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 APPELLEE

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

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
CORI LOSING
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Cori.losing@mt.gov

MATTHEW JENNINGS
Missoula County Attorney
BRIELLE LANDE
Deputy County Attorney
200 West Broadway
Missoula, MT 59802

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TAMMY A. HINDERMAN
Division Administrator
DEBORAH S. SMITH
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147

ATTORNEYS FOR DEFENDANT
AND APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUE 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

I. The offense 2

II. Relevant procedural history 3

SUMMARY OF THE ARGUMENT 4

STANDARD OF REVIEW 6

ARGUMENT 6

I. Because Cole agreed to the $5,000 fine in his plea agreement, and the $5,000 fine imposed pursuant to Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019) has not been declared unconstitutional, Cole has waived appellate review of his sole claim 6

II. Cole has not established that Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019) is facially unconstitutional 7

A. Cole does not sufficiently argue that Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019)'s minimum $5,000 fine is facially unconstitutional 8

B. Montana Code Annotated § 61-8-731(1)(a)(iii) (2019) does not violate the Excessive Fines Clauses under the United States Constitution or the Montana Constitution 9

C. This Court should decline to extend *Gibbons* because this Court's decision in *Gibbons* is manifestly wrong, and, as such, should be overturned 11

1. Neither the plain language nor the legislative history supports that Mont. Code Ann. § 46-18-231 was meant to embody Montana's Excessive Fines Clause 12

2. The *Gibbons* Court did not need to reach the constitutional question because principles of statutory construction support that Mont. Code Ann. § 61-8-731(3) (2019) should be harmonized with Mont. Code Ann. § 46-18-231(3) 17

3. Montana Code Annotated § 61-8-731(3) (2019)'s fine is proportional to the gravity of the offense 21

4. Consideration of an offender's ability to pay a mandatory fine is more appropriately considered an as applied, and not a facial, challenge to Montana's Excessive Fines Clause....26

III. Even if *Gibbons* applies, the district court did not abuse its discretion when it imposed Mont. Code Ann. § 61-8-731(1)(a)(iii)....29

A. The district court considered the applicable statutes and considered Cole's ability to pay before it imposed a $5,000 fine as part of Cole's sentence....29

B. The record supports that imposition of the $5,000 fine was proportional to Cole's specific DUI offense and his individual circumstances 32

CONCLUSION....34

CERTIFICATE OF COMPLIANCE....34

TABLE OF AUTHORITIES

Cases

City of Missoula v. Fox,
2019 MT 250, 397 Mont. 388, 450 P.3d 898 18

Formicove, Inc. v. Burlington N.,
207 Mont. 189, 403 P.3d 324 (1983).....11

In re S.M.,
2017 MT 244, 389 Mont. 28, 403 P.3d 324 .....9, 17

Mont. Sports Shooting Ass'n v. State,
2008 MT 190, 344 Mont. 1, 185 P.3d 1003 22

Ross v. City of Great Falls,
1998 MT 276, 291 Mont. 377, 967 P.3d 1103 .....18, 19

State v. Ber Lee Yang,
2019 MT 266, 397 Mont. 486, 452 P.3d 897 .....passim

State v. Bowley
282 Mont. 298, 938 P.3d 592 (1997) 7

State v. Christensen,
2020 MT 237, 401 Mont. 247, 472 P.3d 622 18

State v. Cleveland,
2014 MT 305, 377 Mont. 97, 338 P.3d 606 7

State v. Curran,
2023 MT 118, 412 Mont. 499, 531 P.3d 547 32

State v. Gatts,
279 Mont. 42, 928 P.2d 114 (1996) 11

State v. Gibbons,
2024 MT 63, 416 Mont. 1, 545 P.3d 686 .....passim

State v. Nance,
120 Mont. 152, 184 P.2d 554 (1947) 7

State v. Oliver,
2022 MT 104, 408 Mont. 519, 510 P.3d 1218 8

State v. Plouffe,
2014 MT 183, 375 Mont. 429, 329 P.3d 1255 .....19, 20, 31

State v. Russell,
2008 MT 417, 347 Mont. 301, 198 P.3d 217 .....9, 17

State v. Sattler,
170 Mont. 35, 549 P.2d 1080 (1976) 7

State v. Tam Thanh Le,
2018 MT 82, 387 Mont. 224, 392 P.3d 607 13

Timbs v. Indiana,
586 U.S. 146 (2019) 26

United States v. Bajakajian,
2017 MT 244, 389 Mont. 28, 403 P.3d 324 .....16, 26

Other Authorities

Montana Code Annotated
§ 45-5-104 25
§ 45-5-106 25
§ 45-5-205 25
§ 45-5-628 25
§ 45-9-130 13
§ 45-9-130(1) 12, 13
§ 46-18-201(2)(a) 32
§ 46-18-201(3)(b) 32
§ 46-18-213 .....29, 30
§ 46-18-231 .....passim
§ 46-18-231(1)(a) 18, 19, 30, 31
§ 46-18-231(1)(b) 18, 31
§ 46-18-231(3) .....passim
§ 61-8-401 .....10, 22, 25
§ 61-8-401(1) 25
§ 61-8-401(1)(a) (2019) 1
§ 61-8-406 .....10, 25
§ 61-8-411 25
§ 61-8-465 .....10, 25
§ 61-8-714(1) (1979) 22

§ 61-8-714(1)(a) 10
§ 61-8-714(1)-(2) (1981).....22
§ 61-8-714(2)(a) (2019) 10
§ 61-8-714(3) 23
§ 61-8-714(3)(a) (2019) 10
§ 61-8-731 24
§ 61-8-731(1) (2019).....10
§ 61-8-731(1)(a) (2019) 1
§ 61-8-731(1)(a)(iii) (2019) .....passim
§ 61-8-731(3) (2019).....passim

Montana Revised Code
§ 32-2132(5)(d) 21

Montana Constitution
art. II, § 22 .....passim

United States Constitution
Amend. VIII .....passim

Black's Law Dictionary 1406 (6th ed. 1990).....11

STATEMENT OF THE ISSUE

Whether Mont. Code Ann.§ 61-8-731(1)(a)(iii) (2019)'s mandatory minimum fine is facially unconstitutional under the Excessive Fines Clauses of the United States Constitution and Montana Constitution.

