IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Case Number: DA 24-0178

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CRAIG ALLEN MCCREA,

Defendant and Appellant.

ON APPEAL FROM THE TWENTIETH JUDICIAL DISTRICT COURT
IN AND FOR LAKE COUNTY, STATE OF MONTANA
BEFORE THE HONORABLE ROBERT L. DESCHAMPS III

OPENING BRIEF OF APPELLANT CRAIG ALLEN MCCREA

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.

Pursuant to M. R. App. P. 12(1)(b) Appellant Craig McCrea states the issues presented for review are as follows:

Issue One: The District Court erred when it denied Appellant's Motion to Suppress.

a. Preservation of Review: This issue was raised and ruled upon as follows:

   i. In Appellant's Motion to Suppress, *See* Record at Register of Actions Listing, Filing No. 41, hereinafter "ROA at [document sequence no.] ____," or ROA 41.

   ii. In Appellant's Argument at the Hearing on the Appellant's Motion to Suppress, *See* Transcript of the Proceedings on Appeal, Motions Hearing on July 27, 2023, hereinafter "Tx-MTNS" at 22:7-27:24.

   iii. In Appellant's Reply Brief in Support of Motion to Suppress, ROA 49.

   iv. The district court denied the motion below. *See* Tx-MTNS at 27:20-27:24.

Issue Two: The District Court erred when it denied Appellant's Plea of Former Jeopardy and Motion to Dismiss with regard to Count 2 of the Amended Information.

a. Preservation of Review: This issue was raised and ruled upon as follows:

i. In Appellant's Plea of Former Jeopardy and Motion to Dismiss, ROA 39.

ii. In Appellant's Argument at the Hearing on the Appellant's Motion to Suppress, *See* Tx-MTNS at 10:1-18:5.

iii. In Appellant's Reply Brief in Support of Plea of Former Jeopardy and Motion to Dismiss, ROA 48.

iv. The district court denied the Motion. Order, ROA 53, entered August 28, 2023.

Issue Three: The District Court imposed an illegal sentence.

a. Preservation of Review:

i. The sentence is illegal and no objection or ruling is necessary to preserve review of an illegal sentence. *State v. Thibeault*, 2021 MT 162, ¶9, 404 Mont. 476, 490 P.3d 105, *citing State v. Coleman*, 2018 MT 290, ¶¶7-11, 393 Mont. 375, 431 P.3d 26, ("…[U]npreserved assertions of error that a particular sentence or sentencing condition was either facially illegal (*i.e.*, of a type or character not authorized by statute or otherwise in excess of the statutorily authorized range or limit for that type of sentence or condition), or facially legal but authorized by a facially unconstitutional statute, are subject to review for the first time on appeal."); *See Also State v. Tippets*, 2022

MT 81, ¶9, 408 Mont. 249, 509 P.3d 1 ("On appeal, we generally refuse to review an issue to which the party failed to object at the trial court level, unless a criminal sentence 'is alleged to be illegal or in excess of statutory mandates.' *State v. Kotwicki*, 2007 MT 17, ¶8, 355 Mont. 344, 151 P.3d 892 (*citing State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979)).")

ii. Appellant nevertheless preserved the issue by filing a timely objection to the sentence pursuant to Mont. Code Ann. § 46-18-116(2). *See* ROA 64.

II. STATEMENT OF THE CASE.

Pursuant to M. R. App. P. 12(1)(c), Appellant indicates briefly the nature of the case and the procedural disposition in the district court below, and states as follows:

Appellant was charged by Information on May 16, 2022 with the offense of Criminal Possession of Dangerous Drugs, a felony, (a violation of Mont. Code Ann. § 45-9-102). ROA 4. The Information alleged only one count, and the dangerous drug was alleged to be fentanyl. *Id*. Appellant entered a plea of not guilty, ROA 6. Appellant was subsequently charged in an Amended Information with the same offenses, Criminal Possession of Dangerous Drugs, a felony, (a violation of Mont. Code Ann. § 45-9-102), but the Amended Information alleged two counts. ROA 20.

Count 1 alleged possession of fentanyl and Count 2 alleged possession of methamphetamine. *Id*.

Prior to trial, Appellant filed a Motion to Suppress, ROA 41, seeking to suppress specified evidence on the grounds it was seized in violation of the Fourth Amendment to the United States Constitution as well as Art. II, §§10 and 11 of the Montana Constitution. *See* ROA 41, page 6, Section II. Appellant also filed a Plea of Former Jeopardy and Motion to Dismiss both counts of the Amended Information on the grounds the prosecution was barred by, *inter alia*, Art. II, §25 of the Montana Constitution.[1] ROA 39, pages 1-2.

The district court conducted a hearing on the motions on July 27, 2023, ROA 52; *See Also*, Tx-MTNS. The district court denied the Motion to Suppress with an oral order from the bench during the hearing, (Tx-MTNS at 27:20-27:24), and issued a written order granting in part, and denying in part, the Plea of Former Jeopardy and Motion to Dismiss. *See* ROA 53. The Order granted the plea of former jeopardy on Count 1 (fentanyl) of the Amended Information, dismissing Count 1, and denied the motion with regard to Count 2 (methamphetamine).

Appellant subsequently entered into a negotiated plea agreement in which he reserved the right to appeal the denial of his pretrial motions, the Motion to Suppress

[1] The Appellant does not appeal the propriety of the denial of the motion based on the statutory double jeopardy bar under Mont. Code Ann. § 46-11-504. *See* ROA 39, pages 1-2.

and the Plea of Former Jeopardy and Motion to Dismiss, pursuant to Mont. Code Ann. § 46-12-204(3), ROA 55, page 5, ¶5, as well as entered a plea of guilty to Count 2, Possession of Dangerous Drugs, methamphetamine, in violation of Mont. Code Ann. § 45-9-102. *See* ROA 55, page 4, ¶1. The State consented to the reservation of the right to appeal the denial of Appellant's Pretrial Motions, ROA 55, page 8 (signature of prosecutor), and district court approved the reservation. *See* Transcript of the Proceedings on Appeal, Change of Plea Hearing, October 31, 2023 and Sentencing, January 24, 2024, hereinafter "Tx" at 22:2-22:3; *See Also,* 17:17-17:18.

Appellant was sentenced and final judgment entered on January 25, 2024, ROA 61. Appellant filed a timely objection to the Judgment pursuant to Mont. Code Ann. § 46-18-116(2) and the district court below has not ruled on the objection as of the date of this Brief.

Appellant timely filed a Notice of Appeal on March 22, 2024.

