IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0381

STATE OF MONTANA,

Plaintiff and Appellee,

vs.

CHRISTOPHER LAPOINTE,

Defendant and Appellant.

# BRIEF OF APPELLANT

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, the Honorable Rienne H. McElyea, Presiding

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## STATEMENT OF THE ISSUE

Whether DUI convictions from another state can be counted for stacking purposes under §61-8-734 MCA (now § 61-8-1008, MCA) if those states do not include a similar requirement that the offense occur on the ways of the state open to the public.

## STATEMENT OF THE CASE

On August 12, 2020, the Appellant was charged with one Count of Driving Under the Influence of Alcohol, in violation of MCA §61-8-401 (now §61-8-1002), a fourth or subsequent offense. The Information alleged that on or about July 24, 2020, the Appellant was in actual physical control of a motor vehicle in the parking lot of 2504 West Main, Bozeman, Montana, a way of the state open to the public. DC Doc. 4.

The Appellant's prior convictions, six in all, were all from the State of California. California law does not require the driving proscribed by their DUI statute take place on a public road or area, instead it also applies to any driving that take place on strictly private property. Cal. Veh. Code § 23152.

The Appellant pled guilty to the DUI charge in Gallatin County, but filed a Motion to challenge the application of the California convictions for stacking purposes under §61-8-734 MCA (now § 61-8-1008, MCA). DC Doc. 64. The District Court denied the Motion citing two reasons. First, the District Court held

that the Appellant failed to come forward with evidence that any of his California convictions took place on ways of the state open to the public. DC Doc. 67 at 3. Presumably the District Court meant the opposite of that, namely that he failed to prove he was not on ways of the state open to the public for his California convictions. Second, the District Court relied on this Court's ruling in *State v. Pankhurst*, 2022 MT 89, 408 Mont. 309, 509 P.3d 15. The District Court focused on the failure of the Appellant to analyze the similarity of impairment required by the two states. DC Doc. 67 at 3 The Defendant was sentenced to 13 months with the Department of Corrections, to be followed by a 3 year suspended sentence. This appeal followed. DC Doc. 71.

## STATEMENT OF THE FACTS

According to the Affidavit of Probable Cause filed in the District Court, around 9:03 p.m. on July 24, 2020, an employee of Lucky Lil's Casino at 2401 West Main, called to report an intoxicated driver had just left the casino, got into a green Dodge Durango, and drove across Main Street. DC Doc. 1. The intoxicated driver had been refused service at the casino due to his level of intoxication. Two Bozeman Police Officers located the Durango in the parking lot of 2504 West Main Street. They approached the vehicle and knocked on the driver's window. DC Doc. 1, at 2. When the Appellant opened his door the officers smelled the odor of an alcoholic beverage coming from him. When asked for his driver's license he

struggled to take it out of his wallet, and ended up just handing his wallet to one of the officers. The officers noted that the keys to the ignition were in the vehicle. DC Doc. 1, at 2. The Appellant's eyes were bloodshot and watery, and his speech was slurred. The Appellant told the Officers he was waiting for someone to bring him "pot." DC Doc. 1, at 2.

The Appellant did poorly on Standardized Field Sobriety Tests (SFSTs). When asked to do the One Leg Stand, one of the SFSTs, the Appellant replied "I can't even do that sober." The Appellant was read the Preliminary Alcohol Screening Test Advisory. He declined to take the test and was arrested for DUI. At the Gallatin County Detention Center one of the Officers read the Appellant the Implied Consent Advisory. He agreed to provide a breath sample, and the results from the Intoxilyzer 8000 were a breath alcohol of .203. DC Doc. 1, at 2.

The officers also learned that there were other reports of an intoxicated driver, at 8:55 p.m. that same evening, involving the vehicle the Appellant had been driving. The report was that the Appellant was intoxicated in the parking lot of the Hoffbrau, a bar and restaurant in Bozeman. The report was that the Appellant's speech was slurred, that he was somewhat hostile, and could not stand well.

The State charged that the Appellant had prior DUI convictions from California in 1999, 2007, two in 2009, 2010, and 2016. DC Doc. 1, at 2.

On August 29, 2022, the Appellant through Counsel filed a Motion to dismiss the felony enhancement in this matter, alleging that that California convictions were not sufficiently similar to MCA § 61-8-401. Appellant's Counsel argued that the failure of the California statutes to require that the offense occur on the ways of the State open to the public rendered them dissimilar to Montana's DUI law. DC Doc. 42. In its response the State argued that the Motion was untimely, in that it was filed past the Motions deadline set in the Omnibus Order. In the alternative the State argued that the California statute was sufficiently similar to the Montana DUI statute to allow the California convictions to be used for stacking purposes. DC Doc. 44. The State also argued that the requirement that the offense be committed on the ways of the State open to the public was not an essential element of the offense. DC Doc. 44 at 5-8.

