ¶ 5. This Court should overrule *McElderry* and *Robison* on the narrow issue of the standard of review for the "reasonable time" inquiry under § 46-10-105, MCA.

An abuse of discretion occurs when a decision is based on a mistake of law, a clearly erroneous finding of fact, or reasoning that was arbitrary and lacking in conscientious judgment, or in excess of the bounds of reason, resulting in substantial injustice. *Larson v. State*, 2019 MT 28, ¶ 16, 394 Mont. 167, 434 P.3d 241; *State v. Incashola*, 1998 MT 184, ¶ 9, 289 Mont. 399, 961 P.2d 745.

A sentence of more than one year of actual incarceration is reviewed for legality. *State v. Running Wolf*, 2020 MT 24, ¶ 7, 398 Mont. 403, 457 P.3d 218. A written judgment that does not conform to the sentencing court's oral pronouncement is an illegal sentence that is reviewable even absent a contemporaneous objection under *State v. Lenihan*, 184 Mont. 338, 602 P.2d 997 (1979). *State v. Waters*, 1999 MT 229, ¶ 24, 296 Mont. 101, 987 P.2d 1142.

SUMMARY OF THE ARGUMENT

Prompt judicial review of probable cause after arrest and before prosecution is a cornerstone of a free society and guaranteed by multiple constitutional provisions. Section 46-10-105, MCA, gives life to these protections and requires that review occur within a reasonable time. Here, Dustin waited thirteen days after his initial appearance,

and fourteen days after his arrest, before probable cause for the arrest or prosecution was reviewed by any judicial officer.

The District Court failed to analyze four of the five factors this Court has provided for a timeliness inquiry and, due to an error of statutory interpretation, went on to grossly misapply the remaining factor—length of delay—effectively slashing it in half. As a result, the court reached a conclusion contrary to that reached in a case—*State v. Robison*—with essentially indistinguishable facts. Moreover, even if this Court does not believe that *Robison* mandated a determination of unreasonable delay, this Court should still find in Dustin's favor by adopting the Twentieth Judicial District's practice of requiring some case-specific justification for delay of greater than ten days, at which point the delay is deemed presumptively prejudicial and unreasonable. No such justification was offered here. The District Court should have granted Dustin's motion to dismiss, and this case should be remanded with instructions to allow Dustin to withdraw his guilty plea and for entry of an order of dismissal with prejudice.

Alternatively, this case should be remanded with instructions to strike from the written judgment the added fees for cost of prosecution

and completion of the presentence investigation so as to conform to the oral pronouncement of sentence.

ARGUMENT

I. Dustin's 13-day delay—while incarcerated—in receiving judicial review of probable cause to arrest and prosecute was unreasonable.

Montana's charging statutes, including § 46-10-105, MCA, are designed to implement various fundamental rights of the accused. First, the freedom from unreasonable seizures under the Fourth Amendment of the United States Constitution and Article II, Section 11 of the Montana Constitution guarantee an individual who has been arrested without a warrant the right to a "probable cause determination by a neutral and detached magistrate" within, as a general matter, 48 hours. *State v. Haller*, 2013 MT 199, ¶¶ 6-8, 371 Mont. 86, 306 P.3d 338; *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56, 111 S. Ct. 1661, 1670 (1991).

Second, Article II, Section 20 of the Montana Constitution guarantees the right to an independent review of a charging decision before commencing prosecution for a serious crime in district court. Mont. Const. Art. II, § 20(1) ("All criminal actions in district court . . .

shall be prosecuted either by information, after examination and commitment by a magistrate or after leave granted by the court, or by indictment . . .”). And the Due Process Clauses of the Fourteenth Amendment of the United States Constitution and Article II, Section 17 of the Montana Constitution protect the accused from excessive pre-charging delay, particularly when incarcerated. *State v. Cameron*, 2021 MT 198, ¶¶ 18-19, 405 Mont. 160, 494 P.3d 314; *Taylor*, ¶ 20; *State v. Mosby*, 2022 MT 5, ¶¶ 49-50, 407 Mont. 143, 502 P.3d 116 (McKinnon, J., concurring).

