FILED
01/29/2025
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 23-0381

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0381

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CHRISTOPHER LAPOINTE,

Defendant and Appellant.

BRIEF OF APPELLEE

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

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STATEMENT OF THE ISSUES

Whether the district court erred in concluding that Appellant's six prior convictions for driving under the influence (DUI) offenses in California could be counted under Mont. Code Ann. § 61-8-734 (2019) to enhance Appellant's sentence.

STATEMENT OF THE CASE

The State charged Appellant Christopher Lapointe (Lapointe) by Information with DUI/Alcohol (fourth or subsequent offense), a felony, in violation of Mont. Code Ann. § 61-8-401. (D.C. Doc. 4.) The State's affidavit of probable cause provided that "[a] records check on [Lapointe] showed that he had prior DUI convictions out of the State of California from 1999, 2007, two in 2009, 2010 and 2016." (D.C. Doc. 1 at 3.) Those convictions were later set out in the Presentence Investigation Report (PSI) (D.C. Doc. 55 at 2-4) as follows:

Arrest Date	Conviction Date	Offense Convicted of	Sentence
11/4/1999	11/17/1999	1. DUI Alcohol Causing Bodily Injury (felony)	36 months probation 120 days jail
10/13/2006	9/11/2007	1. DUI (misdemeanor)	60 months probation 120 days jail
11/21/2008	3/5/2009	1. DUI (felony) 2. DUI BAC ≥ .08 (felony)	1. 24 months prison consecutive 2. 24 months prison stayed

1/3/2009	3/5/2009	1. DUI (felony) 2. DUI While on Bail or Released O/R	1. 24 months prison consecutive 2. 24 months prison stayed
7/2/2010	7/16/2010	1. DUI (felony)	16 months prison consecutive
3/26/2016	8/18/2016	1. DUI with Prior Conviction (felony) 2. DUI BAC ≥ .08 with Priors (felony)	1. 60 months prob. 336 days jail 2. 60 months prob. 336 days jail

At no point during the district court proceedings, nor in his Appellant's Brief, has Lapointe contested the existence or validity of his California convictions.

In the omnibus memorandum filed on April 12, 2021, Lapointe indicated he intended to file a pretrial "motion addressing prior DUI convictions" and the district court set a briefing schedule and dates for a final pretrial conference and a jury trial. (D.C. Doc. 29 at 2, 5-6.) On April 26, 2021, after the State filed a verified application to revoke release due to Lapointe's violation of the terms of his release, the district court issued a bench warrant. (D.C. Docs. 30, 31.)

When Lapointe failed to appear on the date set for the final pretrial conference and the bench warrant remained outstanding, Lapointe's attorney—who had no information regarding Lapointe's whereabouts—requested the jury trial date be vacated. The district court vacated the jury trial. (D.C. Doc. 33.) Law enforcement officers arrested Lapointe on April 20, 2022. (D.C. Doc. 34.) Lapointe appeared with counsel before the court on May 2, 2022, admitted to the allegations in the State's verified application to revoke release, and the court found him in

violation of the court's conditions of release. (D.C. Doc. 37.) The court imposed a new conditional release order and scheduled an omnibus hearing for May 16, 2022. (*Id*.) At the omnibus hearing, the court set dates for a final pretrial conference and a jury trial. (D.C. Doc. 39.)

On July 5, 2022, the State filed another verified application to revoke release on the grounds Lapointe had consumed alcohol on two separate occasions and requested the court issue a warrant for his arrest. (D.C. Doc. 40.) The court issued a bench warrant on July 7, 2022. (D.C. Doc. 41.)

On August 26, 2022, Lapointe filed his pretrial motion addressing his prior DUI convictions and requested the court dismiss the felony enhancement. (D.C. Doc. 42.) The State responded to the motion, objecting on both substantive and procedural grounds. (D.C. Doc. 44.) The district court denied Lapointe's request to dismiss the felony enhancement, finding that the motion he filed was 15 months late and therefore untimely. (D.C. Doc. 47.)

At the final pretrial hearing on October 24, 2022, Lapointe appeared with counsel and informed the court he wished to change his plea. (D.C. Doc. 50.) The court engaged in a standard change of plea colloquy with Lapointe, confirmed that no plea agreement existed, and asked the prosecutor to state the maximum penalty possible. (*Id*.) The minute entry confirms Lapointe pled guilty to Count 1 of the Information and stated the factual basis for his plea with the assistance of his

counsel. (*Id*.) The court accepted the guilty plea, found Lapointe guilty, set a sentencing date of January 9, 2023, ordered Lapointe to report to probation and parole so a PSI could be completed, and quashed the bench warrant issued on July 7 that was still outstanding. (*Id*.)

On November 4, 2022, probation and parole filed a report with the court indicating Lapointe had failed to appear for his scheduled PSI interview appointment. (D.C. Doc. 54.) It appears Lapointe subsequently attended an interview as a PSI was completed and filed on December 2, 2022. (D.C. Doc. 55.) On December 31, 2022, the State filed another verified application to revoke conditional release due to Lapointe's failure to report for testing on four dates in December, as well as Lapointe's consumption of alcohol. (D.C. Doc. 56.) On January 4, 2023, the court issued the requested warrant. (D.C. Doc. 57.)