STATEMENT OF THE CASE

On July 15, 2020, the State charged Appellant Neil Dennis Cole (Cole) by Information with Driving Under the Influence (DUI) (fourth or subsequent offense), a felony, in violation of Mont. Code Ann. § 61-8-401(1)(a) (2019). (Doc. 3.) Cole subsequently pleaded guilty to the offense pursuant to a plea agreement on October 26, 2022. (Docs. 40, 41.) The district court, pursuant to Mont. Code Ann. § 61-8-731(1)(a) (2019),[1] sentenced Cole to 13 months to the Department of Corrections (DOC), with the recommendation that he enter and successfully complete the WATCh program, followed by a 5-year DOC commitment, all suspended. (Doc. 47 at 2.) After the district court inquired into Cole's financial circumstances, the district court imposed the $5,000 fine, less

[1] The specific statute that Cole was sentenced pursuant to is not mentioned in the record. However, Mont. Code Ann. § 61-8-731(1)(a) (2019) is the only statute that Cole could have been sentenced pursuant to based on the instant offense being his first felony DUI and the district court imposing a 13-month commitment to DOC for placement in the WATCh program.

$100 for credit for time served and suspended the remaining $4,900. (Doc. 47 at 6; 3/15/23 Tr. at 6-10.) Cole timely appeals the imposition of the fine.

STATEMENT OF THE FACTS

I. The offense

On June 9, 2020, Missoula police dispatch received two reports concerning Cole. (Doc. 1 at 2.) Cole's son reported to law enforcement that Cole, who was last seen driving on South Third Street from Reserve Street in Missoula, Montana, "was threatening to harm himself." (Doc. 1 at 2.) Another report came in from a store, stating that Cole "seemed impaired" and when he left the store "he stumbled in the street and then fell" before getting in a white jeep and driving off. (*Id*.)

Cole's son was able to track Cole's location and relay that information to Officer Berger. (*Id*.) Sergeant Campbell initiated a traffic stop of Cole at Central and Holborn. (*Id*.) As Sergeant Campbell was talking to Cole, Officer Berger called Cole's son back. (*Id*.) Cole's son reported that he had multiple messages from Cole about self-harm. (*Id*.) Cole's son also believed that Cole was impaired from alcohol and/or prescription medication because Cole had slurred his speech during a phone call with his son earlier that morning. (*Id*.)

Cole reported that he was driving around to find his therapist. (Doc. 1 at 2.) Cole smelled of alcohol, his eyes were watery, and his speech was slurred. (Doc. 1

at 3.) Cole admitted that he had consumed "2.5-3 inches of a traveler, which he said was a plastic whisky bottle." (Doc. 1 at 3 (internal quotations omitted).) That morning, Cole had taken Klonopin, Effexor, and Benadryl. (Doc. 1 at 3.)

During standardized field sobriety tests (SFSTs), another officer nearly had to catch Cole several times. (Doc. 1 at 3.) Cole displayed six out of six indicators of impairment during the horizontal gaze nystagmus maneuver and five out of six indicators for the walk and turn test. (Doc. 1 at 3.) He was unable to perform the one-leg stand test. (Doc. 1 at 3.) Cole, however, believed that the alcohol he had consumed did not impair his ability to safely operate his vehicle. (Doc. 1 at 3.) His blood alcohol content was 0.126. (Doc. 1 at 4.)

II. Relevant procedural history

The State offered Cole a global plea agreement on October 25, 2022. (Doc. 41.) In exchange for Cole pleading guilty to DUI as charged in the Information, the State would dismiss with prejudice the felony DUI charged in Fourth Judicial District Court, Missoula County, Cause No. DC-22-302. (Doc. 1 at 2.) As part of the plea agreement, the State and Cole agreed to jointly recommend that the district court commit Cole to the DOC for a term of 13 months, with the recommendation for placement and completion of the WATCh program, followed by a 5-year DOC commitment, all suspended. (Doc. 41 at 2.) The State and Cole

also agreed, in relevant part, to recommend that the district court impose a $5,000 fine, which he agreed he had the ability to pay. (*Id*. at 6, 8.) Cole pleaded guilty to felony DUI on October 26, 2022. (Doc. 40; 10/26/22 Tr. at 8-9.)

At sentencing, the district court reiterated that the plea agreement included various financial obligations and inquired into Cole's financial situation. (3/15/23 Tr. at 6-7.) Cole receives $1,643 a month from social security. (*Id*.) He pays $300 a month between vehicle insurance and his two storage units. (*Id*.) Cole planned to submit an application to Clark Fork Riverside subsidized housing, which would require him to pay one-third of his income in rent. (*Id*.) Based on Cole's statements concerning his financial obligations, his counsel requested the district court strike the $5,000 fine. (3/15/23 Tr. at 9.) However, Cole agreed that he could pay the $450 pretrial supervision fee over time. (*Id*.) Ultimately, the district court, in relevant part, imposed the $5,000 fine, but gave Cole $100 credit against the fine and suspended the remaining $4,900 of the fine. (*Id*.)

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion when, as part of Cole's sentence, it imposed the mandatory minimum $5,000 fine pursuant to Mont. Code Ann. § 61-8-731(1)(a)(iii). Cole, in his plea agreement, agreed that he had the ability to pay, and to the imposition of, the $5,000 fine. In doing so, Cole did not

agree to an illegal sentence in light of *State v. Gibbons*, 2024 MT 63, 416 Mont. 1, 545 P.3d 686, because *Gibbons* held that Mont. Code Ann. § 61-8-731(3) (2019)'s mandatory minimum fine was unconstitutional, with no mention of the constitutionality of Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019), the statute under which the district court imposed Cole's $5,000 fine.

Moreover, Cole has not met his burden of establishing that Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019)'s $5,000 minimum fine violates the Eighth Amendment and art. II, § 22, of the Montana Constitution. The plain language of Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019) supports that if the district court elects to impose a fine, the $5,000 mandatory minimum fine is proportional in light of the conviction threshold requirements.

Cole's reliance on *Gibbons* does not support that Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019)'s $5,000 fine is facially unconstitutional because this Court's decision in *Gibbons* is manifestly wrong. First, Mont. Code Ann. § 46-18-231 does not embody Monana's Excessive Fines Clause. Second, principles of statutory construction support harmonizing Mont. Code Ann. § 61-8-731(3) (2019) with Mont. Code Ann. § 46-18-231. Third, Mont. Code Ann. § 61-8-731(3) (2019)'s fine is proportional to the gravity of the offense. Fourth, consideration of a defendant's ability to pay, as part of a constitutional excessive fines analysis, constitutes an as-applied, not a facial, constitutional challenge.

Finally, the record supports Cole has the ability to pay the $5,000 fine, and that the fine is not unconstitutional as-applied to Cole. Again, Cole agreed he had the ability to pay the $5,000 fine. Nonetheless, before imposing the $5,000 fine, the district court conducted a serious inquiry into Cole's ability to pay the fine. Based on his financial circumstances, the district court suspended the remaining portion of the fine. As a result, Cole cannot establish that the district court abused its discretion when it imposed the $5,000 fine pursuant to Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019), or that imposition of the fine was disproportionate to his individual circumstances.