The District Court initially denied the Motion of Appellant's Counsel as untimely on October 19, 2022. DC Doc. 47. On October 24, 2022, the Appellant entered an open plea to the one charge of DUI. DC Doc. 50, 53. On January 20, 2023, Appellant's Counsel renewed the Motion to Dismiss the felony enhancement, asserting that it was relevant to the issue of sentencing. DC Doc. 64. The District Court considered the renewed Motion. The Court ruled that the Appellant had failed to conduct a proper analysis of whether the Montana and California statutes were sufficiently similar, and failed to provide factual proof that

the Appellant was on a "way of the state open to the public" for the conduct which occurred in California DC Doc. 67 at 3. Presumably the District Court meant the opposite of that, namely that Appellant failed to prove he was not on ways of the state open to the public for his California convictions. The District Court denied the renewed Motion to Dismiss, finding the two statutes sufficiently similar, relying on this Court's ruling in *State v. Pankhurst*, 2022 MT 89, 408 Mont. 309, 509 P.3d 15. The Defendant was sentenced to 13 months with the Department of Corrections, to be followed by a 3 year suspended sentence. This appeal followed. DC Doc. 71.

A presentence investigation was ordered and completed, and sentencing took place on April 24, 2023. The District Court noted a number of items, including Appellant's ongoing legal difficulties with alcohol, and his initial problems adjusting to alcohol monitoring in this case. In this case the Appellant was first put on alcohol monitoring at the time with a home breath tester called Sober Link. Beginning in October of 2022 the Appellant was placed on 24/7 alcohol monitoring with a SCRAM ankle bracelet at his own cost. Since being placed on that ankle bracelet almost two years ago the record only shows a single alcohol violation by the Appellant, and none since October of 2023. The District Court noted Appellant's gainful employment history, his current full time employment as a plumber, his status as a father, and the District Court's lack of discretion in

sentencing on felony DUIs. The Defendant was sentenced to 13 months with the Department of Corrections, to be followed by a three year suspended sentence, and a $5000 fine. D.C. Doc. 71. The Court noted that "The Defendant has had difficulty with his monitoring on the Court's Pretrial Order. He has indicated that he is trying his best to address this addition, but it is what it is. He is much mired into a pretty severe addiction." DC Doc. 71, 76.

The Appellant was released on bail pending appeal, and remains on 24/7 alcohol monitoring. The Appellant currently resides and is employed in Nevada.

## STANDARD OF REVIEW

The standard of review on a motion to dismiss is one this Court reviews *de novo* for correctness, *State v. Barrett*, 2015 MT 303 §6, 381 Mont. 299, 358 P.3d 921. Whether a prior out of state conviction can be used for stacking purposes under Montana law is such an issue. *State v. Krebs*, 2016 MT 288 §7, 385 Mont. 328, 384 P.3d 98.

## SUMMARY OF THE ARGUMENT

§61-8-734, MCA (now § 61-8-1008, MCA) allows the stacking of similar out of state alcohol based DUI offenses to enhance a Montana conviction for a felony DUI prosecution. Appellant has multiple DUI convictions in California. California law, however, does not include an essential element that of Montana's DUI law, that the offense occur on the ways of the state open to the public. The

DUI statutes of the two states are therefore significantly dissimilar. California convictions should not be used to stack against a Montana conviction.

## ARGUMENT

### I. Driving on the ways of the state open to the public is an essential element of any alcohol based DUI prosecution in Montana

The requirement that drinking and driving only be proscribed if it takes place in a public area has its roots deep in Montana's legislative history. Over 120 years ago, the Montana Legislature passed a statute that prohibited employing anyone from transporting passengers on any public highway if they were "addicted to drunkenness." 1903 Montana Laws, Chapter 44, § 82. As one commentator noted, this preceded the prevalence of automobiles in Montana and was most likely directed at horse drawn carriages and coaches. Rohan, *Montana's Legislative Attempt to deal with the Drinking Driver: The 1983 DUI Statutes*, 46 Mont. L. Rev. 309, 311 (Vol 2, 1986). From 1955 until 1979 Montana's DUI laws applied on "highways and *elsewhere throughout the state*." (emphasis added) 1955 Mont. Laws ch. 263, § 22. Montana DUI statutes would therefore have applied throughout the state, even on private property. But when recodification took place in 1979 "enforcement jurisdiction was limited to the highways of this state. This change caused considerable problems in the enforcement of the DUI laws and the prosecution of the drinking driver." Rohan, supra at 316. In response the 1983