On January 6, 2023, Lapointe moved to continue the sentencing hearing and asked the court "to reconsider the filing of a motion addressing Mr. Lapointe's prior DUI convictions, and the rectitude of utilizing those convictions in aggravating his conviction in this case." (D.C. Doc. 58.) Lapointe appeared in court with his attorney on January 9, 2023, at which time the court granted his motion to continue sentencing and ordered him to file any motions he deemed necessary. (D.C. Doc. 59.) The court addressed the application to revoke release,

Lapointe admitted he had committed the violations alleged by the State, including the consumption of alcohol, and the court quashed the current warrant. (*Id*.)

On January 20, 2023, Lapointe filed a motion to dismiss the felony enhancement of the pending DUI charge. (D.C. Doc. 64.) The State filed its response on February 23, 2023, notifying the court it intended to rely on its 2022 response brief, which had substantively addressed virtually the same defense motion. (D.C. Doc. 66.) The court issued its decision and order on Lapointe's motion on March 6, 2023, denying his request to dismiss the felony enhancement of the DUI to which he had pled guilty. (D.C. Doc. 67.)

The court sentenced Lapointe on April 24, 2023, stayed the custodial portion of the sentence, and ordered conditions of release. (D.C. Docs. 71-74.) Lapointe filed notice of appeal to this Court on July 25, 2023. (D.C. Doc. 79.) On July 26, 2023, the State filed in the district court another verified application to revoke conditional release on the grounds Lapointe had consumed alcohol on July 3, 2023, in violation of the April 24 release order. (D.C. Doc. 81.) The district court issued a summons. (D.C. Doc. 82.)

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STATEMENT OF THE FACTS[1]

On July 24, 2020, around 9:03 p.m., an employee at the Lucky Lil's Casino located at 2401 West Main St. in Bozeman, Montana, called 9-1-1 to report an intoxicated driver. (D.C. Doc. 1 at 1.) The employee reported a male had just left the casino drunk, climbed behind the wheel of a green Dodge Durango parked near the casino, and driven across Main Street. (*Id*.) The casino employees had refused to serve Lapointe due to his apparent level of intoxication. (*Id*.)

Officers with the Bozeman Police Department located the described Durango in the parking lot of 2504 West Main St. (*Id*.) The officers did not activate their emergency lights and parked their patrol vehicles away from the Durango, not behind it or blocking it in. (*Id*. at 2.) One of the officers exited his patrol vehicle and approached the Durango, where he observed a male in the driver's seat. (*Id*.) The officer knocked on the driver's window, the male opened the driver's door, and the officer immediately smelled the odor of an alcoholic beverage coming from the male. (*Id*.) The officer asked the male to produce his driver's license, the male then struggled to retrieve it from his wallet, and, after being unsuccessful, handed the whole wallet to the other officer who had

[1] Since Lapoint pled guilty, the State relies on the affidavit of probable cause filed by the prosecutor in support of the motion for leave to file an Information. (D.C. Doc. 1.)

approached to retrieve the license for him. (*Id*.) The second officer located and removed the license from the wallet and identified the male as Lapointe. (*Id*.)

The second officer observed the keys to the Durango were still in the ignition. (*Id*.) She further observed that Lapointe's eyes were bloodshot and watery, that he smelled of alcohol, and that his speech was slurred as he spoke. (*Id*.) Lapointe volunteered that he was waiting at that location for someone to bring him "pot." (*Id*.)

The officers conducted standard field sobriety testing of Lapointe and, based on the results, requested a preliminary breath test (PBT). (*Id*. at 2-3.) Lapointe refused the PBT. (*Id*. at 3.) The officers arrested Lapointe and transported him to the detention center, where he agreed to provide breath samples after an officer read him the Montana Implied Consent Advisory. (*Id*.) The certified breath testing instrument showed Lapointe's BAC was .203, more than twice the legal limit. (*Id*.)

SUMMARY OF THE ARGUMENT

Under Mont. Code Ann.[2] § 61-8-734(1)(a), a conviction from another state for violating a statute similar to one of Montana's DUI statutes is included for "the purpose of determining the number of convictions for prior offenses." The other state's DUI statute is not required to be identical or the same; it need only be

[2] All references are to the 2019 version of Mont. Code. Ann.

similar. In California, the "place of offense," where a DUI can occur, is "upon the highways and elsewhere throughout the State" of California. (Cal. Veh. Code § 23100.) The "place of offense" for DUIs under Mont. Code Ann. § 61-8-401(1)(b), (c) and (d), is anywhere "within this state," nearly identical to California's statute. Only one type of DUI in Montana, one involving only alcohol under § -401(1)(a), defines the "place of offense" as "upon the ways of this state open to the public." For decades, Montana has stacked convictions under § -401(1)(a) that occur "upon the ways of this state open to the public" with convictions under § -401(1)(b), (c) and (d) that occur anywhere "within this state," which is prima facie evidence that the two "places of offense" are similar under Mont. Code Ann. § 61-8-734(1)(a).