III. STATEMENT OF THE FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW.

Pursuant to M. R. App. P. 12(1)(d), Appellant states the facts relevant to the issues presented for review, with references to the pages or parts of the record at which material facts appear, are as follows:

a. Facts Relevant to Issue One: Denial of Motion to Suppress the May 5, 2022 Stop.

i. On May 5, 2022, Law Enforcement officers initiated a stop of an automobile, a 2017 Silver Chevy Impala, driven by Appellant McCrea, with three passengers aboard. *See Generally,* Exhibit 1 at ROA 42, Lake County Sheriff's Office Report.

ii. The Chevy Impala was owned by Appellant McCrea's father, Robert McCrea. *Id* at page McCrea 007, (Vehicle 1). Appellant McCrea was alleged to have driven the Silver Impala owned by his father, "frequently." *Id* at page McCrea 009, (first paragraph of "Narrative."). There were three passengers, Cassidy Muth, David Kallowat and Bradley Williams. *Id* at page McCrea 010; *See Also*, *Id.* at page McCrea 006-007 (Suspect Information).

iii. Appellant McCrea did not do anything illegal to justify a stop. He did not commit any traffic infractions and was compliant with all state and local registration requirements. *See Id. Generally*.

iv. Detective Sciaretta of the Lake County Sheriff's Office, badge number 1512, wrote the Report at page McCrea 004 of Exhibit 1 at ROA 42. Detective Sciaretta logged events in his report in chronological order as they occurred after 11:35:29 a.m. on May 5,

2022. *See Id.* at pages McCrea 012-014. The stop was initiated at 11:35:29 a.m. on May 5, 2022. *See Id.* at page McCrea 012, which provides:

1. "P>IC< TRAFFIC STO 1113529"

v. Cassidy Muth and Craig McCrea were "detained" *See Id* at page McCrea 012 which provides:

1. "1512: CODE 4, X4 IOS ON SCENE. CASSIDY & CRAIG MCCREA DETAINED. NO NEED"
2. "220505/114105/DP001,MC911"
3. This entry conveys the following information: (1) Badge No. 1512, Detective Sciaretta, was indicating "Code 4," or everything was under control and the scene was "safe" and there was no need to dispatch additional officers to help secure the scene because it was secure; (2) Muth and McCrea, and probably Kallowat and Williams also, were detained and in custody; and (3) These circumstances and conditions and events existed at 11:41:05 a.m. on May 5, 2022.

vi. At 11:41:33 a.m. on May 5, 2022, after the stop, after Appellant McCrea and the other suspects were detained and the scene under

control, Detective Sciaretta was advised there was a warrant outstanding for the arrest of Muth. *See Id.* at page McCrea 013, which provides:

1. "ADV 1512 OF MUTHS 29"
2. "220505/114133/DP001,MC911"
3. This entry conveys the following information: (1) "Adv" means advised; (2) "1512" refers to Detective Sciaretta. The reference is to his badge number; (3) A "29" is police code for an outstanding warrant; and (4) "Muths 29" refers to Cassidy Muth's outstanding warrant.
4. In other words, Detective Sciaretta was advised by dispatch of Cassidy Muth's arrest warrant at 11:41:33 a.m. on May 5, 2022, which was after he stopped the Chevy Impala, and not before.

vii. As a result of the stop, Detective Sciaretta and other Government Agents discovered evidence Appellee used against Appellant McCrea, including, but not limited to: (1) illegal Drugs and drug residue (methamphetamine and fentanyl); (2) drug paraphernalia; (3) a cell phone with incriminating messages; (4) a statement/interview with Appellant which contained admissions and/or statements; (5) a

DNA sample known to belong to Appellant; (6) a more thorough search of the vehicle which yielded additional incriminating evidence; (7) witness identities and testimony (Muth, Kallowat and Williams); (8) Appellant's subsequent consent to search the car, phone, and other containers; and (9) statements by Appellant's father Robert McCrea.

1. Fruits of the stop included, but were not limited to, applications for search warrants, warrants, searches, and evidence reflected in the returns. *See* Exhibit 2 at ROA 42 (phone warrant documents) and Exhibit 3 at ROA 42 (auto warrant documents).
2. The district court below denied the Motion to Suppress. Tx-MTNS at 27:20-27:24.
3. The district court below made the following findings of fact:
    a. Based on the reports and exhibits described above (Exhibit 1 at ROA 42), the district court concluded "…the officers knew that [Muth] was a wanted person well before the stop..."

b. Facts Relevant to Issue Two: Denial in Part of Plea of Former Jeopardy and Motion to Dismiss.

i. The Amended Information, ROA 20, states:

> …COUNT 1: Criminal Possession of Dangerous Drugs, a Felony, under MCA 45-9-102, with a maximum penalty provided by law of imprisonment in the state prison for 5 years and a fine of $5,000.
>
> The facts constituting the offense are:
>
> COUNT 1: on or about May 5, 2022, in Lake County, Montana, the Defendant, CRAIG ALLEN MCCREA, possessed the dangerous drug fentanyl.
>
> COUNT 2: On or about May 5, 2022, in Lake County, Montana, Defendant, CRAIG ALLEN MCCREA, possessed the dangerous drug methamphetamine.

1. The Amended Information in this case was filed pursuant to a Motion and Affidavit for Leave to File an Amended Information (ROA 18), and after examination as required by Art. II, § 20(1) of the Montana Constitution, the district court below granted leave to file the Amended Information. *See* Order, ROA 19.

2. The Affidavit in Support of the Motion for Leave alleged, "…Investigator William Mesteth …located two small blue Mexican fentanyl pills on the driver's floorboard …[and

later] located a baggie of methamphetamine…" ROA 18, at 2:13-2:18.

3. The facts alleged in the Amended Information involve a single transaction or occurrence, and a single alleged transgression, which occurred on May 5, 2022 in a Chevy Impala being driven in Lake County. The methamphetamine in Count 2, (as well as the fentanyl in Count 1), were located in the Chevy Impala stopped and seized on May 5, 2022.

ii. On August 24, 2022, Appellant McCrea was indicted by a United States Grand Jury for conspiracy to possess with intent to distribute fentanyl (in violation of 21 U.S.C. 846) and possession with intent to distribute fentanyl (in violation of 21 U.S.C. 841 and 18 U.S.C. 2). *See* Federal Indictment at Exhibit 1 of ROA 39.

1. The Federal Indictment alleged the date of the crime was between December 8, 2021 and May 5, 2022. *See Id* at Counts 1 and 2 (Defendant was not charged in Counts 3, 4 or 5 of the Indictment). The Federal Indictment was based on two transactions and occurrences, one of which occurred on January 4, 2022 and another which occurred

on May 5, 2022. The Federal Indictment alleged only possession of fentanyl. *See Id*.

2. Federal courts sentence convicted defendants based on a Presentence Investigation Report. *See* Fed.R.Crim.P. 32. A federal sentence, or punishment, is based on "relevant conduct." *See* U.S.S.G. §1B1.3. Relevant conduct includes "…all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant…" *Id.* at §1B1.3(a)(1)(A).
3. On May 19, 2023, Appellant McCrea was convicted in the United States District Court for the District of Montana. The judgment of conviction and sentence is attached as Exhibit 2 of ROA 39.
4. Appellant was convicted, sentenced, and punished for his "relevant conduct" which included possessing both fentanyl and methamphetamine on May 5, 2022. The facts and circumstances of the offense, "The Offense Conduct" is set forth in the Federal Presentence Investigation Report

"PSR" Exhibit 3 at ROA 43, at pgs. 9-11, and 14, ¶¶38, 42, 47 and 65.