STANDARD OF REVIEW

This Court reviews criminal sentences for legality. *Gibbons*, ¶ 20. A claim that a criminal sentence violates a constitutional provision is reviewed *de novo*. *Id.*

ARGUMENT

I. Because Cole agreed to the $5,000 fine in his plea agreement, and the $5,000 fine imposed pursuant to Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019) has not been declared unconstitutional, Cole has waived appellate review of his sole claim.

Cole argues that because *Gibbons* held that the mandatory minimum fine imposed pursuant to Mont. Code Ann. § 61-8-731(3) (2019) was unconstitutional, Cole agreed to an illegal sentence when he agreed to pay the $5,000 fine as stated

in the plea agreement. (Appellant's Br. at 12.) Cole is correct that a defendant cannot plead to an illegal sentence. *State v. Cleveland*, 2014 MT 305, ¶ 29, 377 Mont. 97, 338 P.3d 606. Cole's fine, however, was imposed pursuant to Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019), which this Court has not declared unconstitutional. As such, Cole did not plea bargain to a sentence that the district court was not authorized to impose by law. *See Cleveland*, ¶ 29.

This Court has long held that it will not lend its assistance to an accused criminal in escaping the obligations of a plea bargain after accepting its benefits. *See, e.g.*, *State v. Bowley*, 282 Mont. 298, 310, 938 P.3d 592, 599 (1997); *State v. Sattler*, 170 Mont. 35, 37, 549 P.2d 1080, 1081 (1976); *State v. Nance*, 120 Mont. 152, 166, 184 P.2d 554, 561 (1947). This Court, therefore, should affirm the district court's imposition of the $5,000 fine because Cole agreed to its imposition in exchange for the State dismissing a subsequent 2022 felony DUI charge. (*See* Doc. 41 at 2.)

II. Cole has not established that Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019) is facially unconstitutional.

Even if this Court reviews Cole's challenge to the district court imposing the $5,000 fine, Cole has not established that the $5,000 fine, imposed pursuant to Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019), is facially unconstitutional.

A. Cole does not sufficiently argue that Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019)'s minimum $5,000 fine is facially unconstitutional.

Cole does not explicitly argue that Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019)'s mandatory minimum $5,000 fine is facially unconstitutional. Instead, Cole erroneously asserts his fine was imposed pursuant to Mont. Code Ann. § 61-8-731(3) (2019) and, therefore, was illegally imposed based on this Court's decision in *Gibbons*. In doing so, Cole does not argue that Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019)'s $5,000 mandatory minimum fine is disproportionate to the gravity of the offense, rendering it facially unconstitutional under Montana's Excessive Fines Clause or the United States' Excessive Fines Clause. Nor does Cole argue that *Gibbons* applies to Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019)'s mandatory fine.

This Court "will not conduct legal research on behalf of a party or develop legal analysis that might support a party's position." *State v. Oliver*, 2022 MT 104, ¶ 42, 408 Mont. 519, 510 P.3d 1218 (internal quotations and citation omitted). Because Cole has failed to sufficiently allege that the $5,000 fine imposed pursuant to Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019) is facially unconstitutional, this Court should decline to review his claim. However, even if this Court construes Cole's discussion of *Gibbons* as sufficiently raising a facial constitutional challenge,

Cole has not, and cannot, establish that Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019)'s mandatory fine is disproportionate to the gravity of the offense.

B. Montana Code Annotated § 61-8-731(1)(a)(iii) (2019) does not violate the Excessive Fines Clauses under the United States Constitution or the Montana Constitution.

"Legislative enactments are presumed to be constitutional." *In re S.M.*, 2017 MT 244, ¶ 10, 389 Mont. 28, 403 P.3d 324 (citation omitted). "[C]ourts should avoid constitutional issues whenever possible." *State v. Russell*, 2008 MT 417, ¶ 19, 347 Mont. 301, 198 P.3d 217 (internal quotations and citation omitted). "The party challenging the constitutionality of a statute has the burden of proving beyond a reasonable doubt that it is unconstitutional." *State v. Ber Lee Yang*, 2019 MT 266, ¶ 14, 397 Mont. 486, 452 P.3d 897 (citation omitted). To prevail on a facial challenge, the challenging party must show that "no set of circumstances exists under which the statute would be valid or that the statute lacks a plainly legitimate sweep." *Id.* (internal quotations and citations omitted).

The Eighth Amendment of the United States Constitution and article II, section 22, of the Montana Constitution protect a defendant's right to be free from excessive fines. Proportionality is the touchstone of the Eighth Amendment's and Montana's Excessive Fines Clauses. *Yang*, ¶ 16 (citation omitted). The fine amount "must bear some relationship to the gravity of the offense that it is designed to punish." *Id*.

Thus, in order to establish that Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019)'s fine was facially unconstitutional, Cole would have to establish, beyond a reasonable doubt, that there is no set of circumstances under which Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019)'s mandatory minimum $5,000 fine bears some relationship to a first felony DUI conviction. Cole cannot do so.

By its plain language, Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019)'s mandatory minimum $5,000 fine is proportional. Montana Code Annotated § 61-8-731(1) (2019) requires, before imposition of the mandatory minimum $5,000 fine, that the defendant, in relevant part, must have "any combination of three or more prior convictions under . . . 61-8-401, 61-8-406, or 61-8-465." In other words, the plain language of Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019) supports that the Legislature enacted a financial penalty range—$5,000 to $10,000—that is proportional to the gravity of the offense—felony DUI. Moreover, the penalty ranges, up to felony DUI, all increase incrementally in proportion to the number of offenses. Unless there is a passenger under the age of the 16 when the offense is committed, a first offense DUI is punishable within a fine range of $600 to $1,200, a second offense DUI is punishable within a fine range of $1,200 to $2,000, and a third offense DUI is punishable within a fine range of $2,500 to $5,000. Mont. Code Ann. § 61-8-714(1)(a), (2)(a), (3)(a)

(2019). Continuing up the step ladder of increments of fines, a felony DUI follows suit: the fourth offense DUI has a fine range of $5,000 to $10,000.

Cole has not established that the fine range of $5,000 to $10,000 is disproportionate to an offender who, at a minimum, has committed four DUI offenses.

C. This Court should decline to extend *Gibbons* because this Court's decision in *Gibbons* is manifestly wrong, and, as such, should be overturned.