To the extent that Lapointe argues the "place of offense" element for alcohol-only DUIs in the California and Montana statutes is dissimilar, when considering differing language from other states regarding other elements of DUI, such as impairment, this Court has always focused its consideration on whether a defendant in another state can be convicted on a standard of lesser culpability. Because California extends the "place of offense" for alcohol-only DUIs to the highways or elsewhere throughout the state, including public roadways, and Montana limits the "place of offense" for alcohol-only DUIs to the ways of this state open to the public, the California statute creates a standard of culpability that

is greater than the Montana statute. In any event, a defendant can be convicted of a DUI by driving impaired on the public roadways of both states.

But, even if this Court disagrees that California provides for greater culpability, Lapointe does not challenge the validity of any of his California convictions of which the State gave him notice. Instead, he asks for those convictions to have no bearing on his current DUI conviction in Montana because *maybe* the "place of offense" where he committed all six of his DUIs in California was exclusively on private property. If, in fact, this was true for each of his offenses and subsequent convictions, then Lapointe is in the best position to have that information. Common sense dictates that it is highly unlikely each of Lapointe's California offenses occurred exclusively on private property because, even if he was arrested on private property, he undoubtedly traveled on public roadways to get there.

For Montana's alcohol-only DUI "place of offense" element—upon the ways of this state open to the public—this Court should adopt the rationale of other states and hold that when a defendant challenges this element of a prior out-of-state conviction as dissimilar, and thereby argues against counting the prior conviction under Mont. Code Ann. § 61-8-734, the defendant must present reliable evidence that those prior offenses occurred exclusively on private property, i.e., some place other than the ways of the state that are open to the public, thereby establishing that

the defendant could not have been convicted in Montana. Otherwise, the vast majority of out-of-state convictions would not count for enhancement purposes because in most states the "place of offense" for a DUI can be anywhere, although common sense dictates that most DUIs occur on public roadways.

ARGUMENT

I. Standard of review

"Whether a prior conviction may be used for sentence enhancement is generally a question of law." *State* v. *Maine*, 2011 MT 90, ¶ 12, 360 Mont. 182, 255 P.3d 64. "Whether a prior conviction may be used to enhance a criminal sentence is an issue of law we review de novo for correctness." *State v. Pankhurst*, 2022 MT 89, ¶ 4, 408 Mont. 309, 509 P.3d 15 (citing *State v. Lund*, 2020 MT 53, ¶ 6, 399 Mont. 159, 458 P.3d 1043, and *State v. Krebs*, 2016 MT 288, ¶ 7, 385 Mont. 328, 384 P.3d 98). "A defendant who seeks to challenge the use of a prior conviction for sentence enhancement must overcome a 'presumption of regularity' that attaches to prior convictions." *State v. Sirles*, 2010 MT 88, ¶ 25, 356 Mont. 133, 231 P.3d 1089.

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II. The district court correctly denied Lapointe's motion to ignore his six prior DUI convictions in California and to treat his DUI in Montana as a misdemeanor first offense.

A. Introduction

Lapointe does not dispute that he has six prior valid convictions for the offense of DUI that he committed in California. He argues that because California's DUI law does not include as "an essential element of any alcohol based DUI" that the offense must occur "on the ways of the state open to the public" as is required under Montana law, this makes the DUI statutes of the two states "significantly dissimilar" and precludes his California convictions from enhancing the sentence for the DUI he admits he committed in Montana. (Appellant's Br. at 6-7).

This Court held in *State v. Calvert*, 2013 MT 374, ¶ 8, 373 Mont. 152, 316 P.3d 173 (citing *State v. Polaski*, 2005 MT 13, ¶¶ 16-17, 325 Mont. 351, 106 P.3d 538), that "[i]n evaluating whether another state's statutes are similar to Montana's statutes, we compare the statutes in effect at the time the offense was committed." Lapointe admitted he committed the offense of DUI in Montana on June 24, 2020. On that date, the 2019 version of the Montana Code Annotated was in effect.

Montana Code Annotated § 61-8-734(1)(a) plainly states that "[f]or the purpose of determining the number of convictions for prior [DUI] offenses," a

conviction includes a "conviction for a violation of a *similar statute or regulation* in another state[.]" (Emphasis added.) Section -734(1)(a) does not require the other state's statute or regulation to be the same, identical, or equivalent. The Legislature did not define the word "similar," therefore this Court "reasonably and logically [will] give words their usual and ordinary meaning." *State v. Levine*, 2024 MT 169, ¶ 15, 417 Mont. 410, 553 P.3d 416. The American Heritage Dictionary (https://ahdictionary.com) defines the word "similar" as an adjective meaning "[h]aving a resemblance in appearance or nature; alike though not identical." Dictionary.com (https://www.dictionary.com) defines it as "having a likeness or resemblance, especially in a general way[.]"

Importantly, the Montana Legislature did not preface the word "similar" with a descriptive adverb such as "substantially" or "significantly" to qualify the level of similarity required, as a number of other states have done. See, for example, the following states' stacking statutes (with emphases added): D.C. Code § 50-2206.01(17) ("'Prior offense' means any guilty plea or verdict . . . or a disposition in another jurisdiction for a *substantially similar* offense[.]"); Conn. Gen. Stat. § 14-227a(g)("conviction in any other state of any offense the essential elements of which are determined by the court to be *substantially the same*"); Idaho Code § 18-8005(6) ("any *substantially conforming* foreign criminal violation"); MCLS § 257.625(25)(b) ("'Prior conviction' means a conviction for

any . . . law of another state *substantially corresponding* to the law of this state[.]"); N.C. Gen. Stat. § 20-4.01(24)(d) ("[a]n offense committed in another jurisdiction which prohibits *substantially similar* conduct prohibited by the offenses in this subsection"); and 75 Pa. Cons. Stat. Ann. § 3806(a)(3) ("an offense *substantially similar* to an offense under [Pennsylvania law] in another jurisdiction").