Legislature amended the language of our DUI laws and made certain that they extended to the ways of the state open to the public, but not beyond. 1983 Mont. Laws Chapters 659 and 698. Since that time proving that a DUI offense occurs on the ways of the state open to the public has been an essential element of our DUI law. See MCA §61-8-101, §61-8-401 (now repealed), §61-8-1002. A jury must determine that the proscribed conduct has taken place on a way of the state open to the public. MCJI 10-102(a) (2022). The only exception to this requirement under Montana law relates to subsections of the statute that prohibit impairment due to drug usage, allegations that are not at issue in this case. See §§61-8-401 (b), (c), and (d), MCA. Impairment under these subsections is not subject to the "ways of the state open to the public" element. Appellant was not charged under any of those subsections in this case.

Because of the requirement that an alcohol based DUI take place on the ways of the state open to the public, the Court has reviewed many situations to determine whether the conduct at issue occurred in a way of the state open to the public. *State v. Weis*, 285 Mont. 41, 945 P.2d 900, 54 Mont. St. Rep. 1034 (1997) (privately owned and maintained road was a way of the state open to the public); *Santee v. Department of Justice, Motor Vehicle Div.*, 267 Mont. 304, 883 P.2d 829, (1994) (bank parking lot was a way of the state open to the public); *Billings v. Peete*, 224 Mont. 158, 729 P.2d 1268 (1986) (parking garage was a way of the

state open to the public). *City of Whitefish v. Large*, 2003 MT 322, 318 Mont. 310, 80 P.3d 427 (2003) (carport adjacent to a condominium was a way of the state open to the public), *State v. Taylor*, 203 Mont. 284, 661 P.2d 33 (1983) (borrow pit adjacent to a public roadway was part of the ways of the state open to the public).

## II. The prior decisions of this Court about whether the DUI statutes of other states are sufficiently similar to Montana's alcohol based DUI statutes for stacking purposes are not determinative of the issue now before the Court

This Court has reviewed the statutes of many states to determine whether they are sufficiently similar to Montana DUI to allow them to be used for stacking purposes, including:

- Colorado, *State v. McNally*, 2002 MT 160, 310 Mont. 396, 50 P.3d 1080
- Washington, *State v. Hall*, 2004 MT 106, 321 Mont. 78, 88 P.3d 1273
- Idaho, *State v. Young*, 2012 MT 251, 366 Mont. 527, 289 P.3d 110
- Nevada, *State v. Calvert*, 2013 MT 374, 373 Mont. 152, 316 P.3d 173
- South Dakota, *State v. Cleary*, 2012 MT 113, 365 Mont. 142, 278 P.3d 1020
- Texas, *State v. Olson*, 2017 MT 101, 387 Mont. 318, 400 P.3d 214
- Alaska, *State v. Lund*, 2020 MT 53, 399 Mont. 159, 458 P.3d 1043
- North Dakota, *State v. Pankhurst*, 2022 MT 89, 408 Mont. 309, 509 P.3d 15

- and California, *State v. Polaski*, 2005 MT 13, 325 Mont. 351, 106 P.3d 538[1]

These cases only provide the most general framework to analyze the issue raised by this case,[2] because none of these cases directly address the issue presented by this case. Instead these cases all focus on another legal issue; whether the DUI statutes of the various states require lesser proof of impairment than the Montana statute. A brief review of those cases buttresses this conclusion.

The discussion begins with *State v. McNally*, 2002 MT 160, 310 Mont. 396, 50 P.3d 1080. *McNally* was the first Montana case to find the DUI statute of another state to be so dissimilar that it could not be used for stacking purposes under Montana law. In *McNally*, the defendant had four prior convictions for a Colorado offense called DWAI (Driving While Ability Impaired), an offense for which Montana has no direct analogue. For a DWAI offense, Colorado only required proof that the person's ability to drive had been affected by alcohol or drugs "to the slightest degree." *McNally,* 2002 MT 16 ¶10 (Court's emphasis). The Court noted that the standard in Montana was whether a driver's ability to

[1] The Court has considered whether Georgia's statute is sufficiently similar to Montana's DUI provisions, however, that case was not designated for publication. *State v. Farr*, 2017 MT 200N, 389 Mont. 542, 400 P.3d 242