5. The facts and allegations supporting Appellant's federal conviction were as follows: Appellant possessed fentanyl with the intent to distribute on January 4, 2022 and May 5, 2022. The May 5, 2022 possession involved, as it does with the Amended Information, possession of two fentanyl pills located in the Chevy Impala registered to Appellant's father. Appellant's recommended sentence was calculated based on the amount of drugs (fentanyl) he was demonstrated to possess, and this calculation included the pills found and seized on May 5, 2022. *See* PSR, Exhibit 3 at ROA 43, page 9, ¶38. It also included the methamphetamine which is Count 2 of the Amended Information.

6. The district court below granted the motion with respect to Count 1 (Fentanyl) but denied it with regard to Count 2 (Methamphetamine). *See* ROA 53. *See Also*, Tx-MTNS at 17:8-18:5.

c. Facts Relevant to Issue Three: Entry of Illegal Sentence.

i. At sentencing the district court gave no indication it was imposing the sentence on Count 2 of Case No. DC-22-124 consecutive to the non-existent and as yet unimposed sentence in Case No. DC-22-126. *See* Tx at 14:17-24:13.

ii. The minute entry for the sentencing proceedings on January 24, 2024 similarly makes no mention of the sentence being consecutive to any non-existent or as yet unimposed sentences. *See* ROA 60.

iii. The Judgment nevertheless provides "…The Sentences[2] [sic] shall run Concurrent To his Federal sentence for Possession With Intent to Distribute Fentanyl and Consecutive to any sentence that might be imposed in DC-22-126." ROA 61 at 1:11-1:13.

iv. Appellant filed a timely objection pursuant to Mont. Code Ann. § 46-18-116(2), ROA 64, alleging the written judgment conflicted with the oral pronouncement of the Court because:

1. The Court's oral pronouncement was Appellant's sentence on Count 2 of the Amended Information in DC-22-124 was concurrent with his Federal Sentence in United States District Court for the District of Montana, Case No. CR-

[2] One, and only one, sentence was entered by the district court on January 24, 2024.

22-41-M-DWM and did not state it would be consecutive (or concurrent) to any non-existent sentences, such as the non-existent sentence in DC-22-126.

2. Appellant received no other sentences on January 24, 2024. He pled guilty to Count 2, and only Count 2. The Court dismissed Count 1 in the Order at ROA 53. There were no other counts in the Amended Information in DC-22-124.
3. *See* ROA 64.

IV. STATEMENT OF THE STANDARD OF REVIEW.

Pursuant to M. R. App. P. 12(1)(e), Appellant states the standard of review for each issue presented for review is as follows:

Issue One. Erroneous Denial of Motion to Suppress. This Court has two interrelated standards of review of a district court's ruling on a motion to suppress.

a. This Court's review is plenary as to whether the district court correctly interpreted and applied the law. *See State v. Bieber*, 2007 MT 262, ¶20, 339 Mont. 309, 170 P.3d 444.
b. This Court reviews a district court's factual findings, upon which a motion to suppress is based, on a clearly erroneous standard. *See Id.* To determine whether a finding of fact is clearly erroneous, this Court ascertains whether

the finding is supported by substantial evidence, whether the district court misapprehended the effect of the evidence, and whether the Court is nevertheless left with a definite and firm conviction that the district court made a mistake. *Id*.

Issue Two. Erroneous Denial in Part of Plea of Former Jeopardy and Motion to Dismiss.

a. "A district court's denial of a defendant's motion to dismiss a charge on the basis of double jeopardy presents a question of law that this Court reviews for correctness." *State v. Cech*, 2007 MT 184, ¶7, 338 Mont. 330, 167 P.3d 389, *citing State v. Beavers*, 1999 MT 260, ¶21, 296 Mont. 340, 987 P.2d 371.

Issue Three. Imposition of an Illegal Sentence.

a. The determination of whether a sentence is legal is a question of law upon which this Court exercises *de novo* review. *State v. Rosling*, 2008 MT 62, ¶59, 342 Mont. 1, 180 P.3d 1102, *citing State v. Ariegwe,* 2007 MT 204, ¶175, 338 Mont. 442, 167 P.3d 815.

V. ARGUMENT.

Pursuant to M. R. App. P. 12(1)(f) and (g), Appellant makes his Argument and precedes same with a summary of the argument.

a. Summary of Argument.

On May 5, 2022, Appellant McCrea was driving a Chevy Impala with three passengers aboard: Muth, Kallowat, and Williams. Appellant did not violate any traffic laws or regulations. Officers allegedly stopped the Impala because one of the passengers, Muth, had one or more warrants for her arrest. The officers did not know whether Muth had a warrant but instead called "Dispatch" to ascertain whether a warrant existed. Without waiting for Dispatch to advise them of Muth's warrant status, the officers stopped the Impala, and after the stop, after detaining the occupants, after questioning the occupants, after securing the scene, the officers were subsequently advised by Dispatch that Muth indeed had a warrant for her arrest. At the time of the stop, the Officers did not have reasonable suspicion to stop the Chevy Impala.

Appellant engaged in one transgression against society on May 5, 2022 involving one transaction. He was convicted and punished in federal court for this transgression and is being punished again by virtue of his conviction and sentence on Count 2 of the Amended Information in the district court below. Art. II, §25 of the Montana Constitution as presently interpreted, prohibits this circumstance.

Alternatively, §25 should be interpreted consistently with the intent of the framers and should be held to prohibit Appellant's conviction and sentence on Count 2 of the Amended Information.

The sentence reflected in the Judgment at ROA 61 is illegal. A district court cannot impose a sentence consecutive to, (or concurrent with), a non-existent or as yet unimposed sentence in another matter. The Judgment indicates the sentence is "…Consecutive to any sentence that might be imposed in DC-22-126…" and it is therefore illegal and in violation of "sound sentencing principles." *State v. McGuire*, 260 Mont. 386, 860 P.2d 148 (1993). The illegal components of the sentence must be stricken.

b. Argument.

i. The May 5, 2022 Stop Violated the Constitution.

Appellant McCrea was illegally stopped (seized) and as a result of the illegal and unconstitutional seizure, State agents discovered evidence, witness identities, witness testimony and obtained statements from Appellant and others. All the evidence from each stop is a fruit of the constitutional violation, no exception to the exclusionary rule applies, and the Court must suppress and exclude the evidence from trial.