This Court should decline to extend *Gibbons* to Cole's case because *Gibbons* is manifestly wrong. "Stare decisis means 'to abide by, or adhere to, decided cases.'" *State v. Gatts*, 279 Mont. 42, 51, 928 P.2d 114, 119 (1996) (quoting *Black's Law Dictionary* 1406 (6th ed. 1990)). It "is a fundamental doctrine which reflects [this Court's] concerns for stability, predictability and equal treatment." *Gatts*, 279 Mont. at 51, 928 P.3d at 119 (citation omitted). "When it comes to interpretation of our Constitution, we place a high value on getting it right, because citizens must live with a bad decision unless we correct our mistake." *Gibbons*, ¶ 62. This Court is not constrained to follow precedent that was "badly reasoned or insufficiently reasoned." *Id*. Thus, stare decisis requires this Court to follow precedent unless the precedent is "manifestly wrong." *Formicove, Inc. v. Burlington N.*, 207 Mont. 189, 194-95, 673 P.2d 469, 472 (1983).

This Court should overrule *Gibbons* because it is manifestly wrong for four reasons: (1) Mont. Code Ann. § 46-18-231 is not an incorporation of Montana's Excessive Fines Clause; (2) the plain statutory language supports harmonizing Mont. Code Ann. § 46-18-231(3) with Mont. Code Ann. § 61-8-731(3) (2019); (3) Mont. Code Ann. § 46-8-731(3) (2019)'s fine range is constitutionally proportional to the gravity of the offense; and (4) proportionality to the offender is more appropriately considered as an as-applied, not a facial, challenge under Montana's Excessive Fines Clause.

1. Neither the plain language nor the legislative history supports that Mont. Code Ann. § 46-18-231 was meant to embody Montana's Excessive Fines Clause.

Since its decision in *Yang* this Court has afforded Mont. Code Ann. § 46-18-231 considerable weight. In *Yang*, this Court addressed whether Mont. Code Ann. § 45-9-130(1)'s 35% drug market value fine was unconstitutional because it required district courts to impose the fine "without consideration of an offender's financial resources, the nature of the crime committed, and the nature of the burden the required fine would have on the offender." *Yang*, ¶ 9. This Court began its inquiry into the constitutionality of Mont. Code Ann. § 45-9-130(1) by reviewing the constitutionality of Mont. Code Ann. § 46-18-231(3), a statute not referenced by Mont. Code Ann. § 45-9-130(1) or challenged by Yang on appeal. *Yang*, ¶ 41 (J. Rice, dissenting).

As aptly noted in the dissenting opinion, this Court ultimately concluded that Mont. Code Ann. § 46-18-231(3) "embodies the Eighth Amendment such that other statutes must conform to it to also be constitutional." *Yang*, ¶ 41 (J. Rice dissenting) (citing *Yang*, ¶¶ 17-19). Through that lens, this Court held that Mont. Const. art. II, § 22 "requires that the sentencing judge be able to consider 'the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine will impose' before ordering the offender to pay the 35%-market-value fine contained in § 45-9-130(1), MCA." *Id*. ¶ 24 (quoting Mont. Code Ann. § 46-18-231(3)).[2]

Relying on *Yang*, the *Gibbons* Court again, without any acknowledgment or analysis of the purpose for enacting Mont. Code Ann. § 46-18-231, elevated Mont. Code Ann. § 46-18-231 to the statutory equivalent of Montana's Excessive Fines Clause, concluding that "the Montana Legislature has effectuated [] federal and state constitutional protections against excessive fines by codifying the inquiry necessary to guarantee that a fine is proportional in § 46-18-231, MCA." *Gibbons*,

[2] In *State v. Tam Thanh Le*, 2018 MT 82, 387 Mont. 224, 392 P.3d 607, this Court reviewed the same constitutional challenge to the same statute it reviewed in *Yang*. Yet, in *Le*, this Court concluded, without mention of Mont. Code Ann. § 46-18-231, that Mont. Code Ann. § 45-9-130 did not violate Mont. Const. art. II, § 22 because that statute created a fine that was proportional to the gravity of the offense. *Le*, ¶¶ 13, 15. However, this Court did not overrule *Le* in *Yang*. *See Yang*, ¶ 24.

¶ 50. In support of its conclusion, this Court rationalized, without citation, that Mont. Code Ann. § 46-18-231:

> is an enlightened response to the increasing punitiveness in the American approach to criminal justice, an acknowledgment that imposition of mandatory fines on impoverished defendants are unlikely to reduce future crime, and a recognition that the impact of mandatory minimum fines is disproportionate on families of poor defendants and minority communities, particularly those of color.

Gibbons, ¶ 54. Only by promoting Mont. Code Ann. § 46-18-231 to constitutional status was the *Gibbons* Court able to conclude that Mont. Code Ann. § 61-8-731(3) (2019) was facially unconstitutional under Montana's Excessive Fines Clause because it did not comply with Mont. Code Ann. § 46-18-231.

However, nothing in the legislative history supports the *Gibbons* Court's conclusion that the Legislature intended and enacted Mont. Code Ann. § 46-18-231 to be a constitutional protection against excessive fines. Rather, Mont. Code Ann. § 46-18-231 was enacted to authorize sentencing courts to punish offenders with fines instead of incarceration for certain offenses as long as the offender has the ability to pay the fine and the fine does not exceed $50,000. Mont. S. Jud. Comm., Hr'g on S.B. 14 at 2-3 (Jan. 9, 1981); Mont. S. Jud. Comm., Hr'g on S.B. 14 (Jan. 13, 1981) at 4. Indeed, absent from the legislative history of Mont. Code Ann. § 46-18-231 is any mention of mandatory fines, that fines are unlikely to reduce future crimes, or that the fines are disproportionate on families of poor or minority defendants. *See* Mont. S. Jud. Comm., Hr'g on S.B. 14, 47th Leg. Sess. (Jan. 9,

1981) at 2-3; Mont. S. Jud. Comm., Hr'g on S.B. 14, 47th Leg. Sess. (Jan. 13, 1981) at 4; Mont. S. Jud. Comm., Hr'g on S.B. 14, 47th Leg. Sess. (March 6, 1981) at 4-5; Executive Session of Mont. H. Jud. Comm., S.B. 14, 47th Leg. Sess. (March 10, 1981).

Instead, the Legislature discussed the rising costs on counties for incarceration for offenses, such as white-collar crimes, where defendants with the ability to pay could be effectively punished by ordering a fine instead of incarceration. Mont. S. Jud. Comm., Hr'g on S.B. 14, 47th Leg. Sess. (March 6, 1981) at 4-5; Executive Sess. of Mont. H. Jud. Comm., S.B. 14, 47th Leg. Sess. (March 10, 1981). The only mention of the disparate impact on poor defendants was that poor defendants would have to be incarcerated instead of paying a fine because they would likely not be able to pay the fine. *See* Executive Session of Mont. H. Jud. Comm., S.B. 14, 47th Leg. Sess. (March 10, 1981).