B. The Montana and California DUI statutes are similar.

To determine under Mont. Code. Ann. § 61-8-734(1) whether the Montana and California statutes for the offense of DUI are similar, the Court in *Calvert* held that "[i]t matters not whether another state organizes its statutes differently than Montana, so long as they contain analogous provisions." *Calvert*, ¶ 8 (citing *State v. Hall*, 2004 MT 106, ¶ 20, 321 Mont. 78, 88 P.3d 1273). Montana Code Annotated § 61- 8-401(1) defines the offense of DUI as follows:

> It is unlawful and punishable, as provided in 61-8-442, 61-8-714, and 61-8-731 through 61-8-734, for a person who is under the influence of:
>
> (a) *alcohol* to drive or be in actual physical control of a vehicle *upon the ways of this state open to the public*;
>
> (b) a *dangerous drug* to drive or be in actual physical control of a vehicle *within this state*;
>
> (c) *any other drug* to drive or be in actual physical control of a vehicle *within this state*; or
>
> / / /

(d) *alcohol and any dangerous or other drug* to drive or be in actual physical control of a vehicle *within this state*.

(Emphasis added.)

It is important to note that each subsection of Mont. Code Ann. § 61-8-401(1) defines a separate DUI offense, which can be better compared with another state's DUI laws by charting them out as follows:

<table>
<tr><td colspan="2">It is unlawful and punishable for a person to
drive or be in actual physical control of a vehicle
↓</td></tr>
<tr><td>EITHER:
upon the ways of this state open to the public while
under the influence of:
• Alcohol;</td><td>OR:
within this state while
under the influence of:
• a dangerous drug;
• any other drug; or
• alcohol and any dangerous or other drug.</td></tr>
</table>

As demonstrated by the chart, Mont. Code Ann. § 61-8-401(1), defines the "place of offense" for alcohol-only DUIs as "upon the ways of this state open to the public" and defines the "place of offense" for the three other types of DUI as "within this state."

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On the date of Lapointe's current offense, the version of the California statute defining the offense of DUI, Cal. Veh. Code § 23152, had been in effect since January 1, 2017.[3] California Vehicle Code § 23152 defined California's DUI-related offenses in relevant part as follows:

> (a) It is unlawful for a person who is under the influence of any alcoholic beverage to drive a vehicle.
>
> (b) It is unlawful for a person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.
>
> . . . .
>
> (f) It is unlawful for a person who is under the influence of any drug to drive a vehicle.
>
> (g) It is unlawful for a person who is under the combined influence of any alcoholic beverage and drug to drive a vehicle.

Nowhere in the body of California's DUI statute is a "place of offense" specified; however, Cal. Veh. Code § 23100 provides: "The provisions of this chapter apply to vehicles *upon the highways and elsewhere throughout the State* unless expressly provided otherwise." (Emphasis added.) Because a "way of the state open to the public" falls within California's definition, a person can be convicted in both Montana and California for a DUI occurring on a public roadway.

[3] The general rule for the effective dates of California statutes is found in California Constitution Art. IV, § (9)(c)(1), which provides that unless a bill calls an election, contains an urgency clause, or is a budget-related or tax levy measure, the effective date of a new statute is January 1 of the following year.

Like the applicability provisions of Cal. Veh. Code § 23100, Montana's applicability provisions can be found at Mont. Code Ann. § 61-8-101(2), which provides:

> The provisions of this chapter relating to the operation of vehicles refer exclusively to the operation of vehicles upon highways except:
>
> (a) where a different place is specifically referred to in a given section;
>
> (b) the provisions of 61-8-301 and 61-8-401(1)(b), (1)(c), and (2), with regard to operating a vehicle while under the influence of drugs, *apply anywhere within this state*;
>
> (c) the provisions of 61-8-301 and 61-8-401 except subsections (1)(b), (1)(c), and (2) thereof, 61-8-402 through 61-8-405, and 61-8-465, with regard to operating a vehicle while under the influence of alcohol, *apply upon all ways of this state open to the public*.

(Emphasis added.) Subsection (d) of Mont. Code Ann. § 61-8-401(1)—regarding a DUI involving the combination of alcohol and drugs—is absent from Mont. Code Ann. § 61-8-101(2), but the "place of offense" is expressly defined in the body of § -401(1)(d) as "within this state."

Lapointe argues that, "[f]or stacking purposes under § 61-8-734, 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." (Appellant's Br. at 21.) Lapointe's argument overlooks that in 2019, and for decades beforehand, only one of the four types of DUI defined under Mont. Code Ann. § 61-8-401(1)—the alcohol-only DUI under subsection (a)—defined

the "place of offense" as "upon the ways of this state open to the public." Like California's use of the phrase "upon the highways and elsewhere throughout the [s]tate," the three other types of DUI under Mont. Code Ann. § 61-8-401(1)(b), (c), and (d) define the "place of offense" as "within this state," more precisely defined at Mont. Code Ann. § 61-8-101(2)(b) as "*anywhere* within this state." (Emphasis added.)