1. Burden of and Standard of Proof.

The May 5, 2022 stop and search, was not based on a warrant. Warrantless searches are presumptively unreasonable, and the burden of proving a warrantless search or seizure did not violate the Fourth Amendment was on the State. *See Katz v. United States,* 389 U.S. 347, 357 (1967); *United States v. Scott*, 705 F.3d 410, 416 (9th Cir. 2012), *citing United States v. Hawkins*, 249 F.3d 867, 872 (9th Cir. 2001). *See Also, State v. Hoover*, 2017 MT 236, note 5, 388 Mont. 533, 402 P.3d 1224 ("Upon challenge in a criminal proceeding, the State has the burden of proving that an officer had an objectively reasonable, particularized suspicion of criminal activity.") Appellee had the burden of proving one of the narrowly construed judicial exceptions to the warrant requirement applied. *See Coolidge v. New Hampshire,* 91 S.Ct. 2022, 2032 (1971); *Vale v. Louisiana,* 90 S.Ct. 1969, 1972 (1970); *Chimel v. California,* 89 S.Ct. 2034, 2039 (1969); *United States v. Jeffers,* 342 U.S. 48, 51 (1951); *McDonald v. United States,* 335 U.S. 451, 456 (1948); *State v. Sorenson,* 180 Mont. 269, 273, 590 P.2d 136, 139 (1979)(citing *Coolidge* and *Katz)*. The Appellee, not Appellant McCrea, had the burden of proving the Stop on May 5, 2022 was lawful because it was conducted without a warrant. Appellee did not carry this burden.

2. Fourth Amendment Standards for Lawful Automobile Stops.

Whren v. United States, 517 U.S. 806, 809-810 (1996) recognized:

> The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a "seizure" of "persons" within the meaning of this provision. *See Delaware v. Prouse,* 440 U.S. 648, 653, 99 S.Ct. 1391, 1395, 59 L.Ed.2d 660 (1979); *United States v. Martinez–Fuerte,* 428 U.S. 543, 556, 96 S.Ct. 3074, 3082, 49 L.Ed.2d 1116 (1976); *United States v. Brignoni–Ponce,* 422 U.S. 873, 878, 95 S.Ct. 2574, 2578, 45 L.Ed.2d 607 (1975).

"An automobile stop is thus subject to the constitutional imperative that it not be "unreasonable" under the circumstances." *Id.* Stopping an automobile and detaining its occupants constitutes a seizure within the meaning of the Fourth Amendment, even though the purpose of the stop is limited and the resulting detention brief. *Whren, supra*. Appellant submits his stop was not "limited" nor was the resulting detention "brief." However, as an initial matter, Appellant submits when the respective officers activated their lights and pulled the vehicle over, Appellant had been "seized" as that term is contemplated by the Fourth Amendment. Therefore, the seizure at that time must be based on evidence and information known to the officers at the time of the seizure, and not what they learned afterwards, which in this case was that Muth had a warrant for her arrest.

A motor vehicle stop is analogous to an investigative detention under *Terry*. *See Berkemer v. McCarty,* 468 U.S.420, 439 (1984) citing *Terry v. Ohio*, 392 U.S. 1 (1968). The reasonableness of the stop is evaluated under a two prong test set forth in *Terry*, by asking (1) "whether the officer's action was justified at its inception," and (2) "whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry,* at 20. "The concept of reasonable suspicion ...is not 'readily, or even usefully, reduced to a neat set of legal rules,'" but must be determined by looking to "'the totality of the circumstances—the whole picture,'" *United States v. Sokolow,* 490 U.S. 1, 7–8 (1989) *quoting Illinois v. Gates,* 462 U.S. 213, 232 (1983) and *quoting United States v. Cortez,* 449 U.S. 411, 417 (1981). A court must evaluate the proffered basis for a stop against the standard of whether it was objectively reasonable, given the totality of the circumstances. This Court should examine whether all of the factors, taken together, "sufficed to form a particularized and objective basis" for stopping the vehicle which Appellant McCrea was driving on May 5, 2022. *See United States v. Arvizu,* 534 U.S. 266, 267 (2002); *United States v. Sigmond–Ballesteros,* 285 F.3d 1117, 1121 (9th Cir. 2002)(amended opinion).

"[T]he relevant inquiry" concerning the inferences and conclusions a court draws "is not whether particular conduct is 'innocent' or 'guilty,' but the degree of

suspicion that attaches to particular types of noncriminal acts." *Sokolow,* 490 U.S., at 10, *quoting Gates,* 462 U.S. at 243-244.

3. The Totality of the Circumstances did not Amount to Reasonable Suspicion to Stop the Vehicle Driven by Appellant on May 5, 2022.

This Court should make a *de novo* determination regarding whether the facts submitted justify the stop on May 5, 2022 because that determination is a mixed question of law and fact. In *State v. Warclub,* 2005 MT 149, ¶21, 327 Mont. 352, 114 P.3d 254, this Court held "…mixed questions of law and fact are those in which 'the historical facts are admitted or established, the rule of law undisputed, and the issue is whether the facts satisfy the statutory standard.'" *Id. quoting Lambert v. Blodgett,* 393 F.3d 943, 965 (9th Cir. 2004).

On May 5, 2022, Appellant McCrea did nothing to raise suspicion. He was driving his father's Chevy Impala. He was "observed in the driveway of a known drug house." Exhibit 1, ROA 42, at page McCrea 009. Detective Sciaretta believed, without any expressed basis, Appellant was a drug user and drug trafficker. The Chevy Impala was seen driving around the backside of the residence to access Ashley Spur. This was not illegal or in violation of the traffic regulations. Appellant's actions and driving were unremarkable.

Detective Sciaretta suggests the location in which Appellant was driving was indicative of possible criminal activity. *Brown v. Texas*, 443 U.S. 47, 52 (1979) held location alone is insufficient to justify a *Terry* stop. Similarly, "[t]he citing of an area as 'high-crime' requires careful examination by the court, because such a description, unless properly limited and factually based, can easily serve as a proxy for race or ethnicity." *United States v. Montero–Camargo,* 208 F.3d 1122, 1138 (9th Cir. 2000)(*en banc*); *See Sigmond–Ballesteros,* 285 F.3d at 1124 (finding the particular highway was "of only minimal significance" because the agent's general statements regarding the notoriety of the route for smuggling were insufficient to establish its notoriety, and further noting this "general proposition" was insufficient to establish reasonable suspicion). There was little or no relevance to the fact the Impala was traveling in an area that might have had criminal activity taking place within it or was in close proximity to a "known drug house."

Detective Sciaretta also suggests it was suspicious there were passengers in the Impala. *See United States v. Rodriguez,* 976 F.2d 592, 595 (9th Cir. 1992)(finding no reasonable suspicion even though the agents observed the car appeared to be "heavily loaded"), *amended by* 997 F.2d 1306 (9th Cir. 1993)(amendments not relevant to purpose cited herein); *See Also United States v. Garcia–Camacho,* 53 F.3d 244, 246 (9th Cir. 1995)(finding no reasonable suspicion even though the agent observed the truck appeared "heavily ladened based on the way it reacted to

bumps"). The number of occupants in the car was of no relevance. Objectively speaking, cars frequently have passengers in them, and car manufacturers consciously design vehicles with that purpose in mind. Automobiles have more than one seat, more than one seat belt, and more than one airbag because they frequently carry passengers. The stop on May 5, 2022 was not justified at its inception. *See Terry*, 392 U.S. at 20. The officers were not aware of the warrant for Muth's arrest until six minutes after the stop and detention.