Finally, the Sixth Amendment of the United States Constitution and Article II, Section 24 of the Montana Constitution guarantee a right to a speedy trial and impose a corresponding duty on the government to diligently prosecute the accused. *Ariegwe*, ¶¶ 35, 64. The speedy trial clock begins to run when an individual has been “accused,” whether by “arrest, the filing of a complaint, or by indictment or information.” *Ariegwe*, ¶ 42 (citing *State v. Larson*, 191 Mont. 257, 623 P.2d 954 (1981)).

Together, these constitutional guarantees limit a presumptively innocent person’s exposure to oppressive pre-trial incarceration and

psychological distress associated with being accused of a crime. *Gerstein v. Pugh*, 420 U.S. 103, 114, 95 S. Ct. 854, 863 (1975) (describing harmful effects of post-arrest detention); *State v. Cardwell*, 187 Mont. 370, 375, 609 P.2d 1230, 1233 (1980) (Article II, Section 20 charging "safeguard is necessary . . . to ensure a defendant receives a neutral determination of probable cause for detention"); *Cameron*, ¶¶ 18-19, 27-28 (charging delay); *Ariegwe*, ¶¶ 88 & 97 (oppressive pretrial incarceration and anxiety are concerns of the speedy trial right); *Barker v. Wingo*, 407 U.S. 514, 532-33, 92 S.Ct. 2182, 2193 (1972) (describing harmful effects of pretrial incarceration). Each provision requires, at various stages of the criminal process, an independent review from outside of the executive branch of law enforcement's assertion of guilt. *See McNabb v. United States*, 318 U.S. 332, 343, 63 S.Ct. 608, 614 (1943) ("The awful instruments of the criminal law cannot be entrusted to a single functionary" and must instead be "divided into different parts" and "separately vested."). And the review, at each stage, must be timely. *See Gerstein*, 420 U.S. at 114, 95 S. Ct. at 863 (prompt post-arrest review); *Mosby*, ¶¶ 49-50

(McKinnon, J., concurring); *Cameron*, ¶¶ 18-19, 27-28 (pre-indictment delay); *Ariegwe*, ¶ 35 (speedy trial).

Montana Code Annotated § 46-10-105 implements these various constitutional purposes by guaranteeing some form of post-arrest, pre-prosecution independent review of probable cause within a "reasonable time." *Higley*, 190 Mont. at419, 621 P.2d at 1048 (avoiding "unwarranted incarceration" is a "purpose of the statute"). Sections 46-10-105, -202(1), -203 MCA, require that, for all charges triable in district court, the justice court "shall, within a reasonable time" and "without unnecessary delay," hold a "preliminary examination" for the presentation of evidence after which the court must dismiss the complaint in the absence of sufficient "probable cause to believe" that "the defendant committed" "an offense" unless, alternatively, a district court "grant[s] leave to file an information" or "an indictment [is] . . .

returned." *See* § 46-10-105(2)-(3), MCA; *Haller*, ¶ 8;[3] § 46-11-201(2), MCA (probable cause required to grant leave to file information); § 46-11-331(1), MCA (at least eight grand jurors must conclude that the evidence would "warrant a conviction" to return indictment). Unless probable cause is found through one of those three procedures within a reasonable time, the charges against the defendant must be dismissed. Section 46-10-105, MCA; *Robison*, ¶ 7. Here, it was undisputed below that neither was a preliminary examination conducted nor was a grand jury convened and an indictment returned in Dustin's case. (App. A at 2.). Rather, the matter hinges entirely on whether the District Court's February 10, 2022 grant of leave to file an information was made within a "reasonable time" under § 46-10-105(2), MCA.

What constitutes a "reasonable time" is to be "'determined by the facts of the case.'" *Robison*, ¶ 12 (quoting *McElderry*, 284 Mont. at 370,

[3] The statute provides these three options in an unusual format, listing two (indictment and information) as exceptions to the rule—preliminary examination—alongside other exceptions for waiver or for minor offenses. *See Haller*, ¶ 8 (Section 46-10-105, MCA, creates three distinct procedural options from which the State may choose in obtaining independent review of its probable cause determination); § 46-10-105(1), MCA (waiver); § 46-10-105(1), MCA (case "triable in justice's court"). Here, it was undisputed below that Dustin did not waive his right to a probable cause review and that the case was not triable in justice court. (App. A at 2.)