Notably, the Montana Legislature at Mont. Code Ann. § 61-8-734(1)(b) (2019) expressly included *all* DUI convictions under § -401—regardless of the subsection and associated "place of offense"—for purposes of stacking under § -734(1)(a). This is prima facie evidence that the Montana Legislature considers all of the DUIs under § -401(1) to be similar.

C. This Court has excluded from stacking those out-of-state convictions for DUI offenses where a person can be convicted on a standard based on lesser culpability, whereas a person in California can be convicted on a standard based on greater culpability.

Lapointe argues that the prior decisions of this Court addressing whether another state's DUI law is similar to Montana's DUI law for purposes of sentence enhancement under Mont. Code Ann. § 61-8-734, "are not determinative of the issue" in this case because those "cases all focus on another legal issue: whether the DUI statutes of the various states require lesser proof of impairment than the Montana statute." (Appellant's Br. at 9-10.) However, the concern the Court

expressed when comparing impairment levels is equally applicable to other elements. For example, in *Polaski*, ¶ 22, the Court held "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."

The Court in *Polaski* compared the Montana DUI statute's use of the word "diminished" with the California DUI statute's use of the phrase "impaired to an *appreciable* degree," and concluded that California's standard was "not a lesser standard but rather would be a standard equal to or greater than" Montana's standard. *Id.* (emphasis in original). As such, the Court held that "California's and Montana's [DUI] statutes are sufficiently similar for purposes of § 61-8-734(1)(a), MCA (2001)." *Id.* Important to the instant case, the Court explained that "[a]s 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." *Id.*

By focusing on impairment, Lapointe misses the broader issue of the standard of culpability when applied to the "place of offense" issue. Because California law allows for all DUIs to take place on the highways and elsewhere throughout the state, and Montana law limits alcohol-only DUIs to ways of the state open to the public, California's standard of culpability as to the "place of

offense" is greater than Montana's standard. Thus, there is no concern in the instant case that the district court relied upon out-of-state convictions that were based on statutes providing for lesser culpability than Montana's statutes.

Importantly, drivers in both Montana and California can be convicted of a DUI if the offense occurs on a public roadway. California's standard is equal to or greater than Montana's standard. Even if this Court disagrees, Lapointe still cannot prevail.

III. The presumption of regularity that attaches to prior convictions is not overcome when another state's DUI statute has elements different from Montana's. Once the State provides sufficient proof of a conviction from another state, the burden shifts to the defendant to present evidence of irregularity.

Even if the Court were to agree with Lapointe's argument that the California and Montana alcohol-only DUI statutes are "dissimilar," the lack of similarity does not automatically overcome the "presumption of regularity" that attaches to a prior conviction. This Court has held that a "defendant who seeks to challenge the use of a prior conviction for sentence enhancement must overcome a 'presumption of regularity' that attaches to prior convictions." *Sirles*, ¶ 25 (citation omitted).

In *State v. Holder*, 2020 MT 61, ¶ 10, 399 Mont. 214, 459 P.3d 1282, the Court held that once the State provides competent proof of a prior conviction, "a 'presumption of regularity' attaches to such conviction." (Citations omitted.) "To

overcome the presumption, the defendant must provide 'direct evidence of irregularity.'" *Id*. (citation omitted). Holder appealed the district court's denial of his motion to strike a prior DUI conviction that enhanced his DUI charge to felony level. The Court stated that Mont. Code Ann. § 61-8-731(1) provides that an "individual convicted of DUI who also has three or more prior DUI or DUI-equivalent convictions is guilty of a felony." *Id*. For a prior conviction to be used "for purposes of enhancing a DUI to a felony, the State must provide 'competent proof that the defendant in fact suffered a prior conviction.'" *Id*. (citation omitted).

The Court concluded that the State had provided sufficient proof of Holder's out-of-state conviction by providing his NCIC criminal record, which contained the disposition of the out-of-state offense as "convicted." *Id.* ¶ 12. Because the State provided sufficient proof of the conviction, the presumption of regularity attached, and the conviction was "presumed to be valid absent evidence to the contrary" and "deemed to be sufficient for purposes of enhancing the current DUI charge." *Id.* ¶ 13 (citation omitted).

The Court in *Holder* explained that once the State meets its burden to provide competent proof of the existence of an out-of-state conviction, the burden shifts, and "the defendant must provide direct evidence of irregularity to overcome the presumably valid conviction." *Id*. (citation omitted). Because Holder presented the district court with no evidence to indicate his out-of-state conviction was

irregular, this Court concluded that the district court did not err by relying on the prior out-of-state conviction for purposes of enhancing Holder's penalty. *Id*.

Like in *Holder*, the West Virginia Supreme Court in *State v. Williams*, 490 S.E.2d 285 (1997), addressed the issue of enhancing a DUI sentence by including a prior out-of-state conviction. Williams argued the sentence enhancement for his DUI in West Virgina could not "be based on his prior conviction in Virginia because the Virginia statute makes it unlawful 'to drive or *operate* any motor vehicle . . . while such person is under the influence of alcohol[,]'" whereas West Virginia's statute applied only to driving—not to operating—a vehicle under the influence. *Williams*, 490 S.E.2d at 288 (emphasis in original). He argued that "the elements are too dissimilar to allow for enhancement without the State showing of the facts of his Virginia conviction." *Id*. The West Virginia DUI sentence enhancement statute, W. Va. Code § 17C-5-2(n), even narrower than Mont. Code Ann. § 61-8-734, permits the use of any out-of-state conviction for the offense of DUI provided the other state's statute "*has the same elements as an offense*" under West Virginia's DUI statutes. (Emphasis added.)