4. Article II Sections 10 and 11 of the Montana Constitution.

Appellant had two different bases for his claim that the seizure and search conducted on May 5, 2022 was unconstitutional. The first is the Fourth Amendment to the United States Constitution. The second is that the same stop/seizure, if compliant with the Fourth Amendment, violates the Montana Constitution. The provisions contain similar language, but the Montana Constitution provides greater protection than does the Fourth Amendment. "Read together, Sections 10 and 11 provide robust protection to people in Montana against government intrusions." *State v. Allen*, 2010 MT 214, ¶47, 357 Mont. 495, 241 P.3d 1045. "[I]n light of the constitutional right to privacy to which Montanans are entitled, we have held that the range of warrantless searches which may be lawfully conducted under the Montana Constitution is narrower than the corresponding range of searches that may

be lawfully conducted pursuant to the federal Fourth Amendment." *State v. Goetz*, 2008 MT 296, ¶14, 345 Mont. 421, 191 P.3d 489, *quoting State v. Hardaway,* 2001 MT 252, ¶35, 307 Mont 139, 36 P.3d 900. In other words, Sections 10 and 11 "provide greater protection against government searches than the federal Fourth Amendment." *Allen* at ¶47 *citing Goetz* at ¶14.

Section 10 and 11's greater protections apply to the stop of automobiles. "We have repeatedly held that Montana's unique constitutional language affords citizens a greater right to privacy, and therefore, provides broader protection than the Fourth Amendment in cases involving searches of private property." *State v. Ellison*, 2000 MT 288, ¶46, 302 Mont. 228, 14 P.3d 456. "Such protections extend to warrantless searches of automobiles." *State v. Baty*, 2017 MT 89, ¶18, 387 Mont. 252, 393 P.3d 187 *citing Ellison* at ¶47. Section 10 and 11's "…protections apply to investigative stops of vehicles." *State v. Cooper*, 2010 MT 11, ¶7, 355 Mont. 80, 224 P.3d 636. "The State must prove that an officer had particularized suspicion to stop a vehicle by showing: (1) objective data and articulable facts from which an officer can make certain reasonable inferences; and (2) a resulting suspicion that the person to be stopped has committed, is committing, or is about to commit an offense." *Id*. For the reason argued above, the officers in question stopped the Impala with inadequate basis. They were not aware of the warrant for Muth's arrest, and the driver, Appellant McCrea had not engaged in any suspicious activity prior to the seizure.

5. Fruit of the Poisonous Tree Doctrine.

Everything Appellee sought to introduce against Appellant McCrea in its prosecution was discovered as a result of the auto stop on May 5, 2022. As a result of the unconstitutional stop, Appellee obtained contraband as well as information used to obtain search warrants to search the Impala and a phone belonging to Appellant. The evidence was either a direct result of the stop or a fruit of an illegal and unconstitutional stop. In *Wong Sun v. United States*, 371 U.S. 471, 485-486, (1963) the Supreme Court held:

> The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in *Silverman v. United States*, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734, [1961] that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.' Similarly, testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies. *McGinnis v. United States*, 1 Cir., 227 F.2d 598 [1st Cir. 1955].

Evidence seized during an unlawful search cannot constitute proof against a Defendant and must be excluded from evidence. *See Wong Sun*, at 484 *citing Weeks v. United States*, 232 U.S. 383 (1914). "The exclusionary prohibition extends as well to the indirect as the direct products of such invasions." *Id. citing Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). Evidence derivative of a constitutional violation is "tainted by the prior illegality and thus inadmissible

subject to a few recognized exceptions." *United States v. Landeros,* 913 F.3d 862, 870 (9th Cir. 2019).

"Evidence qualifies as the 'fruit of the poisonous tree' when 'the illegal activity tends to significantly direct the investigation to the evidence in question." *Frimmel Management, LLC v. United States*, 897 F.3d 1045, 1054 (9th Cir. 2018) *quoting United States v. Gorman*, 859 F.3d 706, 716 (9th Cir. 2017), (quoting *United States v. Johns*, 891 F.2d 243, 245 (9th Cir. 1989)). "'The focus,' in other words, 'is on the causal connection between the illegality and the evidence.'" *Id. quoting Gorman* (quoting *Johns*, 891 F.2d at 245). The question in such a case is "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *State v. New*, 276 Mont. 529, 535, 917 P.2d 919, 923 (1996) *quoting Wong Sun,* 371 U.S. at 487–88, 83 S.Ct. at 417.

There are three general exceptions to the Fruit of the Poisonous Tree Doctrine: (1) the attenuation doctrine, (2) the independent source rule and (3) the inevitable discovery doctrine. None of these exceptions apply and the taint in this case was not purged.

a. Attenuation Doctrine.

"[U]nder the 'attenuation doctrine,' evidence is admissible when 'the connection between the illegality and the challenged evidence' has become so attenuated 'as to dissipate the taint caused by the illegality.'" *Frimmel,* 897 F.3d at 1053, *quoting Gorman*, 859 F.3d at 718 (quoting *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1396 (9th Cir. 1989)). "The test…'is more akin to a proximate causation analysis,' rather than a 'but for' test." *Frimmel* at 1053*, quoting United States v. Smith*, 155 F.3d 1051, 1060 (9th Cir. 1998). "The attenuation doctrine evaluates the causal link between the government's unlawful act and the discovery of evidence, which often has nothing to do with a defendant's actions. And the logic of our prior attenuation cases is not limited to independent acts by the defendant." *Utah v. Strieff*, 579 U.S. 232, 238-239 (2016).

In determining whether evidence is attenuated from illegal conduct, relevant factors include: (1) "'the temporal proximity' between the unconstitutional conduct and the discovery of evidence…"; (2) "'the presence of intervening circumstances'"; and (3) "and 'particularly' significant…'the purpose and flagrancy of the official misconduct.'" *Strieff*, 579 U.S. at 239, *quoting Brown v. Illinois*, 422 U.S. 590, 603–604 (1975).

Whether fruit is attenuated is determined by considering the three factors that guide the attenuation inquiry. *Strieff*, 579 U.S. at 238-239. As to the first factor,

attenuation of derivative evidence is favored when "'substantial time' elapses between an unlawful act and when the evidence is obtained." *Id.* at 239 *quoting Kaupp v. Texas*, 538 U.S. 626, 633, 123 S.Ct. 1843, 155 L.Ed.2d 814 (2003)(*per curiam*). Conversely, the less time that passes, the less favorable is a finding of attenuation. In the case at bar, no time passed between the illegal conduct and the obtaining of the derivative evidence (Appellant's statements and evidence, witness identity and testimony). The evidence in question, the statements, testimony, and evidence, were obtained contemporaneously with the constitutional violation, and a finding of attenuation is disfavored.

With regard to the May 5, 2022 stop, there are two items of evidence not contemporaneous with the stop: (1) Appellant McCrea's follow up interview on May 10, 2022, and (2) the interview of his father, Robert McCrea (on an unknown date). These items are not sufficiently attenuated because absent the stop, Appellant would not have been sitting in the Lake County Jail on May 10, 2022 or otherwise in a position to conduct any interviews. Similarly, his father met with the (Lake County) detectives regarding the return of his Chevy Impala (which was seized on May 5, 2022). *See* Exhibit 1, ROA 42 at page McCrea 014, (second to last entry). He would not have met with the detectives about the return of his Impala if they had not seized it in the first place.