[2] The Court has considered at least two cases in which it concluded that tribal court convictions could be used for stacking purposes. *State v. Spotted Eagle*, 2003 MT 172, 316 Mont. 370, 71 P.3d 1239 (tribal conviction from Blackfeet Tribal Court); *State v. Walker*, 2007 MT 34, 336 Mont. 56, 153 P.3d 614 (tribal conviction from Fort Belknap Tribal Court). In those cases this Court reviewed the issue of the lack of counsel in tribal court DUI proceedings. In neither case did this Court review the similarity of the Tribal DUI statutes to Montana's DUI statutes.

drive had been "diminished," noting that the Legislature had considered and rejected the lower standard of impairment in the "slightest degree" when the statute was amended in 1987. *McNally*, 2002 MT 16 ¶21. This Court found that the standard of impairment needed in Colorado for a DWAI offense was therefore a lower standard than that under MCA §61-8-734(1)(a), and disallowed the Colorado DWAI convictions for Montana stacking purposes. *McNally*, 2002 MT 16 ¶23. *McNally* did not address the issue of whether another state's statute had to contain the "ways of the state open to the public" language found in Montana law. It only looked to the standard of impairment required.

In *State v. Hall*, 2004 MT 106, 321 Mont. 78, 88 P.3d 1273, this Court reviewed the Washington DUI statutes to determine whether they could be used for stacking purposes under § 61-8-734(1)(a). Among other issues Hall raised was Washington's standard of culpability for a DUI. Hall relied on a Washington Court of Appeals ruling in which that Court approved a jury instruction that stated "A person is deemed to be under the influence or affected by intoxicating liquor if such person's ability to handle a motor vehicle is lessened in any appreciable degree." *Hall*, 2004 MT 106 ¶21. Hall claimed that this language would violate the principle set forth in this Court in *McNally*. Hall also claimed it would be inappropriate to consider his Washington convictions as that state combined it's DUI and Per Se statutes into one. This Court ruled against both arguments by Hall.

As to the *McNally* issue, the Court found the Washington statutory scheme analogous to that in Montana, and not like the DWAI statute in Colorado. *Hall*, 2004 MT 106 ¶21. This Court went on to hold:

> While we do not necessarily know which subsection of Wash. Rev. Code § 46.61.502 the defendant violated, whether it was the regular DWI or the per se aspect, see, e.g., *Franco*, 639 P.2d at 1324 (the jury need only be unanimous as to guilt of the overall offense but need not be unanimous as to guilt of a particular subsection), it is nonetheless certain that a person convicted of violating Wash. Rev. Code § 46.61.502 committed an offense for which each sub-section has an analogous statute in Montana.
>
> *State v. Hall*, 2004 MT 106 ¶22

*State v. Hall* did not address the issue of whether another state's statute had to contain the "ways of the state open to the public" language found in Montana law.

In *State v. Young*, 2012 MT 251, 366 Mont. 527, 289 P.3d 110, the defendant had prior DUI convictions in Idaho. Young argued that the Idaho DUI statutes were not sufficiently similar to allow for stacking under § 61-8-734(1)(a), MCA. Although the two statutes have mostly similar wording, Idaho does not statutorily define the quantum of impairment necessary. It simply states that the driver must be under the influence of alcohol or drugs. Young argued that the Idaho Court of Appeals had interpreted the phrase "under the influence" as "impairment of driving ability to the slightest degree," thus violating the Court's rationale in refusing to honor Colorado DWAI convictions for stacking purposes as set forth in *McNally*. *Young*, 2012 MT 251¶14. The *Young* Court disagreed for two reasons. First, as

noted above *McNally* involved a Colorado conviction that has no direct analogue under Montana law. Second, and more importantly, this Court noted that the Idaho Supreme Court had issued a new ruling with a different interpretation of the legal standard for impairment.

> In addition, the day after the Idaho Court of Appeals handed down its decision in *Schmoll*, the Supreme Court of Idaho (Idaho's highest court) held that "[i]n order to be 'under the influence,' a person need only have consumed sufficient alcohol and drugs or other intoxicating substances 'to such extent as to influence or affect his driving of the motor vehicle.'" *State v. Oliver,* 144 Idaho 722, 170 P.3d 387, 389 (Idaho 2007) (citing *State v. Glanzman,* 69 Idaho 46, 202 P.2d 407, 408 (Idaho 1949); *State v. Gleason,* 123 Idaho 62, 844 P.2d 691 (Idaho 1992).
>
> Therefore, the Idaho Supreme Court's definition of "under the influence" is essentially the same as Montana's definition with its "diminished" standard. Both require more than just drinking and driving; they require the consumption of alcohol or drugs to affect a person's ability to drive. Consequently, we conclude that the consumption of sufficient alcohol or drugs to influence or affect a person's driving is not a lesser standard than if, as a result of consuming alcohol or drugs, a person's ability to safely operate a motor vehicle has been diminished.
>
> *State v. Young*, 2012 MT 251¶17-18