944 P.2d at 233). In *Robison*, this Court identified the following nonexclusive factors as relevant considerations when determining the reasonableness of a delay: "length of the delay, reasons for the delay, whether the defendant has been incarcerated or prejudiced, whether the defendant has counsel, [and] the seriousness or complexity of the charge. . . ." *Robison*, ¶ 12.

In Dustin's case, the District Court made two errors under *Robison*. First, due to a misinterpretation of the plain language of § 46-10-105, MCA, it miscalculated *Robison's* initial factor—length of the delay—and short-changed Dustin by seven of his thirteen days of delay. Second, it then failed to analyze the remaining *Robison* factors at all. As a result, the court reached the opposite result of *Robison* notwithstanding indistinguishable or even more compelling facts.

A. The District Court's length-of-delay calculation contravenes the plain language of § 46-10-105, MCA.

Section 46-10-105(2), MCA, clearly stops the clock on the "reasonable time" inquiry when "the *district court* has *granted leave* to file an information." (Emphasis added.) "[W]here the language of the statute is plain, unambiguous, direct, and certain, the statute speaks

for itself." *McElderry*, 284 Mont. at 369, 944 P.2d at 232 (internal quotation marks and citation omitted). Nevertheless, the District Court, explicitly rejected this approach and instead essentially stopped the clock seven days prior, when the *prosecution* filed its motion and affidavit *requesting* leave to file an information. It explained its reasoning:

> "[D]ismissal of the charges is required i[f] a preliminary examination is not conducted and a reasonable time expires prior to the filing of an information in district court." [*Robison*, ¶ 7.]
>
> While the Court appreciates Seyler's position the reason for the delay to an incarcerated person is immaterial, this Court believes there is an important distinction to be drawn in this case when determining "reasonable time." It is undisputed the *State filed their request* for leave within the Twentieth Judicial District's 10-day time frame. It is also undisputed no preliminary examination was held, but as noted in *Robi*[]*son* and *important to this Court's decision* is the *Robi*[]*son* Court noted dismissal is required if a reasonable time expires prior to the *filing* of an information, *not the granting*. While immaterial to Seyler *it is material to this Court* the delay of 3-4 days beyond the 10-day limit imposed by the judges of the Twentieth Judicial District was *attributable to the "judge" [herself*]. This Court does not believe it is unreasonable for a district court judge to take 3-4 days (regardless of the State's argument weekends were involved) to decide on a felony charge. Additionally, it was also not unreasonable for the Justice Court to not hold the preliminary hearing as the case had been filed in District Court, *regardless of granting leave*.

(App. A at 3.) (italic emphasis added, underline emphasis in original). The court thereby excised delay attributable to the judiciary from the reasonable time inquiry.

The District Court, in concluding that "the case had been filed in District Court" within 10 days, conflated the *actual filing* of an information with a mere *request for leave* to file an information. (App. A at 3 (emphasis in original).) It is undisputed that the only relevant document that had been "filed" within ten days was the State's motion seeking leave to file an information. And neither the statute nor *Robison* say that the "reasonable time" calculation ends when the prosecution *seeks leave* to file an information, as the District Court concluded here. *See Robison*, ¶ 7. Rather, as Dustin argued below, § 46-10-105(2), MCA, unambiguously stops the reasonable time calculation when the district court "*grant[s]* leave." (Emphasis added.) (D.C. Doc. 16.) The District Court expressly dismissed this procedural step, concluding that its analysis proceeded "regardless of granting leave." (App. A at 3.)