The second factor requires a Court to consider whether intervening circumstances "purged the taint" of the constitutional violation. *United States v. Washington*, 387 F.3d 1060, 1073 (9th Cir. 2004). There were no intervening circumstances in the case at bar. The violations were part of one continuous course of conduct and one encounter. Again, a finding of attenuation is disfavored.

Flagrancy of the Fourth Amendment violation is "particularly significant," especially when officers commit the illegal search with the subjective purpose of seeking evidence of the sort at issue. *Strieff*, 579 U.S. at 239 (internal quotation marks omitted); *See also United States. v. Ceccolini*, 435 U.S. 268, 279–80 (1978) (giving weight to the government's showing that the officers did not conduct the illegal search with the intent of locating the evidence at issue). Derivative evidence is therefore more likely to be tainted if there is evidence that "the illegal conduct that preceded it involved 'either purposeful extraction of evidence or flagrant illegality.'" *United States v. Shetler*, 665 F.3d 1150, 1160 (9th Cir. 2011) (*quoting United States v. Washington*, 387 F.3d 1060, 1075 n.17 (9th Cir. 2004)). Here, the purpose and intent of the Government actors was to extract the evidence now sought to be presented, the witness identities and testimony, and the statements from Defendant and to conduct an illegal seizure and search without a warrant. The illegality is especially flagrant with respect to the May 5, 2022 stop.

b. Independent Source Rule.

The Exclusionary Rule seeks to put "the police in the same, not a worse, position" by virtue of their misconduct. *Murray v. United States*, 487 U.S. 533, 537 (1988) (*quoting Nix v. Williams*, 467 U.S. 431, 443, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377 (1984)). Independent Source exists to ensure the Government is not placed in any worse a position than they would be had it observed the constitution. "[I]n the classic independent source situation, information which is received through an illegal source is considered cleanly obtained when it arrives through an independent source." *Murray*, 487 U.S. at 538-539, *quoting United States v. Silvestri*, 787 F.2d 736, 739 (1st Cir. 1986). The independent source doctrine permits the introduction of tainted evidence but only if that same evidence was "later obtained independently from lawful activities untainted by the initial illegality." *Murray,* 487 U.S. at 533, *citing Silverthorne Lumber Co,* 251 U.S. 385. An independent source exists when law enforcement possesses an independent source of information which would have led to the evidence, or if law enforcement was engaged in an investigation which would have led to the evidence. *See State v. Lacey*, 2009 MT 62, ¶54, 349 Mont. 371, 204 P.3d. 1192, *citing State v. Therriault*, 2000 MT 286, ¶60, 302 Mont. 189, 14 P.3d 444. The evidence in question in this case did not arrive through any independent source, law enforcement in this case possessed no independent information and were not engaged in any independent investigation

that would have yielded witness identities, testimony, or other evidence and/or statements. The evidence came about as a direct and intended result of the initial illegality and the independent source doctrine is inapplicable.

c. Inevitable Discovery.

The inevitable discovery rule only applies "when it has a high level of confidence that the warrant in fact would have been issued and that the specific evidence in question would have been obtained by lawful means." *United States v. Cunningham*, 413 F.3d 1199, 1203 (10th Cir. 2005). The inevitable discovery rule is stated as follows: "…if 'by following routine procedures, the police would inevitably have uncovered the evidence,' then the evidence will not be suppressed despite any constitutional violation." *United States v. Young*, 573 F.3d. 711, 721 (9th Cir. 2009), *quoting United States v. Ramirez–Sandoval,* 872 F.2d 1392, 1399 (9th Cir. 1989). "…[T]he doctrine requires that the fact or likelihood that makes the discovery inevitable arise from circumstances other than those disclosed by the illegal search itself." *United States v. Boatright,* 822 F.2d 862, 864-865 (9th Cir. 1987). Appellee would not have discovered any of the evidence in question pursuant to any routine procedure or inevitable circumstance.

6. The Search Warrants at Exhibits 2 and 3 of ROA 42.

The search warrants are "fruits" under the standard *Wong Sun* analysis, or alternatively, the applications for search warrant for each allege unconstitutionally

obtained information. "[W]hen the issuance of a search warrant is based in part on illegal information, the reviewing court shall excise the illegally obtained information from the application for search warrant and review the remaining information *de novo* to determine whether probable cause supported the issuance of a search warrant." *State v. Kuneff*, 1998 MT 287, ¶19, 291 Mont. 474, 970 P.2d 556. No deference is given to the original probable cause determination. *See Id.* Absent the information obtained by virtue of the unconstitutional stop, there was no probable cause to suspect the information sought would possess or lead to evidence of a crime.

ii. Prosecution of Appellant for the Crime alleged in Count 2 of the Amended Information Violated the Double Jeopardy Clause of Art. II, §25 of the Montana Constitution.

1. Art. II, §25 of the Montana Constitution Provides Greater Protections than does its Federal Counterpart.

The Montana State Constitution, Article II, §25 provides: "[n]o person shall be again put in jeopardy for the same offense previously tried in any jurisdiction." This Court previously concluded the Fifth Amendment's rights and guarantees are "minimal." *State v Guillaume*. 1999 MT 29, ¶19, 293 Mont. 224, 231, 975 P. 2d 312, 317, *citing State v. Johnson*, 221 Mont. 503, 512, 719 P.2d 1248, 1254 (1986). "Article II Section 25 of the Montana Constitution affords greater protection against

multiple punishments for the same offense than does the Fifth Amendment of the United States Constitution." *Guillaume,* at ¶16. Art. II, §25 of the Montana Constitution also prohibits defendants from being sentenced to multiple punishments for the same offense. This constitutional provision has been applied uniformly to protect against subsequent prosecution of offenses derived from the same elements. "[D]ouble Jeopardy exemplifies the legal and moral concept that no person should suffer twice for a single act." *Guillaume*, at ¶ 17. Appellant's conviction and sentence on Count 2 of the Amended Information results in his suffering twice for the single act allegedly committed on May 5, 2022, possession of dangerous drugs (fentanyl and methamphetamine).

Art. II, §25 of the Montana Constitution, "protects defendants from both multiple punishments imposed at a single prosecution for the same offense, and for multiple prosecutions for offenses arising out of the same transaction." *State v. Savaria*, 284 Mont. 216, 222, 945 P.2d 24, 28 (1997). The facts alleged in the Amended Information implicate both protections. "[W]hether multiple punishments have been imposed in violation of a defendant's fundamental right to be free from double jeopardy brings into question the fundamental fairness of the proceedings and the integrity of the judicial process." *State v. Whitehorn*, 2002 MT 54, ¶39, 309 Mont. 63, 50 P. 3d 121 (2002)(citing cases). Appellant is clearly being punished a second time for offenses which arose out of a single transaction.

