IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0305

STATE OF MONTANA,

Plaintiff and Appellee,

v.

NEIL DENNIS COLE,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, the Honorable Leslie Halligan, Presiding

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUE 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 3

STANDARDS OF REVIEW 6

SUMMARY OF THE ARGUMENT 6

ARGUMENT 7

The District Court imposed a mandatory-minimum fine of $5,000 under a statute this Court has determined is facially unconstitutional. The District Court applied $100 in credit for time served against the fine and suspended the remaining $4,900 contingent upon successful completion of probation. The entire $5,000 fine must be struck from the judgment because it lacks statutory authority 7

CONCLUSION 14

CERTIFICATE OF COMPLIANCE 15

APPENDIX 16

TABLE OF AUTHORITIES

Cases

City of Kalispell v. Salsgiver,
2019 MT 126, 396 Mont. 57, 443 P.3d 504 (*en banc*) 7, 13

City of Whitefish v. Curran,
2023 MT 118, 412 Mont. 499, 531 P.3d 547 (*en banc*) ..... passim

Griffith v. Kentucky,
479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) 13

State v. Arellano,
2024 MT 108, 416 Mont. 406, 549 P.3d 428 12

State v. Cleveland,
2014 MT 305, 377 Mont. 97, 338 P.3d 606 12

State v. Eaton,
2004 MT 283, 323 Mont. 287, 99 P.3d 897 9

State v. Gibbons,
2024 MT 63, 416 Mont. 1, 545 P.3d 686 (*en banc*) ..... passim

State v. Heafner,
2010 MT 87, 356 Mont. 128, 231 P.3d 1087 ..... 13, 14

State v. Ingram,
2020 MT 327, 402 Mont. 374, 478 P.3d 799 9

State v. Lenihan,
184 Mont. 338, 602 P.2d 997 (1979) 8

State v. Mingus,
2004 MT 24, 319 Mont. 349, 84 P.3d 658 ..... 9, 11, 12

State v. Reichmand,
2010 MT 228, , 358 Mont. 68, 243 P.3d 423 13

State v. Stewart,
2012 MT 317, 367 Mont. 503, 291 P.3d 1187 13

State v. Whitehorn,
2002 MT 54, 309 Mont. 63, 50 P.3d 121 13

State v. Yang,
2019 MT 266 9

Teague v. Lane,
489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) 13

Statutes

Mont. Code Ann. § 46-18-201(2)(a) 8, 11, 12
Mont. Code Ann. § 46-18-201(3)(b) 8
Mont. Code Ann. § 46-18-231(3) 4, 8
Mont. Code Ann. § 46-18-403(2) 11
Mont. Code Ann. § 61-8-401(1)(a) 1
Mont. Code Ann. § 61-8-722(1) 8
Mont. Code Ann. § 61-8-731(3) ..... passim

Constitutional Authorities

Montana Constitution

Art. II, § 22 10

United States Constitution

Amend. VIII 10

STATEMENT OF THE ISSUE

The District Court imposed a mandatory-minimum $5,000 fine on Neil Cole during sentencing, pursuant to Mont. Code Ann. § 61-8-731(3) (2019). Subsequently, this Court held that § 61-8-731(3) (2019) is facially unconstitutional. Must the fine be struck from the judgment because it is unsupported by lawful statutory authority?

STATEMENT OF THE CASE

In June 2020, the State charged Neil Dennis Cole with one count of driving under the influence of alcohol or drugs – 4th offense, a felony, in violation of Mont. Code Ann. § 61-8-401(1)(a) (2019). (Doc. 3.) For more than two years, the parties cooperated to get Mr. Cole admitted into treatment court. Ultimately, their efforts were unsuccessful. (Docs. 11.1, 13, 14, 17, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 35, 36, 38, 39.) Finally, in October 2022, the parties reached a global plea agreement that disposed of the instant case on appeal, DC-20-349, and another case, DC-22-302. (Doc. 41.)