Nor is it logical to assume that the 1981 Legislature, by enacting Mont. Code Ann. § 46-18-231(3)'s ability to pay provision, was establishing an "enlightened approach" to what proportionality for purposes of Montana's Excessive Fines Clause included. This is especially true when viewed in the context of the evolution of the Eighth Amendment's Excessive Fines Clause, which Montana's Excessive Fines Clause mirrors. *See* U.S. Const. amend. VIII; Mont. Const. art. II, § 22. In 1998, *17 years after the Legislature enacted Mont. Code Ann.*

§ 46-18-231, the United States Supreme Court applied the Eighth Amendment's Excessive Fines Clause *for the first time* in *United States v. Bajakajian*, 524 U.S. 321, 327 (1998).

In *Bajakajian*, the United States Supreme Court "adopt[ed its] standard of gross disproportionality articulated in [its] Cruel and Unusual Punishments Clause precedents," and concluded that district courts determining proportionality "must compare the amount of the forfeiture to the gravity of the defendant's offense." *Bajakajian*, 524 U.S. at 336-37. If the district court concludes that the forfeiture amount "is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." *Bajakajian*, 524 U.S. at 337. Although *Bajakajian* dealt with criminal forfeiture, the United States Supreme Court analyzed the criminal forfeiture at issue in *Bajakajian* by examining the purpose for prohibiting fines, implicitly setting the same test for excessive fines as for excessive forfeitures for purposes of the Eighth Amendment. *See Bajakajian*, 524 U.S. at 334-37. To date, the United States Supreme Court has not expanded proportionality to include comparison of fines to an individual offender's ability to pay when a fine provision is facially challenged under the Eighth Amendment.

Simply put, this Court's conclusion that the Legislature enacted Mont. Code Ann. § 46-18-231 as the embodiment of Montana's Excessive Fines Clause is unsupported and contradicted by the legislation itself. First, when Mont. Code

Ann. § 46-18-231(3) was enacted, the United States Supreme Court had not set a test for what constituted an unconstitutionally excessive fine. Second, the history and plain language of Mont. Code Ann. § 46-18-231 do not support that the Legislature was even considering Montana's Excessive Fines Clause when it enacted a statute that was meant to create alternative sentences for certain offenses. The *Gibbons* Court's presumption to the contrary renders *Gibbons* manifestly wrong because, just as in *Yang*, this Court improperly elevated a statute designed for a specific purpose to a constitutional mandate rather than adhering to the basic rules of statutory construction.

2. The *Gibbons* Court did not need to reach the constitutional question because principles of statutory construction support that Mont. Code Ann. § 61-8-731(3) (2019) should be harmonized with Mont. Code Ann. § 46-18-231(3).

The *Gibbons* Court disregarded this Court's standard practice of presuming legislative enactments to be constitutional and avoiding constitutional issues whenever possible, even though the *Gibbons* Court could have reached a similar conclusion—that the ability to pay must be considered before imposing a fine pursuant to Mont. Code Ann. § 61-8-731(3) (2019)—by correctly employing principles of statutory construction. *See S.M.*, ¶ 10; *Russell*, ¶ 19.

Statutory construction requires the district court to simply "ascertain and declare what is in terms or in substance contained therein, not to insert what has

been omitted or to omit what has been inserted." *City of Missoula v. Fox*, 2019 MT 250, ¶ 18, 397 Mont. 388, 450 P.3d 898. "The starting point for interpreting a statute is the language of the statute itself." *State v. Christensen*, 2020 MT 237, ¶ 95, 401 Mont. 247, 472 P.3d 622. The plain meaning of the statute controls when the "intent of the Legislature can be determined from the plain meaning of the words used in the statute." *Id.*

When several statutes apply to a situation, the statutes should be construed, if possible, in a manner that will give effect to each of them. *Fox*, ¶ 18. "[T]he rules of statutory construction require us to reconcile statutes if it is possible to do so in a manner consistent with legislative intent." *Ross v. City of Great Falls*, 1998 MT 276, ¶ 19, 291 Mont. 377, 967 P.3d 1103. "Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it." *Fox*, ¶ 18.

Because DUI offenses are not mentioned in Mont. Code Ann. § 46-18-231(1)(b), Mont. Code Ann. § 46-18-231(1)(a) would apply to DUI sentences. Montana Code Annotated § 46-18-231 provides, in relevant part:

> (1) (a) Except as provided in subsection (1)(b), whenever, upon a verdict of guilty or a plea of guilty or nolo contendere, an offender has been found guilty of an offense for which a felony penalty of imprisonment could be imposed, the sentencing judge may, in lieu of or in addition to a sentence of imprisonment, impose a fine only in accordance with subsection (3).
>
> . . . .
>
> (3) The sentencing judge may not sentence an offender to pay a fine unless the offender is or will be able to pay the fine and interest.

> In determining the amount and method of payment, the sentencing judge shall take into account the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine interest will impose.

Montana Code Annotated § 61-8-731(3) (2019) requires the district court to sentence the offender to the DOC for a term of 13 months to 5 years, *or* impose a fine of $5,000 to $10,000, *or* both. Mont. Code Ann. § 61-8-731(3) (2019). Montana Code Annotated § 46-18-231(1)(a) is, therefore, consistent with Mont. Code Ann. § 61-9-731(3) (2019),[3] which provides that the district court can incarcerate an offender, impose a fine, or both. Given the similar intents based on the plain language, Mont. Code Ann. § 61-8-731(3) (2019) should be read in conjunction with Mont Code Ann. § 46-18-231(1)(a), (3). *See Ross*, ¶ 9.

Under this interpretation, the district court, when imposing a sentence pursuant to Mont. Code Ann. § 61-8-731(3) (2019), would have to conduct an ability to pay analysis before it imposed a fine. If the district court concludes that the offender has the ability to pay a fine, however, the district court would be confined to imposing a fine between $5,000 to $10,000 because this range is more specific than the $50,000 maximum fine available pursuant to Mont. Code Ann.

[3] Principles of statutory construction support that Mont. Code Ann. § 46-18-231 is only reconcilable with Mont. Code Ann. § 61-8-731(3) (2019) because that specific provision imposes a discretionary fine. Otherwise, principles of statutory construction support that mandatory fine provisions would control Mont. Code Ann. § 46-18-231. *See Plouffe*, ¶ 27.