As applicable here, the judicial branch, not the executive, is the subject of the constitutionally-mandated affirmative duty of

independent review imposed by § 46-10-105, MCA.[4] *See* § 46-10-105, MCA ("the *justice's court* shall" hold a preliminary examination within a reasonable time unless "the *district court* has granted" leave to file an information (emphases added)); § 46-10-202(1) ("*The judge* shall hear the evidence without unnecessary delay." (emphasis added)); § 46-10-203(2), MCA ("*the judge* shall dismiss the complaint and discharge the defendant" in the event of insufficient probable cause); § 46-11-201(2), MCA (after reviewing the affidavit, "*the judge* . . . shall grant leave to file the information, otherwise the application is denied" (emphasis added)). Section 46-10-105, MCA, unambiguously stops the "reasonable time" clock when the court issues a determination on probable cause—the statute makes no distinction between delay attributable to the State or delay attributable to the court. The District Court misapplied *Robison* and § 46-10-105, MCA, to effectively reduce the length of Dustin's delay from 13 to six days.

[4] In the related speedy trial context, court delay is "institutional delay[]" and, like delay attributable to the prosecutor, "weigh[s] against" a finding that the delay was reasonable. *Allery*, ¶ 20 (citing *Ariegwe*, ¶ 108).

B. This court should reverse the District Court's erroneous ruling under *Robison*.

"[A] reasonableness inquiry must be determined by the facts of the case," including the five factors set out in *Robison*: (1) length of delay; (2) reasons for the delay; (3) incarceration/prejudice; (4) presence of defense counsel; and (5) seriousness/complexity of charge. *Robison*, ¶ 12 (internal quotation marks and citation omitted). Yet, aside from an erroneous calculation of the length of delay, the District Court failed to meaningfully consider any of "the facts of [Dustin's] case" or analyze any of the remaining *Robison* factors.

Properly examining these factors, Dustin's case is even more compelling than *Robison*, where the Court upheld a dismissal for unreasonable delay. *See Robison*, ¶¶ 12-16. The defendant in *Robison* experienced an 11-day delay after appearing in justice court, two less than Dustin's (when correctly calculated). *Robison*, ¶¶ 3-4. Like Robison, Dustin was charged with burglary. *See Robison*, ¶¶ 3, 12 (seriousness/complexity of the charges). The State never asserted that Dustin's probable cause determination was complex. (D.C. Doc. 17.) To the contrary, the State's affidavit revealed that probable cause rested solely on a single paragraph alleging that Dustin had been confronted

in other persons' residences with other persons' property and there is no indication that any follow up investigation occurred after his arrest. (D.C. Doc. 2.) And, as in *Robison*, Dustin was incarcerated during the delay, satisfying the prejudice prong. *Robison*, ¶ 12 (incarceration constitutes sufficient prejudice).

Notably, unlike in *Robison*, where the defendant was held on only $10,000 bail, *Robison*, ¶¶ 4, 13, Dustin was held on $100,000 bail, despite the similar charges. (D.C. Doc. 1.) And unlike in *Robison*, where the defendant had received an initial post-arrest probable cause determination, the record here contains no indication that the Justice Court made a probable cause determination after Dustin's warrantless arrest.[5] *Robison*, ¶¶ 3, 13. In fact, the Justice Court could not have done so, as the Justice Court record contains no factual allegations whatsoever that could have formed the basis for such a determination. (D.C. Doc. 1.) Thus, during Justice Court proceedings, Dustin had no notice of the nature of the State's allegations against him, rendering

[5] Montana's criminal procedure statutes do not appear to expressly require a review of probable cause within 48 hours after a warrantless arrest as discussed in *McLaughlin*, 500 U.S. at 56, 111 S. Ct. at 1670 and *Gerstein*, 420 U.S. at 114, 95 S. Ct. at 863. *See* §§ 46-7-101 & -102, MCA.

much of the time he spent languishing in jail essentially dead time for purposes of preparing his defense.[6] And Dustin never waived his right to a timely review of probable cause at the scheduled preliminary hearing, yet the hearing was vacated with no apparent justification.