*State v. Young* did not address the issue of whether another state's statute had to contain the "ways of the state open to the public" language found in Montana law. It only looked to the standard of impairment required. [3]

[3] In *State v. Barrett*, 2015 MT 303, 381 Mont. 299, 358 P.3d 921, this Court again reviewed the Idaho DUI statute but only about an unrelated issue, whether Idaho's denomination of Barrett's 3rd DUI to a 2nd DUI under a plea bargain required Montana to ignore one of Barrett's three DUI convictions. This Court concluded that all three of his convictions should be counted for stacking purposes under § 61-8-734(1)(a). *Barrett*, 2015 MT 303 13¶

In *State v. Calvert*, 2013 MT 374, 373 Mont. 152, 316 P.3d 173, this Court reviewed Nevada's DUI statutory framework to determine whether Nevada convictions could be used for stacking under § 61-8-734(1)(a), MCA. Calvert argued that Nevada's statute was not sufficiently similar to Montana's DUI law as Nevada criminalized having a blood alcohol content of .10 or greater within two hours of driving regardless of a person's blood alcohol content while driving. *Calvert*, 2013 MT 374 ¶11. This Court found Calvert's arguments unconvincing. First the Court noted that the Nevada Supreme Court made it clear that their statute was designed to criminalize driving while intoxicated, not afterwards. *Calvert*, 2013 MT 374 ¶12. Second, the Court found that neither Nevada nor Montana actually require the prosecution to prove an individual's precise blood alcohol content while driving. *Calvert*, 2013 MT 374 ¶ 13. Finally, the Court that the level of impairment proscribed by Nevada was exactly the same as in Montana at the time and thus avoiding a *McNally* issue. *Calvert*, 2013 MT 374 ¶14.

*State v. Calvert* did not consider the issue of whether another state's statute had to contain the "ways of the state open to the public" language found in Montana law. In fact, however, Nevada did have similar statutory language. Nevada requires that in a DUI prosecution the vehicle be "on a highway or on premises to which the public has access". *Calvert*, 2013 MT 374 ¶9.

In *State v. Cleary*, 2012 MT 113, 365 Mont. 142, 278 P.3d 1020, this Court reviewed South Dakota's DUI statutory framework to determine whether South Dakota convictions could be used for stacking under § 61-8-734(1)(a), MCA. In this particular case, Cleary had been convicted of a DUI in South Dakota. He had done everything necessary to complete the requirements imposed on him by South Dakota, and then had successfully gone through South Dakota's expungement process. South Dakota, however, would allow the use of the expunged conviction for some purposes. The question then became whether the expunged conviction could be used for stacking purposes under §61-8-734 (1)(a), MCA. This Court first concluded that an expunged South Dakota conviction did not constitute a conviction for Montana purposes. The Court also concluded that Montana did not have any similar statutes that would allow the use of an expunged conviction for any enhancement purposes, and so declined to consider the South Dakota process that would have allowed for it. *Cleary*, 2012 MT 113, ¶ 24.

*State v. Cleary* did not address the issue of whether another state's statute had to contain the "ways of the state open to the public" language found in Montana law.

In *State v. Olson*, 2017 MT 101, 387 Mont. 318, 400 P.3d 214, the defendant challenged Texas DUI convictions under the *McNally* standard. This Court found

the two sets of statutes to be sufficiently similar to allow Texas convictions to count as stacking offenses under §61-8-734 (1)(a), MCA.