§ 46-18-231. *See State v. Plouffe*, 2014 MT 183, ¶ 27, 375 Mont. 429, 329 P.3d 1255 ("It is a well-established rule of statutory construction that specific provisions prevail over general provisions.").

When the relevant statutes are properly harmonized, the ability to pay is considered before a fine may be imposed pursuant to Mont. Code Ann. § 61-8-731(3) (2019). However, the *Gibbons* Court disregarded statutory construction in favor of giving the Legislature credence only as to Mont. Code Ann. § 46-18-231 based on its own incorrect assessment of the purpose of enacting the statute, at the expense of the Legislature's intent in enacting Mont. Code Ann. § 61-8-731(3) (2019). In doing so, the *Gibbons* Court showed its hand. Montana Code Annotated § 61-8-731(3) (2019) is not legally unconstitutional, but rather it is unconscionable to the *Gibbons* Court because it does not provide what the *Gibbons* Court would have enacted if it had been the Legislature: an ability to pay analysis before imposing any fine.

In other words, the *Gibbons* Court's disregard of this Court's settled practice of not reaching constitutional questions and correctly employing principles of statutory construction has resulted in the *Gibbons* Court creating "a bad decision" that impacts both the Legislature's ability to set proportional penalties and the safety of Montana citizens. *See Gibbons*, ¶ 62. Thus, the doctrine of *stare decisis* requires this Court to overrule *Gibbons*.

3. Montana Code Annotated § 61-8-731(3) (2019)'s fine is proportional to the gravity of the offense.

Gibbons is also manifestly wrong because the *Gibbons* Court failed to acknowledge that the Legislature has consistently enacted DUI penalties that increase exponentially in relation to the number of DUI convictions. In other words, the *Gibbons* Court, by choosing to focus only on Mont. Code Ann. § 46-18-231, overlooked that the Legislature has exemplified the concept of proportionality to the gravity of the offense by providing harsher penalties for repeat DUI offenders to address repeated dangerous behavior that impacts all Montanans.

The Eighth Amendment of the United States Constitution and article II, section 22 of the Montana Constitution protect a defendant's right to be free from excessive fines. Proportionality is the touchstone of the Eighth Amendment's and Montana's Excessive Fines Clauses. *Yang*, ¶ 16. The fine amount "must bear some relationship to the gravity of the offense that it is designed to punish." *Id*.

Fines have been part of the DUI sentencing scheme in Montana since 1955. Although the fines were discretionary, the Legislature, in 1955, set fine ranges for each level of DUI offense. Mont. Rev. Code § 32-2132(5)(d). For instance, the first offense DUI was punishable by six months in jail, or a fine of $100 to $500, or both. *Id*. A second offense DUI was punishable by 10 days to 6 months in jail and, at the court's discretion, a fine of $300 to $500. *Id*. A third or subsequent

conviction was punishable by 30 days to 1 year in jail and, at the court's discretion, a fine of $500 to $1,000. *Id*.

In 1979, the Legislature eliminated jail sentences for first and second offense DUIs, instead requiring those offenders to only pay a fine:

> Every person who is convicted of a violation of 61-8-401 shall be punished by a fine of not less than $100 or more than $500. On a second conviction, he shall be punished by a fine of not less than $300 or more than $500. On the third or subsequent conviction, he shall be punished by imprisonment for a term of not less than 30 days or more than 1 year, which may be added, in the discretion of the court, a fine of not less than $500 or more than $1,000.

Mont. Code Ann. § 61-8-714(1) (1979).

Then, in 1981, *the same year that the Legislature enacted Mont. Code Ann. § 46-18-231*,[4] the Legislature maintained mandatory fines for first and second offense DUIs. Mont. Code Ann. § 61-8-714(1)-(2) (1981). At that time, "[t]he fine for shooting a deer out of season in Montana [was] higher than [DUI] on the first offense." Mont. S. Jud. Comm., Hr'g on H.B. 364, 47th Leg. Sess. (Jan. 30, 1981) at 3. The Legislature struggled with this disparity, especially because DUIs were "a serious problem in Montana," with 164 or "half of the people killed in accidents, involved a drunk driver," and "[t]wo-thirds of people stopped for [DUI were considered] problem drinkers." *Id*. at 2. As a result, the Legislature felt that "[t]he

[4] "[T]he Legislature is presumed to act with deliberation and with full knowledge of all existing laws on the subject." *Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 41, 344 Mont. 1, 185 P.3d 1003.

time ha[d] come for [them] to try to take some direct and forceful action to try to cut down on the number of fatalities." Highway and Transportation Comm., Hr'g on H.B. 364, 47th Legislative Sess. (March 10, 1981) at 4. The Legislature's goal with changing the sentences available was to attempt to find a "balance between punitive and rehabilitative." *Id*. at 1.

In 1989, the Legislature made the fine mandatory for a third or subsequent DUI conviction. Mont. Code Ann. § 61-8-714(3); Mont. S. Jud. Comm., Hr'g on H.B. 425, 51st Leg. Sess. (March 16, 1989) at 7. The purpose of House Bill 425 was to diminish the impact of drunk drivers in Montana. Mont. H. Jud. Comm., Hr'g on H.B. 425, 51st Leg. Sess. (Feb. 7, 1989) at 1. By 1989, it was reported that only 1 out of every 2,000 drunk drivers was being arrested and drunk driving was the leading cause of death for people ages 15 to 40. *Id*. Many drunk drivers drive "at least 100 times intoxicated before they are caught the first time." *Id*. at 5-6. By implementing harsher penalties, the Legislature hoped to deter that conduct, with the goal of stunting fatalities from drunk driving accidents. *Id*. at 1-2.

The Legislature's concerns in the 1980s remain true today: Montana consistently has a high percentage of fatal accidents caused by drunk driving. *See* NHTSA, *2021 Traffic Safety Facts: Alcohol-Impaired Driving*, at 9-10 (June 2023) (leading the nation in percentage of fatal accidents caused by drunk driving); NHTSA, *2022 Traffic Safety Facts: Alcohol-Impaired Driving*, at 9-10 (June 2024)

(exceeding the national average in percentage of fatal accidents caused by drunk driving).

To combat the tragedies caused by drunk drivers in Montana, the Legislature has implemented a sentencing scheme that continues to impose mandatory fine ranges for every DUI offense level along with residential treatment and incarceration. As this Court recognized in *Gibbons*, "only the Legislature [ ] has the authority to determine the offense and penalty." *Gibbons*, ¶ 52. The Legislature clearly complied with that directive and, in doing so, it considered the proportionality between the gravity of each DUI offense and provided a corresponding, proportional fine range to deter offenders from committing repeat DUIs. Moreover, the mandatory nature of the fines ensures equal treatment for all offenders statewide.