The plea agreement provided that Mr. Cole would plead guilty to the DUI charge in this case, and the State would move to dismiss DC-22-302 with prejudice at sentencing. (Doc. 41 at 1 – 2.) Among other

things, Mr. Cole agreed to pay "all fines, fees, and restitution ordered by the sentencing court according to a schedule" set by his probation officer in specified amounts, including the mandatory-minimum $5,000 fine. (Doc. 41 at 6.) The District Court accepted Mr. Cole's guilty plea. (COP Tr. at 7 – 9.)

At sentencing, the District Court imposed the parties' agreed-upon sentence of a 13-month commitment to the Department of Corrections ("DOC"), followed by a five-year suspended sentence with a recommendation that Mr. Cole enter and successfully complete the Watch Program. (Sent. Tr. at 10 – 11, 12 – 13, attached hereto as App. A.) Following Defense Counsel's request to strike the fine based on Mr. Cole's inability to pay it, the District Court asked Mr. Cole questions about his financial situation. (Sent. Tr. at 8 – 10.) In the oral pronouncement, the District Court imposed the $5,000 fine reduced by $100 for credit for time served of one day and suspended "the remainder of the fine of $4,900 based on his successful completion of the conditions of probation" and "continued good compliance."[1] (App. A at 11 – 12;

[1] Additionally, the District Court dismissed DC-22-302 with prejudice. (App. A at 13.)

Sent. Tr. at 8.) The written judgment conforms with the oral pronouncement. (D.C. Doc. 47 at 2, 6, attached hereto as App. B.)

Mr. Cole timely appealed.

STATEMENT OF THE FACTS

In June 2020, the State charged Neil Cole with committing a felony DUI. After more than two years of unsuccessful attempts to enter Treatment Court, Mr. Cole entered into a plea agreement with the State to resolve the charge. (Doc. 41.) As part of the agreement, Mr. Cole agreed to pay certain fees and costs, as well as the $5,000.00 mandatory-minimum fine. (Doc. 41 at 6 – 8.) Mr. Cole also agreed to waive his rights to appeal, post-conviction relief except for ineffective assistance of counsel, and sentence review. (Doc. 41 at 8.) Both Mr. Cole and his attorney signed the agreement. (Doc. 41 at 10 – 11.)

At the change of plea hearing, Mr. Cole pled guilty to "driving or being in physical control of a vehicle, a white Jeep, on a way of the State open to the public . . . while under the influence of alcohol and/or drugs and that this was a fourth of subsequent offense." (COP Tr. at 8 – 9.) The District Court found Mr. Cole guilty of a felony DUI and ordered a presentence investigation ("PSI"). (COP Tr. at 9, 11.)

At sentencing, Mr. Cole was unsure how old he was. Eventually, everyone agreed Mr. Cole was born in 1956, making him 66 years old at the time. (Sent. Tr. at 4 – 5.) The District Court proceeded to review Mr. Cole's financial situation with him, observing he had agreed to pay $450 in pretrial supervision costs. (Sent. Tr. at 6 – 7.) Mr. Cole explained he nets $1,643/month in Social Security and needs to pay about $300/month for auto insurance and a storage unit. (Sent. Tr. at 7 – 8.)

Notwithstanding the counseled consent to financial obligations in the written plea, Defense Counsel argued, "I took a note here to ask the Court to make a factual finding about his ability to pay it under 46-18-231(3)."[2] (Sent. Tr. at 8.) Counsel questioned Mr. Cole about his housing arrangements. Mr. Cole indicated he had been waiting two-and-a-half years for subsidized housing and hoped to be accepted into Clark Fork Riverside when he finished his 13-month term at Watch, where his rent would be one-third of his monthly income. (Sent. Tr. at 8 – 9.) Whereupon, Defense Counsel stated, "I guess, Judge, where I'm going with all this is the $5,000 fine, to me, seems like a lot for Mr.

[2] Counsel did not indicate at that point what "it" was.

Cole, and I'm going to request that the Court strike all of it." (Sent. Tr. at 9.)