Under the totality of the "facts of the case," Dustin was entitled to a finding of unreasonable delay. *See Robison*, ¶ 12. Dustin had a longer prejudicial/incarcerated delay and was held on a much higher bail (despite similar charges) than the defendant in *Robison*, and never received the initial probable cause review granted to Robison. And, as in *Robison*, the State failed to offer justifications or make other reasonableness arguments below—limiting its arguments to the role of the day-count alone. *Robison*, ¶¶ 13-14. In *Robison*, the Court affirmed

[6] This is particularly troubling in light of the undeveloped nature of the State's assertion of probable cause for at least one of the burglary charges. The first count was eventually supported by the allegations in the State's affidavit that, (a) when arrested, Dustin admitted to having been at a different residence previously, but denied stealing anything, and that (b) another resident a mile away had recently come upon an individual matching Dustin's description trying to start a lawn mower in the complainant's garage. Burglary requires that an individual unlawfully enter an occupied structure with the purpose to commit, or actually commits, "an offense" once inside. *See* § 45-6-204(1), MCA. Neither the State's motion for leave and affidavit nor any other filing during the delay gave Dustin notice of the State's theory regarding what offense attempting to start a lawn mower might constitute.

the district court's conclusion that the delay was unreasonable. *Robison*, ¶ 15. The District Court should have come to the same conclusion under the facts here.

Instead, the District Court failed to analyze all but one of the *Robison* factors—length of delay—and then proceeded to grossly miscalculate that factor on the basis of a misinterpretation of § 46–10–105, MCA. As a result, it reached a conclusion at odds with that of *Robison*, despite similar if not even more compelling facts in this case. The District Court's ruling regarding "[w]hether the factual circumstances establish" an unreasonable delay under § 46-10-105, MCA, and *Robison* was incorrect. *See Steigelman*, ¶ 10 (de novo review in related constitutional speedy trial context); *Case*, ¶ 5 (de novo review in related statutory speedy trial context). Moreover, the District Court's decision constituted an abuse of discretion as it was premised on a misapplication of law and reached an ultimate conclusion that was arbitrary and beyond the bounds of reason. *See Larson*, § 16*; Incashola*, ¶ 9. This Court should reverse the District Court's erroneous ruling and grant Dustin's motion for dismissal, vacating the resulting

convictions and sentence. *Robison*, ¶ 7 ("Dismissal of the charges is required" if a "reasonable time expires prior to" filing an information).

C. Alternatively, if this Court does not agree that the District Court should be reversed under the *Robison* test, it should refine that test to, as in the Twentieth District, adopt a 10-day period as presumptively unreasonable and prejudicial delay, at least where the defendant is incarcerated upon a warrantless arrest.

Established Twentieth Judicial District Court practice implements *Robison* by using 10 days as a marker beyond which delays are presumptively unreasonable and prejudicial and the burden rests on the State—as the party with responsibility to accuse and bring the defendant to trial—to justify the delay under the *Robison* factors. (*See* App. A at 2-3 (District Court order referencing "the Twentieth Judicial District's 10-day time frame"); D.C. Doc. 16 Ex. B (*State v. McElderry*, Order Granting Motion to Dismiss, Twentieth Jud. Dist. (Nov. 20, 1997)—district court on remand in *McElderry* finding that the "*State has failed its burden* of showing the reasonableness of its delay for 12 days" (emphasis added); D.C. Doc. 16 Ex. C (*State v. Robison,* Order Granting Motion to Dismiss, Twentieth Jud. Dist., 3 (Dec. 27, 2001)—district court advising that "any delay in excess of ten days will trigger

an inquiry into the reasonableness of the delay, and . . . the burden of showing reasonableness is upon the State"); D.C. Doc. 16 Ex. D (*State v. Blackcrow*, Order to Dismiss with Prejudice, Twentieth Jud. Dist., 2 (Feb. 20, 2022)—district court ruling that, "[w]hile there is no bright line rule, delay after 10 days should be sufficiently justified and explained").