Indeed, the *Gibbons* Court even noted that "the clear purpose and intent of the [L]egislature under § 61-8-731, MCA, was to impose an enhanced financial penalty for felony DUIs." *Gibbons*, ¶ 56 n.3. The Legislature ensured proportionality with those enhanced penalties, especially for offenders sentenced pursuant to Mont. Code Ann. § 61-8-731(3) (2019), which has additional requirements that must be met.

Before the district court can impose a fine pursuant to Mont. Code Ann. § 61-8-731(3) (2019), the person must either (1) be convicted of violating

Mont. Code Ann. §§ 61-8-401, -406, -411, or -465, and have a single conviction under Mont. Code Ann. § 45-5-106; or (2) have any combination of four or more convictions under Mont. Code Ann. §§ 45-5-104, -205, -628, 61-8-401, -406, or -465, with the offense under § 45-5-104 occurring while the person was operating a vehicle under the influence of alcohol, a dangerous drug, and/or any other drug, as provided in § 61-8-401(1). The person must also have been, "upon a prior conviction, placed in a residential alcohol treatment program under subsection (2)." Mont. Code Ann. § 61-8-731(3) (2019).

After a person satisfies the conviction and prior enrollment in residential treatment thresholds of Mont. Code Ann. § 61-8-731(3) (2019), the district court shall sentence the offender to the DOC for a term of 13 months to 5 years, *or* impose a fine of $5,000 to $10,000, *or* both. Mont. Code Ann. § 61-8-731(3) (2019) (emphasis added). As Mont. Code Ann. § 61-8-731(3) (2019)'s plain language clearly states, the district court is not mandated to impose a fine. However, if the district court elects to impose a fine, the district court is required to impose a fine that is not less than $5,000, and not more than $10,000. Nonetheless, if the district court imposes a fine, the district court being required to impose a $5,000 mandatory minimum fine does not negate that Mont. Code Ann. § 61-8-731(3) (2019) incorporates the concept of proportionality.

4. Consideration of an offender's ability to pay a mandatory fine is more appropriately considered an as-applied, and not a facial, challenge to Montana's Excessive Fines Clause.

The *Gibbons* Court concluded that a fine is not excessive if it is both proportional to the gravity of the offense and to the offender. *Gibbons*, ¶ 56. In support of this conclusion, the *Gibbons* Court not only continued to rely on Mont. Code Ann. § 46-18-231(3), but also on the United States Supreme Court's recitation of the history of the Eighth Amendment's excessive fines clause as existing to ensure that economic punishments are not only "proportioned to the wrong," but also that they "not be so large as to deprive [an offender] of his livelihood." *Gibbons*, ¶ 48 (citing *Timbs v. Indiana*, 586 U.S. 146, 151 (2019)). However, the United States Supreme Court, in *Bajakajian*, when assessing a facial constitutional challenge to an economic punishment, only accounted for the proportionality of the economic punishment to the gravity of the offense, with no consideration for the livelihood of the offender. This rationale is consistent with the distinction between facial and as-applied constitutional challenges.

"A defendant's facial constitutional challenge is based on the defendant's allegation that the *statute* upon which the district court based her sentence is unconstitutional." *Yang*, ¶ 11 (emphasis in original). To prevail on a facial challenge, the challenging party must show that "no set of circumstances exists

under which the statute would be valid or that the statute lacks a plainly legitimate sweep." *Yang*, ¶ 14 (internal quotations and citations omitted).

As this relates to mandatory fines generally, and specifically the challenged fine range under Mont. Code Ann. § 61-8-731(3) (2019), the challenging party would have to show that Mont. Code Ann. § 61-8-731(3) (2019)'s fine range, under no set of circumstances, is proportional to the gravity of the offense.

As discussed more thoroughly above, the Legislature created DUI fines that are proportional to the gravity of the offense. As it relates specifically to Mont. Code Ann. § 61-8-731(3) (2019)'s fine range, it is proportional to receive a fine of $5,000 to $10,000 when the offender is being sentenced for a fourth or subsequent DUI, and the offender has already received treatment during a previous DUI sentence and has demonstrated an inability to drive safely and sober. The Legislature, thus, considered the gravity of the offense when it set the mandatory fine.

A facial challenge cannot, and should not, consider proportionality to each offender. Instead, it should be appropriately considered as an as applied challenge. "A defendant's as-applied constitutional challenge is based on the defendant's allegation that her *sentence* is unconstitutional, although imposed pursuant to a constitutional sentencing statute." *Yang*, ¶ 11 (emphasis in original).

Even if Mont. Code Ann. § 61-8-731(3) (2019) is not reconciled with Mont. Code Ann. § 46-18-231(3), as argued above, district courts remain free to

consider ability to pay objections to mandatory fines through as-applied challenges under Montana's Excessive Fines Clause. In other words, if the offender argues that he has no ability to pay the fine, which would render the fine *excessive to him* because it would deprive him of his livelihood, the district court would be free to not impose the mandatory fine as it would be unconstitutional as to that offender, Mont. Code Ann. § 46-18-231(3) aside.

By failing to properly frame the issue raised in *Gibbons* as an as-applied challenge, the *Gibbons* Court effectively concluded that under no set of circumstances could Mont. Code Ann. § 61-8-731(3) (2019) be constitutional. The *Gibbons* Court did so while also notably concluding that "[m]andatory minimum fines *can* produce punishment that is disproportionate and unjust when the offender's ability to pay is not considered." *Gibbons*, ¶ 54 (emphasis added). In other words, the *Gibbons* Court, by using the word can, recognized that circumstances exist under which a fine imposed pursuant to Mont. Code Ann. § 61-8-731(3) (2019) is constitutionally proportional. The *Gibbons* Court's conclusion that Mont. Code Ann. § 61-8-731(3) (2019) is *facially* unconstitutional, while focusing on the *offender's* individual livelihood, impermissibly conflated the two available constitutional challenges, rendering *Gibbons* manifestly wrong.

The holding in *Gibbons* was manifestly wrong because it failed to recognize that constitutionally required proportionality was infused into Mont. Code Ann.

§ 61-8-731(3) (2019) when the Legislature set the penalty. This failure, along with improperly equating statutory language from Mont. Code Ann. § 46-18-231 as part of Montana's Excessive Fines Clause, failing to harmonize the two statutes at issue, and improperly framing the challenge as a facial challenge when a proportionality to the offender challenge is more appropriately considered as an as-applied challenge, all established that this Court should overrule *Gibbons*.

III. Even if *Gibbons* applies, the district court did not abuse its discretion when it imposed Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019).