The court rejected Williams' argument, holding that the other state's "mere use of the term 'operate' in its [DUI] statute is insufficient to find that 'same elements' are not required in Virginia." *Williams*, 490 S.E.2d at 289. "Proof that a defendant has been convicted of the offense of [DUI] in another state is similar to

proof of any other material fact in a criminal prosecution; once the State has introduced sufficient evidence to lead impartial minds to conclude that the defendant had once before been convicted of [DUI], the State has made a *prima facie* case." *Id*. at 288. The court continued, stating that "[n]otwithstanding the fact that another state's [DUI] statute may contain additional elements not found in [West Virginia's DUI statute], *an out-of-state conviction may properly be used for sentence enhancement . . . provided that the factual predicate upon which the conviction was obtained would have supported a conviction under the West Virginia DUI statute.*" *Id*. (emphasis added).

In another case very similar to Lapointe's, the Nebraska Supreme Court grappled with the issue of sentence enhancement given the differences between the DUI statutes of Nebraska and California. *State v. Garcia*, 792 N.W.2d 882 (2011). It held that Nebraska did not have "the initial burden of showing a substantial similarity of every element of the respective DUI laws or that the facts surrounding the prior conviction would have resulted in a violation of Nebraska DUI laws as they existed at that time." *Id*. at 889. Garcia argued that because the "place of offense" for DUIs in California applied to any property, whereas Nebraska's "place of offense" applied only to highways or private property that "is open to public access," the laws of the two states did not have the same scope of application, and therefore the prosecution had the burden to show what "place of

offense" was involved in his California convictions and prove it would have been a violation under Nebraska law. *Id.* at 888.

The court in *Garcia* held that "[t]he fact that another state's DUI laws apply more broadly to 'all property' does not mean that it is the State's burden of production to come forward with evidence showing the exact location of the defendant's prior DUI—because of the theoretical possibility that it was committed on a kind of property to which Nebraska DUI laws would not apply." *Id.* at 890. The court pointed out that the issue of "whether Garcia was on a public highway or on private property with 'public access' is not likely to be reflected anywhere in the record of the prior California convictions, even assuming there were any obtainable records not already presented." *Id*. at 891.

The Nebraska Supreme Court pointedly stated:

> Garcia, on the other hand, can easily attest to where he was operating his vehicle in connection with the prior California DUI convictions. Even in a criminal prosecution, we have said that "'if a negative is an essential element of the crime, and is 'peculiarly within the knowledge of the defendant,' it devolves upon him to produce the evidence, and upon his failure to do so, the jury may properly infer that such evidence cannot be produced.'" This policy is even more apparent when the fact in question pertains not to an element of a criminal offense, but goes to punishment only. The fact that the defendant has previously been convicted of DUI is irrelevant to guilt or innocence and is relevant only to the sentence to be meted out.

Id. (citations omitted).

From a policy perspective, the Nebraska Supreme Court further opined, "All states prohibit driving under the influence of alcohol or drugs. But subtle variations on that general theme are as numerous as the states themselves. It was not our Legislature's intent to prohibit the consideration of prior out-of-state DUI convictions simply because differing elements of the offense . . . make it merely *possible* that the defendant's behavior would not have resulted in a violation of [Nebraska's DUI law] had it occurred here." *Id*. at 890 (emphasis in original). To prohibit use of out-of-state convictions on such grounds "would also be contrary to the legislature's intent to increase the severity of sentences for recidivistic drunk driving." *Id*.

The approach taken by Nebraska and West Virginia regarding sentencing enhancement procedures—the prosecution's prima facie establishment of prior convictions and the burden then shifting to the defendant to challenge those convictions—has been upheld by the United States Supreme Court. *See Parke v. Raley*, 506 U.S. 20 (1992). The court in *Parke* held that "deeply rooted in our jurisprudence" is "the 'presumption of regularity' that attaches to final judgments, even when the question is waiver of constitutional rights." *Id*. at 29. The Court pointed out that "[f]or much of our history, it appears that state courts altogether prohibited defendants in recidivism proceedings from challenging prior convictions as erroneous." *Id*. at 32. Further, "[i]n recent years state courts have

permitted various challenges to prior convictions and have allocated proof burdens differently." *Id*. The court concluded that "[i]n light of the relative positions of the defendant and the prosecution in recidivism proceedings, we cannot say that it is fundamentally unfair to place at least a burden of production on the defendant." *Id*. The court held that the "range of contemporary state practice certainly does not suggest that allocating some burden to the defendant is fundamentally unfair." *Id*. at 33.