> Comparing these to Montana's provisions, both States set the same level of culpability for DUI per se: an alcohol concentration of 0.08. *Polaski*, ¶ 20; *Barrett*, ¶ 9. Olson argues that the rebuttable inference of diminished driving when having an alcohol concentration of 0.08 under § 61-8-401(4)(c), MCA—Montana's standard DUI statute, not DUI per se—results in a "lower standard of proof" for DUI per se under Montana law. However, this argument is incorrect because a conviction under Montana's DUI per se provision, § 61-8-406, MCA, requires no proof of diminishment. The rebuttable inference of diminishment is set forth in the standard DUI statute, § 61-8-401, MCA, because it is relevant to proving that offense, not DUI per se. Thus, the DUI per se statutes in Montana and Texas are similar.
>
> Regarding standard DUI, violations under Texas and Montana law are based on similar measures of culpability. Montana requires a person's ability to safely operate a vehicle to be "diminished," while Texas requires a person not have "the normal use of mental or physical faculties." As we held in *Polaski*, "diminished" ability means that a person's ability to safely operate a vehicle is "reduced or to a lesser degree." *Polaski*, ¶ 22. Both Montana and Texas require an appreciable loss of driving ability in order to establish the similar measures of "diminished" or "not having the normal use." This is distinct from the Colorado statutes at issue in *McNally*, which criminalized a third DUI category based upon a hair-trigger impairment standard of merely "to the slightest degree." *McNally*, ¶ 10.
>
> We conclude that the Texas DUI statutes in 2005 and 2007 were similar to Montana's laws in effect at that time, rendering Olson's Texas convictions as prior convictions for the purposes of § 61-8-734(1)(a), MCA. Because Olson's Texas convictions are sufficient, along with his Montana convictions, to support his felony DUI conviction, we do not address Olson's DUI conviction in Georgia.
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> *State v. Olson*, 2017 MT 101, §15-P17, 387 Mont. 318, 321-322, 400 P.3d 214, 217-218

*State v. Olson* did not address the issue of whether another state's statute had to contain the "ways of the state open to the public" language found in Montana law.

In *State v. Lund*, 2020 MT 53, 399 Mont. 159, 458 P.3d 1043, the Court reviewed Alaska DUI statutes to determine whether they were sufficiently similar to Montana law to allow them to be used for stacking purposes under § 61-8-734(1)(a), MCA. Lund had three prior DUI convictions in Alaska, and had argued that Alaska allows conviction of a DUI under a lesser standard than Montana. The District Court in *Lund* had concluded that the two statutes, while not identical, used essentially the same standards of impairment. *Lund*, 2020 MT 53 ¶9. The *Lund* Court clarified the ruling in *McNally* and noted that McNally's convictions in Colorado were from a statute (DWAI) that had no counterpart in Montana. *McNally*, 2020 MT 53 ¶11. Unlike the DWAI offense in Colorado, Alaska's DUI regimen was found to be very similar to that in Montana, both in structure and in the level of impairment required. The *Lund* Court concluded:

> …Alaska's standard of, "a level of impairment that renders the driver incapable of operating a motor vehicle with the caution characteristic of a person of ordinary prudence who is not under the influence" is not a lesser standard of impairment than required to sustain a Montana DUI conviction. Rather, Alaska's standard equates to Montana's "diminished" standard. Therefore, Alaska's and Montana's "under the influence" definitions are sufficiently similar for purposes of § 61-8-734(1)(a), MCA. As a result of a similar standard in both Alaska and Montana,

> Lund could have been convicted in Montana in 2003, 2007 and 2009, for the same conduct for which he was convicted in Alaska.
>
> *State v. Lund*, 2020 MT 53 ¶14, 399 Mont. 159, 458 P.3d 1043

*State v. Lund* did not address the issue of whether another state's statute had to contain the "ways of the state open to the public" language found in Montana law. It only looked to the standard of impairment required.

In *State v. Pankhurst*, 2022 MT 89, 408 Mont. 309, 509 P.3d 15, at issue was whether North Dakota DUI convictions could be used for stacking purposes under §61-8-734 (1)(a), MCA. Under North Dakota law, a person can be convicted of a DUI if they are "so affected" by alcohol they do no "possess that clearness of intellect and control of himself that he would otherwise have. *Pankhurst*, 2022 MT 89 §10. Pankhurst objected to the lack of a nexus between the consumption of alcohol and impairment of one's ability to drive. This Court found that both the Montana law and the North Dakota law on the subject require similar levels of impairment, and that the North Dakota Supreme Court had ruled contrary to Pankhurst's argument.

> The North Dakota Supreme Court similarly found that North Dakota's DUI statute requires a nexus between alcohol and the defendant's ability to operate a vehicle in *Hanson*. 73 N.W.2d at 140. The court there concluded that the trial court did not err when it instructed the jury in a DUI trial that it was "immaterial" how much alcohol the defendant consumed. *Hanson*, 73 N.W.2d at 140. The court reasoned that "[t]he measure of [alcohol's] effect upon the mental and bodily processes of the individual determines whether he was under the influence . . . which to any degree affected his ability to operate his automobile within the meaning of the statute[.]" *Hanson*, 73 N.W.2d at 140.