The District Court asked Mr. Cole whether imposition of the $5,000 fine over the period of the judgment would be a hardship. Mr. Cole responded, "Yes, I do. I haven't bought any food because I –the food has to be for a month and will have to be added into that too." (Sent. Tr. at 9 – 10.) The District Court inquired if "other fees" would be a hardship, to which Mr. Cole responded, "It will have to be a little at a time, you know." (Sent. Tr. at 10.) Mr. Cole confirmed he could pay the $450 pretrial supervision fees "over time." (Sent. Tr. at 10.)

The Prosecutor asked no questions of Mr. Cole. Nor did the Prosecutor argue Mr. Cole must pay the fees, costs, and fine included in the plea agreement. The Prosecutor did not object to the District Court's inquiry about Mr. Cole's ability to pay financial obligations or to Defense Counsel's request to strike the fine completely.

In pertinent part, during the oral pronouncement the District Court ruled:

> I will impose the $5,000 fine. I'll give him credit against it for $100. I'll suspend the remainder of the fine of $4,900 based on his successful completion of the conditions of

> probation. I will not impose any other fees that are listed, but for the $50 PSI fee. And I will impose the pretrial supervision fees of $450. However, if he wishes to make application to that program for a reduction in those fees, he's certainly welcome to do that.
>
> So, Mr. Cole, that will mean that I've suspended the $4,900 in the fine based on you[r] continued good compliance. You will have an obligation of $500 to pay over the term of the sentence. I hope that won't present an undue hardship. I do understand your limited means and also the uncertainty of your housing situation moving forward.

(App. A at 11 – 12. Accord App. B at 5 – 6, ¶¶ 28 – 29.)

STANDARDS OF REVIEW

This Court reviews a criminal sentence for legality. *State v. Gibbons*, 2024 MT 63, ¶ 20, 416 Mont. 1, 545 P.3d 686 (*en banc*) (citations omitted), *cert. denied* ___ U.S. ___, ___ S.Ct. ___, 2024 WL 4427558. "A claim that a criminal sentence violates a constitutional provision is reviewed de novo." *Gibbons*, ¶ 20 (citation omitted).

SUMMARY OF THE ARGUMENT

The District Court imposed a $5,000 fine on Neil Cole, reduced it by credit for time served, and suspended the remainder of the fine contingent on Mr. Cole's successful completion of a five-year

probationary sentence. Pursuant to *Gibbons*, the fine is facially unconstitutional. It cannot be imposed later even if Mr. Cole's sentence is revoked. This Court should reverse the District Court, vacate the imposition and suspension of the illegal fine, and remand with instructions to amend the written judgment by striking the fine.

ARGUMENT

The District Court imposed a mandatory-minimum fine of $5,000 under a statute this Court has determined is facially unconstitutional. The District Court applied $100 in credit for time served against the fine and suspended the remaining $4,900 contingent upon successful completion of probation. The entire $5,000 fine must be struck from the judgment because it lacks statutory authority.

"A trial court's authority to impose sentences in criminal cases is defined and constrained by statute, and . . . a district court has no power to impose a sentence in the absence of specific statutory authority. . . . [A] sentence not based on statutory authority is illegal." *City of Kalispell v. Salsgiver*, 2019 MT 126, ¶ 35, 396 Mont. 57, 443 P.3d 504 (*en banc*) (citations, internal quotation marks omitted). "[T]he sentencing authority of a court exists solely by virtue of a statutory grant of power and therefore cannot be exercised in any manner not

specifically authorized. *State v. Lenihan*, 184 Mont. 338, 342, 602 P.2d 997, 1000 (1979)." *Gibbons*, ¶ 52 (internal quotation marks omitted).

In *Gibbons*, this Court held the fine required by Mont. Code Ann. § 61-8-731(3) (2019) was facially unconstitutional. *Gibbons*, ¶ 66. The Court determined, "the mandatory minimum $5,000 fine required by the sentencing statute, every time it is imposed, prevents a judge from considering constitutional and statutorily mandated factors and is, therefore, facially unconstitutional." *Gibbons*, ¶ 60. Further, the Court explained it was impossible to harmonize Mont. Code Ann. § 61-8-731(3) with the constitutionally required proportionality analysis in § 46-18-231(3), because the Legislature disallowed such harmonizing by the explicit, mandatory language it used in § 61-8-731(3). *Gibbons*, ¶ 53.