This Court should adopt the rationale of West Virginia, Nebraska, and other states as discussed and upheld in *Parke*, and hold that when a defendant challenges an out-of-state conviction by claiming that an element of the out-of-state DUI offense is dissimilar to a Montana element, once the State has established the existence of the out-of-state conviction, the burden shifts to the defendant, who must produce reliable evidence that the facts in the out-of-state case would not have resulted in a conviction in Montana. In Lapointe's case, he would have to provide sufficient evidence that his six DUI convictions in California were for offenses that occurred exclusively on private property—i.e., some place other than the ways of the state open to the public.

Absent a burden-shifting process as described in *Williams* and *Garcia*, the DUI convictions from the majority of states would not count for enhancement purposes under Mont. Code Ann. § 61-8-734 based on how those states address the

element of location in their DUI statutes. More than 20 states, either in the body of their DUI statutes or in separate applicability statutes like Cal. Veh. Code § 23100, define the "place of offense" using the same,[4] or virtually the same,[5] wording as California: "elsewhere throughout the [s]tate."

While another ten states have statutes that are silent on the "place of offense" element, i.e., have no applicability-type statutes and the bodies of their DUI statutes do not specify a "place of offense," the courts of those states uniformly have held that the lack of a specific "place of offense" means the offense can occur anywhere including private property. *See Caulkins v. Dept. of Pub.*

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[4] These states currently use the wording "on (or upon) the (streets and) highways and elsewhere throughout the (this) state" as the "place of offense" for DUIs: Alabama (Code of Ala. § 32-5A-2); Colorado (C.R.S. § 42-4-103); Delaware (21 Del. C. § 4101(a)(2)); Georgia (Ga. Code Ann. § 40-6-3(a)(3)); Illinois (625 Ill. Comp. Stat. 5/11-201(2)); and Wyoming (Wyo. Stat. Ann. § 31-5-103(a)(ii)).

[5] The following states use the phrase "within (or in) this state," "anywhere in this (or the) state," or "throughout this state" to define the "place of offense": Arizona (Ariz. Rev. Stat. § 28-1381(A)); District of Columbia (D.C. Code §§ 50-2206.11, 50-2206.14); Florida (Fla. Stat. § 316.193(1)); Iowa (Iowa Code § 321J.2(1)); Kansas Kan. Stat. Ann. § 8-1501(b)); Kentucky (Ky. Rev. Stat. Ann. § 189A.010(1)); Maryland (Md. Code Ann., Transp. § 21-901); Minnesota (Minn. Stat. § 169A.20, subd. 1); Mississippi (Miss. Code Ann. § 63-11-30(1)); New Hampshire (N.H. Rev. Stat. Ann. 265-A:2(I)); New Mexico (N.M. Stat. Ann. § 66-8-102(A)); Ohio (Ohio Rev. Code Ann. § 4511.19(A)(1)); Rhode Island (R.I. Gen. Laws § 31-27-2(a)); South Carolina (S.C. Code Ann. § 56-5-2930(A)); Utah (Utah Code Ann. § 41-6a-502(1)); and Washington (Rev. Code Wash. § 46.61.502(1)).

Safety, Div. of Motor Vehicles, 743 P.2d 366, 368 (Alaska 1987) ("[I]t has been unlawful for an intoxicated person to operate a motor vehicle in any area of this state, whether the area is publicly or privately owned."); *Sanders v. State*, 846 S.W.2d 651 (Ark. 1993) (statute contains no location or geographic element, one can be convicted for DUI on private property); Conn. Gen. Stat. § 14-227a (2006) (History Notes: Session Law P.A. 06-147, "amended Subsec. (a) to delete requirement that the motor vehicle be operated on public highway of state or on road of specified district organized under the provisions of chapter 105 or on private road on which a speed limit has been established pursuant to Sec. 14-218a or in parking area for ten or more cars or on school property"); *State v. Watson,* 787 P.2d 691, 692 (Haw. 1990) ("We see nothing in [DUI statute] which requires that the operation of a vehicle while under the influence of intoxicating liquor be done on a public highway."); *People v. Clark*, 362 N.E.2d 407, 409 (Ill. App. Ct. 1977) ("[A] violation of [the DUI statute] can occur on private as well as public property."); *State v. Nobles*, 179 A.3d 910, 919 (Me. 2018) ("[T]he crime of [DUI] does not require operation on a public way."); *Bertram v. Dir. of Revenue*, 930 S.W.2d 7, 9 (Mo. Ct. App. 1996) ("Neither § 577.010 (driving while intoxicated) nor § 577.012 (driving with excessive blood alcohol content) mention anything about public highways . . . . It is not necessary to allege or prove that the vehicle was operated on a public road or highway."); *State v. Magner*, 376 A.2d 1333,

1334 (N.J. Super. Ct. 1977) ("Although many amendments [to the DUI statute] have appeared since 1921, none has undertaken to restore to the offense the phrase respecting public ways . . . . [T]he general rule that if a motor vehicle statute makes no references to offenses occurring on a public highway, it is usually held that the statute applies generally throughout the State."); *Sarafin v. Commonwealth*, 764 S.E.2d 71, 76 (Va. 2014) ("[W]e hold that [DUI statute] contains no 'on a highway' requirement for the operation of motor vehicles . . . . [W]e are bound by the plain meaning of the statute, which compels our conclusion that [the DUI statute] contains no 'private way' exception for the operation of motor vehicles.").