> *Hanson* and *Christianson* support a conclusion that North Dakota and Montana require equivalent levels of intoxication to convict a person of DUI. Although North Dakota's definition of "under the influence" does not contain identical language requiring a nexus between impairment and driving ability, it does require that a person's mental and physical faculties be diminished by alcohol.
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> *State v. Pankhurst*, 2022 MT 89, ¶14-15, 408 Mont. 309, 315, 509 P.3d 15, 18-19

*State v. Pankhurst* did not address the issue of whether another state's statute had to contain the "ways of the state open to the public" language found in Montana law. This Court did note, however, that the North Dakota statute has a similar requirement.

> For a DUI conviction to be "sustain[ed]" in North Dakota, the State must prove (1) **that the defendant was driving a motor vehicle on a public way** and (2) that the defendant was driving "while under the influence of intoxicating liquor so as to not possess the clearness of intellect and control of himself that he would otherwise have." *North Dakota v. Salhus*, 220 N.W.2d 852, 856 (N.D. 1974) (citation omitted); *see also* N.D. Cent. Code § 39-08-01(1). (emphasis added)
>
> *State v. Pankhurst,* 2022 MT 89, ¶9, 408 Mont. 309, 313, 509 P.3d 15, 17

Finally, this Court has considered whether California DUI convictions can be the basis of stacking offenses in Montana under §61-8-734 (1)(a), MCA. In *State v. Polaski*, 2005 MT 13, 325 Mont. 351, 106 P.3d 538, the defendant, proceeding pro se, was challenging the use of California DUI convictions that took place in 1988, 1996, 1997, and 2001. Based on these four prior convictions Polaski was charged in Montana with a 2002 felony DUI offense pursuant to §61-8-734 (1)(a),

MCA. Polaski's primary challenge was to compare the California definition of "under the influence" with Montana's definition, a *McNally* challenge. The Court compared California's standard of "impaired to an appreciable degree" with Montana's standard that the ability to safely operate a motor vehicle be "diminished."

> We now compare California's "under the influence" statute with Montana's "under the influence" statute. For a defendant to be guilty of driving "under the influence" in violation of Cal. Veh. Code § 23152(a), the alcohol or drug "must have so far affected the nervous system, the brain, or muscles of the individual as to impair to an appreciable degree the ability to operate a vehicle in a manner like that of an ordinarily prudent and cautious person in full possession of his faculties." *People v. Enriquez,* 42 Cal. App. 4th 661, 665, 49 Cal. Rptr. 2d 710 (Cal. Ct. App., 1996). By contrast, for a defendant to be guilty of driving "under the influence" in violation of § 61-8-401(1), MCA (1991-2001), his or her ability to safely operate the vehicle need only be "diminished." Sec. 61-8-401(3), MCA (1991-2001).
>
> In *State v. McNally*, 2002 MT 160, P22, 310 Mont. 396, P22, 50 P.3d 1080, P22, we concluded that if another state's law allows a person to be convicted using a lesser standard than would be required in Montana for a conviction, the statutes are not similar for purposes of § 61-8-734(1)(a), MCA . While our statutes do not define "diminished," an ordinary definition of the word is "reduced or to a lesser degree." Webster's Third New International Dictionary 634 (1971). We conclude that California's standard of "impaired to an *appreciable* degree" is not a lesser standard but rather would be a standard equal to or greater than our "diminished" standard. Therefore, California's and Montana's "under the influence" statutes are sufficiently similar for purposes of § 61-8-734(1)(a), MCA (2001). As a result of a similar standard in both California and Montana, Polaski could have been convicted in Montana in 1996, 1997 and 2001, for the same conduct for which he was convicted in California.

*State v. Polaski*, 2005 MT 13, ¶21-P22, 325 Mont. 351, 356-357, 106 P.3d 538, 542

*State v. Polaksi* did not address the issue of whether another state's statute had to contain the "ways of the state open to the public" language found in Montana law. The Court's comparison of California's DUI statutes to Montana's is therefore not determinative of the issue Appellant now raises.

## III. For stacking purpose under §61-8-734, MCA (now § 61-8-1008, MCA) this Court should only recognize the law of states that limit the applicability of their alcohol based DUI laws to ways of the state open to the public, or equivalent language. California is not such a state

As noted above, Montana has a long history of tying the applicability of DUI laws to public highways and public spaces. There was a time, from 1955 to 1979, when Montana extended its DUI laws to private property. But since 1983 Montana has required that the impaired driving take place on a way of the state open to the public. This Court has given a generous interpretation to that term, but it definitively does not apply to alcohol impaired driving that takes place solely on private property. That is a deliberate policy decision made by the Montana Legislature.