This approach draws on this Court's analogous speedy trial jurisprudence, which the *Robison* analysis parallels in large part. *See Taylor*, ¶ 18 ("A speedy trial analysis, which focuses on post-indictment delay, involves an inquiry similar to that which we engage in for pre-indictment delay"). *Compare Allery*, ¶¶ 17-19 (speedy trial analysis considers: (1) length of delay—200-day threshold with further delay progressively raising the state's burden to justify it; (2) reasons for delay; (3) the accused's responses to delay; and (4) prejudice to the accused (citing *Ariegwe*, ¶ 113)) *with Robison* ¶ 12 (§ 46-10-105, MCA, reasonable time inquiry includes: (1) "length of the delay"; (2) "reasons for the delay" and the "seriousness or complexity of the charge"; (3)

"whether the defendant has counsel"; and (4) "whether the defendant has been incarcerated or prejudiced").[7]

This Court has repeatedly held that there are no hard numerical "outer limit[s]" to what might constitute a reasonable time. *See Robison*, ¶¶ 10-11; *McElderry*, 284 Mont. at 369-71, 944 P.2d at 232-33. However, it has not spoken directly to the practice at issue here: taking 10 days as sufficient under the length-of-delay prong to warrant shifting the burden to the State to provide a sufficient explanation as to the "reasons for the delay" under *Robison*. *See Robison*, ¶¶ 10-12; *McElderry*, 284 Mont. at 369-71, 944 P.2d at 232-33.[8] As in the speedy trial context, the presumptive burden shift serves the interests of

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[7] Similarly, the burden is on government to justify a delay greater than 48 hours in obtaining a probable cause review after a warrantless arrest. *McLaughlin*, 500 U.S. at 57, 111 S. Ct. at 1670.

[8] The *Robison* Opinion appears to indicate that the Court believed the district court in that case had contravened *McElderry's* prohibition on hard numerical "outer limit[s]." *See Robison*, ¶ 11. The discussion was not material to the *Robison* Court's ultimate holding in favor of the defendant. *See Robison*, ¶¶ 11 & 15. Regardless, the use of non-dispositive numerical benchmarks to aid in making consistent assessments of *Robison's* length-of-delay prong is clearly distinguishable from the hard outer-limits proscribed in *McElderry,* and is consistent with how *Robison* itself applied the relevant factors. *See Robison*, ¶¶ 4, 12-14 (affirming dismissal where defendant made preliminary showing of 11-day incarcerated delay and State subsequently failed to offer arguments before district court regarding reasons for the delay, prejudice, or other facts relevant to reasonableness inquiry).

justice, as the accused is not in a position to readily know the reasons for the delay or the complexity of the State's case. *See Ariegwe* ¶¶ 62, 64, 99 (state bears increasing burden to explain pretrial delays beyond 200 days; prejudice is often impossible to prove for incarcerated defendants). Moreover, the approach offers defendants, courts, and prosecutors alike a much-needed measure of certainty and consistency. (*See* D.C. Doc. 17 at 1 (prosecutor agreeing with defense in arguing that "[i]t seems reasonable and necessary to determine a period of time" for the judicial determination of probable cause to occur)).

Both parties and the court relied upon a numerical benchmark below. (*See* D.C. Doc. 16 at 4-5 (motion to dismiss, pointing to incarcerated delay beyond 10-day mark); D.C. Doc. 17 at 1-2 (response to motion to dismiss—State agreeing necessity of taking the "same stance as is done with speedy trial determinations"—proposing a 15-day total—"[r]ather than [] a floating mark"); App. A at 2-3 (court order referencing and applying "the 10-day deadline followed by the judges of the twentieth judicial district")). The correctly calculated number of days of delay, 13 (rather than six), clearly exceeds the ten-day mark.

The State was therefore required to offer some justification for the delay or other reasonableness arguments. It made no such effort.