Only 15 states use wording like Montana's alcohol-only DUI "place of offense" upon the ways of this state open to the public in the body of their DUI statutes and/or applicability statutes.[6] If, as Lapointe argues, an out-of-state conviction for an alcohol-only DUI must take place "upon the ways of this state open to the public" to count as a conviction under § -734, then the convictions from only these 15 states might count.

[6] Idaho Code §§ 49-117(18), 18-8004(1)(a); A.L.Mass. GL ch. 90, § 24 (1)(a)(1); Mich.CLS § 257.625(1); R.R.S. Neb. § 60-6,108(1); Nev. Rev. Stat. Ann. §§ 484C.110(1)-(4), 484A.185(1)-(3); N.Y. Veh. & Traf. Law § 1192(7); N.C. Gen. Stat. § 20-138.1(a); N.D. Cent. Code § 39-08-01(1); Okla. Stat. Tit. 47, § 11-902; 75 Pa. Cons. Stat. §§ 3101, 3102; S.D. Codified Laws §§ 32-14-1, 32-14-2; Tenn. Code Ann. § 55-10-401; Tex. Penal Code §§ 1.07(a)(40), § 49-04(a); Vt. Stat. Ann. tit. 23, §§ 1200-1201; and Wis. Stat. § 346.61.

To "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[,]" as Lapointe urges this Court to do (Appellant's Br. at 21), simply because it is merely *possible* that the defendant's behavior would not have resulted in a violation of Montana law had the offense occurred here, would defeat the intent of the Legislature to reduce recidivism for DUIs.

Two years before Montana first enacted its felony DUI law, the Legislature expressed its concerns regarding repeat DUI offenders in the preamble to 1997 Session Laws, ch. 107, which was enacted to authorize Montana courts to require ignition interlock devices in DUI cases:

> WHEREAS, since the early 1980s, strict laws and extensive public awareness campaigns have helped reduce the traffic death toll attributed to drunken driving; and
>
> WHEREAS, despite the progress that has been made in the battle against drunken driving, there remain on Montana's roads and highways a small group of hard-core drinkers who regularly drink to high levels of intoxication (over 0.15%) and still drive; and
>
> WHEREAS, on a weekend night, these hard-core drunk drivers make up only 1% of all drivers, yet account for almost half of the driving fatalities; and
>
> WHEREAS, approximately 80% of all drunk drivers killed on the nation's highways in 1995 had a blood alcohol concentration of 0.15% or higher, and to get to that level, a 160-pound man would have to consume more than six drinks in 1 hour; and

> WHEREAS, approximately 50% of all fatally injured drunk drivers in 1995 had a blood alcohol concentration of 0.20% or higher, more than twice the legal limit in Montana; and
>
> . . . .
>
> WHEREAS, reduction of repeat DUI offenses will, over time, reduce one of the growing pressures for increased incarceration expenses impacting our local and state corrections systems; and
>
> . . . .
>
> WHEREAS, the incidence of recidivism is lower among offenders with ignition interlock devices in their vehicles; and
>
> . . . .
>
> WHEREAS, the use of ignition interlock devices is legal in Montana, but the devices are not currently available throughout the state nor will they be consistently used in the state until installation of these devices is required by Montana courts responsible for sentencing DUI offenders.

1997 Mont. Laws, ch. 107.

Yet despite the Legislature's efforts to reduce the number of DUI offenses in Montana in the intervening 30 years since 1997 Session Laws, ch. 107, was enacted, as of January 3, 2025, when Forbes Advisor published the results of its study of all 50 states, Montana ranked #1 as the worst state for drunk driving.[7] Adopting Lapointe's reasoning would only make it more difficult for Montana to make its roadways safer.

[7] Source: https://www.forbes.com/advisor/car-insurance/worst-states-for-drunk-driving/ [continued on page 31]

CONCLUSION

The district court did not err when it denied Lapointe's motion to dismiss the felony enhancement of his DUI charge. To enhance a sentence under Mont. Code Ann. § 61-8-734, a prior conviction for an out-of-state DUI offense need only be pursuant to a statute similar to Montana's DUI statute, and is not required to be identical or equivalent. California's DUI statute is similar to Montana's DUI statute, even though Montana requires that alcohol-only DUIs must occur on the ways of this state open to the public. California also prohibits DUIs on public roadways. The district court correctly determined that Lapointe's six prior convictions for the offense of DUI in California counted to enhance the sentence for DUI in Montana to which Lapointe pled guilty.

[continued from page 30]

Top 10 Worst States For Drunk Driving
1. Montana
Montana's score: 100 out of 100

- Montana ranks as the worst state for drunk driving, with 8.57 drunk drivers involved in fatal crashes for every 100,000 licensed drivers, and 7.14 people killed in crashes involving a drunk driver for every 100,000 state residents. Both rates are the highest in the nation.
- More than two-fifths (43.51%) of traffic deaths in Montana are caused by drunk drivers, the highest in the nation.
- Underage drinkers are also at high risk in Montana. The state has the worst rate of drunk drivers under age 21 involved in fatal crashes (1.17 per 100,000 licensed drivers).
- Big Sky Country has the 11th highest number of DUI arrests per 100,000 licensed drivers (450.50).

Respectfully submitted this 29th day of January, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times 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 7,479 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Carrie Garber
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CERTIFICATE OF SERVICE

I, Carrie L. Garber, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 01-29-2025:

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