A. The district court considered the applicable statutes and considered Cole's ability to pay before it imposed a $5,000 fine as part of Cole's sentence.

Even if this Court extends *Gibbons* to Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019)'s mandatory fine range, the district court did not abuse its discretion when it imposed a $5,000 fine following consideration of Cole's ability to pay.

To the extent that *Gibbons*'s holding is, as Cole asserts, that the $5,000 mandatory minimum fine is unconstitutional and, therefore, struck from the statute, the district court still had the discretion to impose a $5,000 fine pursuant to Mont. Code Ann. § 46-18-213. (*See* Appellant's Br. at 11.) Montana Code Annotated § 46-18-213 provides that when an offender is convicted of a felony offense with no financial penalty stated, the district court, in its discretion, may impose a fine

not to exceed $50,000. If *Gibbons* results in mandatory minimum fines being struck in their entirety, then the fine range would default to the range provided at Mont. Code Ann. § 46-18-213. Because Mont. Code Ann. § 46-18-213 has a discretionary fine range, Mont. Code Ann. § 46-18-231(1)(a) and (3) would apply. As such, the district court did not abuse its discretion when it imposed a $5,000 fine after considering Cole's ability to pay.

Alternatively, if *Gibbons*'s holding is that Mont. Code Ann. § 61-8-731(3) (2019)'s mandatory minimum fine is unconstitutional because it does not authorize the district court to conduct an ability to pay analysis, the district court, here, complied with *Gibbons* because it did conduct an ability to pay analysis. Before imposing the fine, the district court explicitly asked Cole about his current financial situation. Cole informed the district court of his housing situation, his monthly expenses, and that he currently was not employed but was receiving social security. Based on that information, the district court credited $100 against the fine and suspended $4,900 of the fine to prevent a financial hardship on Cole over the course of his sentence.

The district court appropriately considered Cole's financial circumstances when it elected to suspend the remaining portion of his fine because statutorily it did not have the authority to not impose the $5,000 fine. Montana Code Annotated § 46-18-231(1)(a) provides, in relevant part, and except for the offenses listed at

Mont. Code Ann. § 46-18-231(1)(b), that after an offender has been found guilty by verdict or plea, the district court "may, in lieu of or in addition to a sentence of imprisonment, impose a fine only in accordance with subsection (3)." DUI is not an offense listed at Mont. Code Ann. § 46-18-231(1)(b).

Accordingly, based on the plain language of Mont. Code Ann. § 46-18-231(1)(a), a district court has the ability to impose the fine in lieu of imposing a mandatory minimum custodial sentence required in DUI offenses. Because this interpretation of the statutes leads to an absurd result, it cannot be the correct interpretation. Indeed, the correct statutory interpretation of Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019) is that because it mandates the district court impose a $5,000 to $10,000 fine, without mention of ability to pay or cross-reference to Mont. Code Ann. § 46-18-231(3), Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019) is the more specific statute. As such, Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019) controls Mont. Code Ann. § 46-18-231(3), which is a general statute. *See Plouffe*, ¶ 27.

Because Mont. Code Ann. § 46-18-231(3) does not apply to Mont. Code Ann. § 61-8-731(1)(a)(iii) (2019)'s fine provision, the district court correctly imposed the $5,000 mandatory fine. However, the district court also correctly used the evidence that it heard regarding Cole's ability to pay to suspend his fine, which it had the authority to do. District courts have the authority to suspend fines.

State v. Curran, 2023 MT 118, ¶ 25, 412 Mont. 499, 531 P.3d 547 (relying on Mont. Code Ann. § 46-18-201(2)(a), (3)(b)). This includes mandatory fines. *Curran*, ¶ 28. The district court correctly used its discretion when it suspended the remainder of Cole's $5,000 fine after inquiring into his ability to pay the fine.

B. The record supports that imposition of the $5,000 fine was proportional to Cole's specific DUI offense and his individual circumstances.

As argued above, in order to consider whether a fine is constitutionally proportional under the Excessive Fines Clause to an offender's own characteristics and circumstances, the challenge must be raised as an as-applied constitutional challenge. Construing Cole's ability to pay objection as an as-applied constitutional challenge, Cole cannot establish that the fine was disproportionate to the circumstances of the DUI offense and his individual circumstances.

The instant DUI is the result of Cole taking various prescription medications and Benadryl, along with drinking whiskey before driving around Missoula. Cole fell by his vehicle before driving a second time. Cole's son had to call law enforcement out of concern for Cole. Cole could not complete the SFSTs. Indeed, law enforcement nearly had to catch Cole during the SFSTs. Cole's BAC was 0.126. Yet, he believed he was safe to drive. And, during the pendency of this case, Cole's first felony DUI, Cole was charged with another felony DUI, which was ultimately dismissed pursuant to the plea agreement.

In the plea agreement, Cole agreed that he had the ability to pay the monetary obligations listed, which included the $5,000 fine. He was working on obtaining housing that would cost one-third of his income. Cole had a storage unit he was paying for because he did not have a permanent residence for his belongings. He had minimal other bills or expenses. Cole receives social security and is in his 60s. Absent from the record is any discussion of Cole's inability to procure employment. Cole agreed he could pay the $450 supervision fee over time.

The record supports that over the course of his sentence, Cole had the ability to pay the $5,000 fine. Nonetheless, the district court suspended the remaining $4,900 of the fine imposed in an effort to limit Cole's financial hardships during his sentence as long as he remained compliant with his conditions.

In sum, the district court appropriately imposed the $5,000 fine as a means to deter Cole's future conduct and to protect his safety and the safety of the public. The district court also appropriately suspended the fine subject to conditions to account for Cole's financial circumstances. The $5,000 fine, less $100 for credit, and suspension of the remainder, was not disproportionate to Cole, the offender. As such, Cole has not established that the $5,000 fine was constitutionally excessive as applied to him.

CONCLUSION

This Court should affirm Cole's conviction and sentence.

Respectfully submitted this 26th day of February, 2025.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ Cori Losing*
CORI LOSING
Assistant Attorney General

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 7,960 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Cori Losing
CORI LOSING

CERTIFICATE OF SERVICE

I, Cori Danielle Losing, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-26-2025:

Matthew C. Jennings (Govt Attorney)
200 W. Broadway
Missoula MT 59802
Representing: State of Montana
Service Method: eService

Deborah Susan Smith (Attorney)
555 Fuller Avenue
P.O. Box 200147
Helena MT 59620-0147
Representing: Neil Dennis Cole
Service Method: eService

Electronically signed by LaRay Jenks on behalf of Cori Danielle Losing
Dated: 02-26-2025