Appellant claims Section 25 provides greater protection than does the Fifth Amendment. This Court held, a proponent arguing the Montana Constitution provides greater rights than its federal counterpart "…'must establish sound and articulable reasons that the Montana Constitution affords greater protection for a particular right.'" *State v. Myran,* 2012 MT 252, ¶25, 366 Mont. 532, 289 P.3d 118, *quoting State v. Covington,* 2012 MT 31, ¶20, 364 Mont. 118, 272 P.3d 43. Further, this burden can be met by "…reference [to] Constitutional Convention transcripts and committee reports…" *Myran* at ¶25. Also relevant to this determination is "…the plain meaning of the words used …" and "…relevant legislative intent, which in the case of constitutional interpretation is the 1972 Constitutional Convention." *State v. Schneider*, 2008 MT 408, ¶15, 347 Mont. 215, 197 P.3d 1020.

Guillaume conducted this procedure and found the plain words of §25 provided greater protections than did the Fifth Amendment. The legislative intent relevant to §25 is the 1972 Montana Constitutional Convention. The Convention Delegates were aware the Fifth Amendment merely provided, "…nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; …" *See* Fifth Amendment, United States Constitution. The Montana Constitution's first double jeopardy provision similarly provided "… nor shall any person be twice put in jeopardy for the same offense." Montana Constitution of 1889, Art. III, Section 18. In 1972 the Constitutional Convention's Bill of Rights Committee

recommended a substantive change to the 1889 double jeopardy provision and stated as follows:

> It is noted that the "two sovereignties rule" is still in effect at the federal level. In recent years, ***the rule which permits prosecutions by different jurisdictions for the same offense arising from the same set of criminal facts***, has come under scrutiny and criticism. The provision recommended by this committee would ***prohibit the state from following the prosecution of another jurisdiction for the same offense and criminal facts.*** The committee is well-aware that the state Constitution cannot limit the federal government in this practice. However, ***as the committee believes that subsequent prosecutions as these described above are a violation of the protection against double jeopardy,*** it is hoped that the federal government and the state can cooperate in cases involving violations of the laws of both jurisdictions. In this way, a person accused of a crime will be placed in jeopardy only once ***in accordance with the long-established principles.***
>
> Montana Constitutional Convention Proceedings, Vol. 2, p. 641 (Feb. 2, 1972)(Bill of Rights Committee Proposal and Comments) (Excerpts at Exhibit 4, ROA 39), emphasis supplied.

The "two sovereignties rule" predated Montana's first constitution, and applied to any two sovereigns, whether State, Federal, Tribal, or foreign nation. *See Fox v. Ohio*, 46 U.S. 410, 435 (1847). The rule is still the same. *Gamble v. United States*, 139 S.Ct. 1960 (2019). Any two sovereigns, who draw authority to govern, from separate sources, are separate sovereigns for Fifth Amendment purposes and each may prosecute the same act without violating, or implicating, the Fifth Amendment. *Heath v. Alabama*, 474 U.S. 82, 89 (1985). It was this rule, "the rule which permits prosecutions by different jurisdictions for the same offense arising from the same set of criminal facts," that §25 sought to abrogate because

"subsequent prosecutions as these" were "a violation of the protection against double jeopardy." *See* Exhibit 4, *supra*. The Montana Constitution's Double Jeopardy clause was then altered and §25 now provides: "[n]o person shall be again put in jeopardy for the same offense previously tried in any jurisdiction." Delegate Dahood explained as follows:

> …I should explain, since it is a legal distinction. We have added the language "nor shall any person be twice put in jeopardy for the same offense previously tried in any jurisdiction." The phrase "previously tried in any jurisdiction" has been added. The rule throughout the United States and the several states in this past has always been that you could be tried twice for the same crime and be punished twice for the same crime, contrary to the popular conception that this cannot happen in America. It was justified by the courts in this fashion: a state is a separate criminal jurisdiction; the United States is a separate federal jurisdiction. Each is autonomous in the area of criminal practice, and each has a sovereign right to prescribe punishment for transgressions of the law within its own area of jurisdiction. So consequently, if you stole a car in Montana and drove it across a state line, you would commit two crimes. The first crime, of course, would be against the law of the State of Montana in taking the car, and technically you could be tried, convicted and sentenced to a substantial term in the penitentiary. And the federal court could then place a detainer upon you and, upon your release, since the statute of limitations would not run while you're incarcerated, then take you to a federal courtroom and have you tried and convicted and sentenced to a federal penitentiary.
> …
> We think it violates a basic fundamental right that **an individual should be punished only once for whichever transgression he may be convicted of, whether under federal law or state law. It shouldn't make any difference which jurisdiction has him first.**
> …
> **What this does, it provides now in Montana that if someone should commit some crime within the geographical sovereign limits of Montana and he transgresses federal criminal law at the time that he does it and the Federal Court should have him tried and**

> **convicted after indictment by a federal grand jury, *that's the end of it*.**
> …
> What we're trying to do here is to make sure that Montana is not going to punish someone who has already been punished for a transgression against society, whether it be Montana society or the federal society.
> …
> Delegate Studer: …if a fellow stole that car like you say and went out of the state with it and the federals tried him first for transportation over the state line and I wasn't exactly satisfied that they'd prosecuted right or it'd been bungled some way and he'd been turned loose, [§25] means that when that fellow comes back here and we have definite evidence that he'd swiped the car and everything, I can't do anything about it?
>
> Delegate Dahood: No, not a thing you can do about it. Delegate Studer, simply because—that they've had one chance at him, that's enough. That's double jeopardy. …
>
> Montana Constitutional Convention Verbatim Transcript, March 9, 1972, Vol. V, pp. 1777-1779 (Excerpts at Exhibit 5 of ROA 39)(emphasis supplied).

In *State v. Hernandez,* 213 Mont 221, 689 P. 2d 1261 (1984), Hernandez was convicted of burglary and theft of coins. While on probation Hernandez attempted to sell some of the coins and was again charged with theft by receiving stolen property. This Court held the earlier conviction for theft of coins and subsequent prosecution for selling the coins clearly arose out of the same transaction. It further held a second conviction violated Art. II, §25 of the Montana Constitution. The facts of *Hernandez*, involving different acts on different days, but involving the same coins, demonstrate a broad interpretation of the "single act" requirement of §25. However, the single act allegedly committed by Appellant in the case at bar is truly

a single act and single transgression, occurring on May 5, 2022, in the County of Lake, State of Montana, in the Impala, involving the same witnesses, evidence, events and transactions.