California does not limit its DUI laws to public highways and public areas. At all times relevant to this case California DUI laws have applied throughout that state. See Cal. Veh. Code § 23152, which provides multiple different ways that a

DUI can occur for "driving a vehicle." This is not an academic argument, California prosecutes individuals for impaired driving on private property. In *People v. Malvitz*, 11 Cal. App. 4th Supp. 9, 14 Cal. Rptr. 2d 698, the California Court of Appeals held that Cal. Veh. Code § 23152 is applicable to impaired driving on private property.

> According to the stipulated facts, appellant, who was under the influence of alcohol, drove a motor vehicle on a privately owned and paved area which was part of a locked storage facility. This facility was not open to the general public, but lessees and others with business on the property could enter. The lower court found him guilty, rejecting his contention that Vehicle Code section 23152, subdivision (a) could not apply because he drove only on private property which was not open to use by the general public.
>
> Discussion- The single narrow issue raised by this appeal is whether section 23152, subdivision (a) applies to any place in California where a vehicle can be driven, including the particular venue of appellant's under-the-influence driving, or whether it applies only to places where the general public is likely to be endangered by such driving.
>
> Based on the stipulated facts, appellant, while under the influence of alcohol, drove in an area that was, at the most, accessible only to specific members of the public (those who were able to open the gate by using a code). If section 23152, subdivision (a) prohibits driving under the influence anywhere a vehicle can be driven, regardless of whether the property is publicly or privately owned and regardless of whether the property is open to the general public, the judgment against appellant must be affirmed.
>
> We find that section 23152, subdivision (a) does prohibit driving under the influence on private property for three reasons: first, section 23152, subdivision (a) is not limited to public highways and roads by virtue of its inclusion in division 11 of the Vehicle Code; second, section 23152, subdivision (a) is the product of a series of legislative refinements which progressively expanded its applicability and, third, Penal Code

> section 367d, which made it a misdemeanor to operate or drive a motor vehicle while intoxicated, has effectively merged into section 23152, subdivision (a).
>
> *People v. Malvitz*, 11 Cal. App. 4th Supp. 9, 11, 14 Cal. Rptr. 2d 698, 699 (Cal. App. 1992)

California is not the only state that expands its DUI laws to the entire area of the State, both public and private property. In *Reed v. Beckett*, 238 W. Va. 354, 795 S.E.2d 509 (Sup. App. Ct. of Virginia, 2016), the Supreme Appellate Court of Virginia ruled that Virginia's DUI laws applied throughout the state, regardless of the public or private nature of the location where the impaired driving occurs.

> W.Va. Code § 17C-5-2a(a) is clear and unambiguous. Through its definition of the phrase "in this State," the Legislature made the act of driving while intoxicated a revocable offense "anywhere within the physical boundaries of this State." The Legislature chose to structure our DUI statutes to regulate the condition of the driver, not the locale in which the driving is taking place. Thus, the Legislature expressed its plain intent to prohibit an intoxicated person from driving a vehicle anywhere in West Virginia, whether on public roads or across private land.
> Reed v. Beckett, 238 W. Va. 354, 357, 795 S.E.2d 509, 512 (Sup. App. Ct. of Virginia, 2016)

Not only did the Virginia Court rule that its DUI laws apply to private property, it provided an analysis of other states that extend their DUI laws to private property. According to the Court in *Reed*, there are 18 states that extend their DUI laws to private property including Georgia, South Carolina, Arkansas, California, Hawaii, Indiana, Arizona, Maine, Florida, Colorado, Illinois, Louisiana, Vermont, Mississippi, Connecticut, Missouri, Iowa, and

Virginia. *Reed v. Beckett,* 238 W. Va. 354, 795 S.E.2d 509 (Sup. App. Ct. of Virginia, 2016), at fn. 13.

## CONCLUSION

The element of ways of state open to the public is an essential element of alcohol based DUI prosecutions in Montana. This Court should not allow DUI convictions to be used for stacking purposes under §61-8-734, MCA (now § 61-8-1008, MCA), if those states do not limit their alcohol DUI laws to public highways and public spaces. The statutes are too dissimilar. This conclusion excludes the Appellant's California convictions. This Court should reverse the decision of the District Court, and return this case to Gallatin County for misdemeanor sentencing.

Respectfully submitted this 17th day of September, 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 Time New Roman 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 6563, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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