Instead, the State argued a more appropriate limit would be a 15-day limit (ten to the prosecution, five to the court). (D.C. Doc. 17.) While other numbers are certainly conceivable, the ten-day threshold used by judges of the Twentieth Judicial District has proven workable and is in accordance with the underlying constitutional purposes of § 46-10-105(2), MCA. Law, like "[a]rt . . ., consists in drawing the line somewhere." G.K. Chesterton, *Orthodoxy*, (1908). *E.g., Ariegwe*, ¶¶ 107 & 123 (implementing 200-day threshold in speedy trial context); *McLaughlin*, 500 U.S. at 57, 111 S. Ct. at 1670 (implementing 48-hour threshold for probable cause determination after arrest). These constitutional prerogatives are especially pressing here, where Dustin, unlike the defendant in *Robison*, did not receive a prompt post-arrest review of probable cause at his initial appearance but was nonetheless held on $100,000 bail. *Robison*, ¶ 13. If this Court declines to find in Dustin's favor under the facts of *Robison* alone, it should alternatively hold that Dustin's delay was unreasonable because the State failed to offer any justification or other arguments to show reasonableness of a

delay beyond 10-days. *See Robison,* ¶¶ 12-15 (upholding finding that prejudicial incarcerated delay of 11 days without State-offered reasonableness justifications was unreasonable).

II. Alternatively, Dustin's Written Judgment Must Conform to his Oral Sentencing.

Alternatively, if this Court does not vacate Dustin's convictions and sentence, the written judgment should be remanded to conform to the sentence pronounced orally at Dustin's sentencing hearing. A sentence that is "orally pronounced from the bench in the presence of the defendant is the legally effective sentence and valid, final judgment." *State v. Calahan*, 2023 MT 219, ¶ 27, 414 Mont. 71, 538 P.3d 1129 (internal quotation marks omitted); *State v. Lane*, 1998 MT 76, ¶ 40, 288 Mont. 286, 957 P.2d 9. At the sentencing hearing, the District Court imposed an exclusive list of five financial obligations:

> [(1)] There's restitution in the amount of $185. That will be paid through the Department of Corrections and there's a surcharge with that. [(2)] There is a $20 surcharge for each charge and [(3)] a $50 victim advocate fee; [(4)] there's one $10 technology user fee; [(5)] there's also probation and supervisory fees. *That's going to be the extent of your financial obligations.* I want you to pay the restitution and those other amounts when you get out and take care of those.

(App. B at 5 (emphasis added).)

Nevertheless, the court's written judgment also contains a $200 cost-of-prosecution fee and a $50 PSI fee, neither of which were mentioned by the sentencing court among Dustin's financial obligations. (App. C at 4.) This case must be remanded to the District Court to conform to its written judgment to the orally imposed and legally effective sentence. *Calahan*, ¶ 29.

Even if the district court had orally imposed a $200 fee for cost of prosecution—which it did not—such a condition would have been illegal, in any event. Section 46-18-232(1), MCA, provides that a court may require the defendant to pay "$100 per felony case or $50 per misdemeanor case[.]" While Dustin pleaded guilty to two felony *counts* of burglary, he was sentenced with regard to only one *case*—DC 22-0032. (*See* App. C at 4; App. B at 2, 6.)[9] Thus, he could only have been required to pay $100 for the costs of prosecution in this case. The additional $100 is facially illegal and this Court should remand the

[9] The presentence investigation, in recommending fees and charges, inexplicably referenced two different district court case numbers, neither of which correspond to the instant case. (D.C. Doc. 23 at 11.)

sentence to reduce the cost-of-prosecution fee to a total of $100 if it does not strike the fee altogether.

CONCLUSION

Following his warrantless arrest, Dustin spent 14 days incarcerated awaiting judicial review of probable cause. In denying Dustin's motion to dismiss, the District Court misapplied *Robison* and misinterpreted § 46-10-105(2), MCA, inexplicably excising delay attributable to the judicial branch from the unreasonable delay inquiry. Dustin respectfully asks this Court to reverse the District Court's denial of Dustin's motion to dismiss with prejudice and remand for a withdrawal of Dustin's guilty pleas and vacatur of the resulting convictions and sentences for both counts of burglary. If this Court does not reverse the lower court's decision, it should remand with instructions to amend the judgment to conform to the legally effective sentence verbally pronounced at sentencing by stripping the PSI fee and costs of prosecution or, alternatively, reducing the latter fee from $200 to $100.

Respectfully submitted on this 15th day of February, 2024.

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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 6,412, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Anders K. Newbury
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APPENDIX

CERTIFICATE OF SERVICE

I, Anders K. Newbury, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-15-2024:

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