In interpreting the Montana Constitution, this Court has routinely relied on federal and sister state interpretations of similar constitutional provisions. *See MEA-MFT v. McCulloch*, 2012 MT 211, ¶27, 366 Mont. 266, 291 P.3d 1075; *State v. Bullock*, 272 Mont. 361, 379-383, 901 P.2d 61, 72-75 (1995)(relying on sister state constitutional right to privacy decisions to interpret Montana Constitution's right to privacy). "Simply put double jeopardy exemplifies the legal and moral concept that no person should suffer twice for a single act." *Guillaume*, at ¶ 17; *See Also*, Exhibit 5, of ROA 39 at page 1778 (Comments of Delegate Dahood). The Hawaii Supreme Court held the double jeopardy clause is intended to "ensure that individuals are not subjected to multiple prosecutions for a single act." *State v. Lessary*, 75 Haw. 446, 457, 865 P.2d 150, 155 (1994). *Lessary* noted "*Blockburger*[3] and its progeny focused almost exclusively on whether the legislature intended to allow the imposition of multiple ***punishments*** for the commission of a particular act." *Id*. at 454, *citing Missouri v. Hunter*, 459 U.S. 359 (1983)(emphasis supplied). "Because of its focus on the statutory definitions of offenses, however, the [*Blockburger*] 'same elements' test does not prevent the government from initiating multiple ***prosecutions*** against

[3] *Blockburger v. United States,* 284 U.S. 299 (1932).

an individual based on a single act as long as the subsequent prosecutions are for offenses with 'different' elements." *Lessary, supra*, at 455 (emphasis supplied). "In *Grady* [*v. Corbin*, 495 U.S. 508 (1990)], the United States Supreme Court recognized the dangers inherent in allowing the government to pursue multiple prosecutions against an individual. ...Successive prosecutions, however, whether following acquittals or convictions, raise concerns that extend beyond merely the possibility of an enhanced sentence… Even when a State can bring multiple charges against an individual under *Blockburger*, a tremendous additional burden is placed on that defendant if he must face each of the charges in a separate proceeding." *Lessary,* at 455-56*, citing Grady, supra* at 518-19. These were the same concerns expressed, and which were thought to have been addressed, in the Montana Constitutional Convention. *Lessary* noted that *Grady*, was overruled in a 5/4 decision in *United States v. Dixon*, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), but four United States Supreme Court Justices "continued to believe that the *Blockburger* test alone does not provide adequate protection" to safeguard the interests sought to be guaranteed by the Fifth Amendment Double Jeopardy clause. *Lessary* at 456, 155, *citing Dixon*, 113 S.Ct. 2868 (White, J, concurring in part and dissenting in part), 2879 (Blackmun, J., concurring in part and dissenting in part), 2881 (Souter, J., concurring in part and dissenting in part). "In 'instances of successive prosecutions,' however, 'the interests of the defendant are of paramount

concern.'" *Lessary* at 456, 155*, quoting Dixon*, 113 S.Ct. at 2870-71 (White, J., concurring in part and dissenting in part)(emphasis by Justice White). "We [the Hawaii Supreme Court] do not believe that the State's interest in prosecuting different offenses in different courts outweighs a defendant's 'paramount' interest in being free from vexatious multiple prosecutions." *Lessary* at 456-457, 155. The *Lessary* Court held "[t]he 'same conduct' test set forth by the United States Supreme Court in *Grady* attempted to provide those protections." *Lessary*, at 457, 156.

> [T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.
>
> *Grady*, 495 U.S. at 521, *quoted by Lessary, supra*.
>
> The "same conduct" test as set forth in *Grady*, on the other hand, protects individuals from multiple prosecutions for the same act without unnecessarily restricting the ability of the State to prosecute individuals who perform separate acts that independently constitute separate offenses. In addition, the "same conduct" test was applied in criminal prosecutions in Hawaii [and every other state and territory in the United States] for the three years that *Grady* was the applicable law under the United States Constitution. We believe that the application of the *Grady* rule is necessary to afford adequate double jeopardy protection, and, therefore, we adopt the "same conduct" test under the Hawaii Constitution.
>
> *Lessary*, at 459, 156.

Like the Montana Constitution, the Hawaii Constitution provides greater protection against double jeopardy than does the Fifth Amendment. Based on *Guillaume*, the Verbatim Transcripts, *Lessary*, and *Grady*, Appellant submits the

Grady "same conduct" test should and must apply to claims of double jeopardy under §25, and that Appellant's conviction and sentence on Count 2 of the Amended Information was imposed in violation of Art. II, §25 of the Montana Constitution.

iii. The Sentence was Illegal.

The Judgment provides in relevant part: "…The Sentences[4] [sic] shall run Concurrent To his Federal sentence for Possession With Intent to Distribute Fentanyl and Consecutive to any sentence that might be imposed in DC-22-126." ROA 61 at 1:11-1:13. This Court held a district court is without authority to order a defendant to serve his term of incarceration "…consecutive to another sentence not yet imposed." *McGuire,* 260 Mont. at 388, 860 P.3d at 149-150. *See Also, State v. Jones,* 2008 MT 331, ¶23, 346 Mont. 173, 194 P.3d 86 (Rice, J., concurring)(citing to *McGuire,* at 388, 149-150, and suggesting "[t]he same rule should apply to the attempt to impose a sentence concurrent to a sentence which may be imposed in the future."). *McGuire* held:

> Furthermore, sound sentencing principles preclude a court from imposing a sentence consecutive to one not yet imposed. By definition, a consecutive sentence does not begin until the sentence to which it is consecutive has been satisfied. On that basis, a sentence ordered to run consecutively to one which has not been imposed creates problems of implementation. Furthermore, when a court orders a sentence to run consecutively to one not yet imposed, the court does so without knowing the length of the *future* sentence; therefore, it lacks an adequate basis for the exercise of its discretion. Finally, the imposition of consecutive sentences under these circumstances interferes with the

[4] One, and only one, sentence was entered by the district court on January 24, 2024.

> sentencing discretion of the court which will impose the future sentence. *See State v. King,* (Ariz. App. 1990), 802 P.3d 1041.

McGuire at 388, 150.

Appellant submits the appropriate remedy for this illegal sentence is to strike the provision ordering Appellant's sentence to be served consecutive to one that had not yet been imposed. *See McGuire* at 388, 150.

VI. CONCLUSION.

Pursuant to M. R. App. P. 12(1)(h), Appellant states his conclusion and the precise relief sought.

a. Conclusion.

For the reasons stated above, the district court below erred when it denied Appellant's Motion to Suppress and further erred in denying his Plea of Former Jeopardy and Motion to Dismiss with regard to Count 2 of the Amended Information. Last, the sentence imposed was illegal to the extent it sought to require the Appellant to serve the sentence consecutive to a sentence that did not exist and had not yet been imposed.

b. Statement of Relief Sought.

The Court should vacate the judgment below and remand the case for proceedings consistent with an Order finding the May 5, 2022 stop illegal and unconstitutional, and excluding all fruits of that stop and/or, vacate the judgment and dismiss Count 2 of the Amended Information as barred by Art. II, §25 of the

Montana Constitution. Last, if the foregoing grounds for appeal are denied, this Court should strike the portion of the judgment providing the sentence shall be consecutive to a sentence that had not yet been imposed and affirming the remainder.

Respectfully submitted this 31st day of May, 2024.

/s/ Shandor S. Badaruddin

_____

Shandor S. Badaruddin

Attorney for Appellant Craig McCrea

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word for Mac version 16.28 is 9,732 words, excluding table of contents, table of citations, certificate of service, certificate of compliance and the appendices per M. R. App. P. 11.4.d.

So certified this this 31st day of May, 2024.

/s/ Shandor S. Badaruddin

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