Before deciding *Gibbons*, this Court ruled, over three dissenting justices, that a sentencing court possesses discretion pursuant to Mont. Code Ann. § 46-18-201(2)(a), (3)(b), "to suspend or otherwise order an alternative to the mandatory $600 fine" in Mont. Code Ann. § 61-8-722(1) (2019). *City of Whitefish v. Curran*, 2023 MT 118, ¶ 27, 412 Mont. 499, 531 P.3d 547 (*en banc*). Additionally, the Court determined the sentencing court abused its discretion by not recognizing its

authority to suspend the fine. *Curran*, ¶ 27. In reaching its holding, the majority and concurring opinions emphasized that Curran had not challenged the constitutionality of the mandatory-fine statute at sentencing in the municipal court, on appeal at the district court, or on appeal at the Montana Supreme Court. *Curran*, ¶¶ 21 and n.3 (majority op.), 31 (Shea, J., concurring).

By contrast, the three dissenting justices put forth, "Imposition of fines and fees and their enforcement cannot be considered in isolation without doing injustice to individuals when they are sentenced by the court." *Curran*, ¶ 32 (McKinnon, J., dissenting). The dissent rejected the notion that discretion could be exercised at the enforcement phase of sentencing because the DUI sentencing statute itself prohibited the exercise of any discretion when imposing a mandatory-minimum fine. *Curran*, ¶ 32. The dissent disagreed that *State v. Mingus*, 2004 MT 24, 319 Mont. 349, 84 P.3d 658, and *State v. Ingram*, 2020 MT 327, 402 Mont. 374, 478 P.3d 799, could be reconciled with *State v. Eaton*, 2004 MT 283, 323 Mont. 287, 99 P.3d 897, or *State v. Yang*, 2019 MT 266, 397, Mont. 486, 452 P.3d 897. Instead, the dissent emphasized:

> Due process and equal protection principles ground a court's inquiry into the appropriateness

> of any penalty that is imposed. We have individualized sentencing in this country. In imposing a penalty, a sentencing court should consider the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, and the existence of alternative means for effectuating the penological purpose. . . .
>
> Monetary sanctions present fundamental challenges to the notion of fairness and equality when they are imposed without consideration of a defendant's ability to pay.

Curran, ¶¶ 38 – 39. In the dissent's view:

> Failure to address indigency upon *imposition* of the fine—under the guise that inequities will be addressed through the manner in which the fine is *enforced*—produces a disparate impact on the impoverished individual and entrenches patterns of poverty and punishment, in sharp contrast to the indigent defendant's counterpart who can afford the fine.

Curran, ¶ 48 (emphasis added).

Less than a year after *Curran*, the Court considered a facial constitutional challenge to the mandatory-minimum fine in Mont. Code Ann. § 61-8-731(3) (2019), under the excessive fines clause of the Eighth Amendment to the United States Constitution and Article II, Section 22 of the Montana Constitution. *Gibbons*, ¶ 63. Without addressing

Curran, the Court expressly overruled "*Mingus* to the extent it prevents a court from considering an offender's ability to pay prior to imposing any fine." *Gibbons*, ¶ 64. Further, the Court held, "Section 61-8-731(3), MCA, is facially unconstitutional to the extent that whenever the sentencing judge imposes a fine, the statute does not allow the judge to consider, before imposing the $5,000 mandatory minimum, the proportionality factors protecting an offender from excessive fines." *Gibbons*, ¶ 66.

In the instant case, the District Court imposed the mandatory $5,000 fine, pursuant to Mont. Code Ann. § 61-8-731(3) (2019). It then reduced the fine by $100 for credit for time served, pursuant to Mont. Code Ann. § 46-18-403(2), and suspended the remaining $4,900 contingent upon Mr. Cole's successfully completing probation, pursuant to Mont. Code Ann. § 46-18-201(2)(a). *Gibbons* makes clear, however, that the upfront imposition of the mandatory-minimum DUI fine – not just the subsequent enforcement of it – is facially unconstitutional. Mr. Cole's fine cannot survive the Court's ruling in *Gibbons*.

Curran stands for the proposition that a sentencing court possesses discretion to suspend payment of a fine under § 46-18-

201(2)(a). But *Curran* does not authorize imposition of a facially unconstitutional fine that is suspended pending successful completion of probation. *Gibbons* holds that the fine required by § 61-8-731(3) (2019) – the exact same version of the fine at issue in the instant appeal – is unconstitutional in all its applications because the statute prohibits the sentencing court from reducing the fine below $5,000 or waiving it completely, regardless of a defendant's ability to pay. *Gibbons*, ¶¶ 60, 64, 66.

It does not matter that Mr. Cole agreed to pay the $5,000 fine in his plea agreement. When he signed the plea agreement, a $5,000 minimum fine was mandated by *Mingus*. Later, in *Gibbons*, the Court declared the mandatory-minimum fine facially unconstitutional.

A defendant cannot acquiesce in "a sentence not authorized by law." *State v. Arellano*, 2024 MT 108, ¶ 16, 416 Mont. 406, 549 P.3d 428. Nor may a party seek "enforcement of an illegal, and therefore unenforceable, provision" in a plea agreement. *State v. Cleveland*, 2014 MT 305, ¶ 23, 377 Mont. 97, 338 P.3d 606. "[T]here can be no plea bargain to an illegal sentence." *Cleveland*, ¶ 25 (McKinnon, J., specially concurring). Sentencing conditions that lack statutory authority are

"illegal *ab initio*." *Salsgiver*, ¶ 43. "[A] party cannot acquiesce and tacitly accept a trial court's exercise of power that it does not have legal authority to impose." *Salsgiver*, ¶ 42.

Mr. Cole's appeal was pending when the Court issued its decision in *Gibbons*. Because his conviction is not yet final, *Gibbons* controls. "[A]ll defendants whose cases are pending on direct review or not yet final must be treated the same in the sense that they are all entitled to have newly announced constitutional rules applied to their cases." *State v. Stewart*, 2012 MT 317, ¶ 30, 367 Mont. 503, 291 P.3d 1187, citing *Griffith v. Kentucky*, 479 U.S. 314, 327—28, 107 S.Ct. 708, 715—16, 93 L.Ed.2d 649 (1987); *State v. Reichmand*, 2010 MT 228, ¶¶ 11—12, 358 Mont. 68, 243 P.3d 423. New substantive rules of constitutional interpretation should be given retroactive application. *State v. Whitehorn*, 2002 MT 54, ¶ 37, 309 Mont. 63, 50 P.3d 121, analyzing and applying *Teague v. Lane*, 489 U.S. 288, 310—12, 109 S.Ct. 1060, 1075—76, 103 L.Ed.2d 334 (1989).

When an illegal portion of a sentence cannot be corrected on remand, "the case should be remanded to the district court with instructions to strike the illegal conditions." *State v. Heafner*, 2010 MT

87, ¶ 11, 356 Mont. 128, 231 P.3d 1087. Accordingly, this Court should reverse the District Court's decision to impose a $5,000 fine and suspend $4,900 of it. It does not matter whether Mr. Cole successfully completes probation. The fine is facially unconstitutional and cannot be imposed even if Mr. Cole's suspended sentence is revoked. The Court should remand with instructions for the District Court to issue an amended judgment that strikes the fine completely.

CONCLUSION

For the foregoing reasons, Neil Cole respectfully requests the Court to reverse the District Court, vacate the $5,000 fine in Mr. Cole's judgment, and remand with instructions for the District Court to issue an amended judgment without the $5,000 fine.

Respectfully submitted this 12th day of November, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 2,823, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Deborah S. Smith
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APPENDIX

Oral Pronouncement of Sentence.....App. A

Judgment.....App. B

CERTIFICATE OF SERVICE

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