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.

REDACTED REPLY BRIEF OF APPELLANT

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

APPEARANCES:

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
debbiesmith@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

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

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

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Authorities

Montana Constitution

United States Constitution

ARGUMENT

I. Mr. Cole's plea agreement, which contemplated a $5,000 fine under a facially unconstitutional statute, did not waive appellate review of his challenge to the legality of the fine.

The State argues Mr. Cole agreed to imposition of the $5,000 in his plea agreement in exchange for the State dismissing another DUI charge. (Appellee Br. at 7, citing Doc. 41 at 2.) True enough. Nevertheless, the State's waiver argument fails for two reasons.

First, when the parties signed and filed the written plea document on October 26, 2022 (Doc. 41), *State v. Mingus*, 2004 MT 24, 319 Mont. 349, 84 P.3d 565, was governing precedent. In *Mingus*, the Court held that Mont. Code Ann. § 46-18-231 "does not apply to mandatory fines. When a fine is statutorily mandated, the court has no discretion as to whether to impose the fine, irrespective of the defendant's ability to pay." *Mingus*, ¶ 15; *accord State v. Reynolds*, 2017 MT 317, ¶ 19, 390 Mont. 58, 408 P.3d 503 (same). Nearly 18 months after Mr. Cole's plea was negotiated and while Mr. Cole's appeal was pending, this Court decided *State v. Gibbons*, 2024 MT 63, 416 Mont. 1, 545 P.3d 686 (*en banc*), *cert. denied* ___ U.S. ___, 145 S.Ct. 355 (2024), expressly overruling "*Mingus* to the extent it prevents a court from considering an

offender's ability to pay prior to imposing any fine." *Gibbons*, ¶ 64. The parties agreed to the $5,000 fine only because they thought, based on *Mingus*, the fine was statutorily mandated.

Second, at the sentencing hearing on March 15, 2023, the Prosecutor did not request a fine, notwithstanding the plea agreement's terms. Additionally, the Prosecutor did not object to Defense Counsel's request for the fine to be struck under Mont. Code Ann. § 46-18-231(3). (Sent. Tr. at 6-9.)

Mr. Cole is not attempting to avoid the obligations of his plea bargain: He has served a 13-month custodial commitment to the Department of Corrections and is still serving his five-year suspended sentence.[1] (Apps. A, B.) He does not challenge the $500 financial obligation the District Court permitted to be paid over time for supervision fees and the PSI fee. (Apps. A, B.) Mr. Cole only challenges the $5,000 mandatory-minimum fine the District Court imposed at sentencing, which *Gibbons* subsequently established is facially

[1] The State's recitation of the alleged circumstances of Mr. Cole's DUI comes from the affidavit in support of the Prosecutor's leave to file an information. (Appellee Br. at 2-3, 32, citing Doc. 1.) The State's asserted "facts" were not proven at trial nor admitted by Mr. Cole in his change of plea colloquy. (COP Tr. at 8-9.)

unconstitutional under the Excessive Fines Clause in Eighth Amendment of the United States Constitution and in Article 2, Section 22 of the Montana Constitution.

Accordingly, here, where (a) the parties negotiated a plea including a mandatory-minimum fine under governing precedent that was overruled while Mr. Cole's appeal was pending, and (b) the Defense argued at sentencing, with the Prosecutor's acquiescence, for the fine to be struck, Mr. Cole has not waived appellate review of his challenge to the $5,000 fine included in his judgment

II. *Gibbons* clearly applies to the mandatory-minimum fine required by Mont. Code Ann. § 61-8-731(1)(a)(iii).

The State argues *Gibbons* is inapplicable to Mr. Cole's fine because Mr. Cole was sentenced for his fourth DUI, pursuant to Mont. Code Ann. § 61-8-731(1)(a)(iii), while Mr. Gibbons was sentenced for his fifth or greater DUI, pursuant to Mont. Code Ann. § 61-8-731(3). (Appellee Br. at 5, 7-8.) The State contends the Court has not declared the $5,000 mandatory-minimum fine in the subsection (1)(a)(iii), for a fourth DUI facially unconstitutional, only the fine in subsection (3), for a fifth DUI. (Appellee Br. at 7.) The State also observes that in his opening brief Mr. Cole mistakenly argued his fine was imposed under

§ 61-8-731(3) and did not argue the fine under § 61-8-731(1)(a)(iii) is facially unconstitutional.[2] (Appellee Br. at 8.) Therefore, the State contends the Court should decline review of the facial constitutionality of § 61-8-731(1)(a)(iii). (Appellee Br. at 8.)

What the State ignores in its brief is that -731(1)(a)(iii) uses the same mandatory fine language for four DUI convictions as the language in -731(a)(3) for five or more DUI convictions that the Court found facially unconstitutional in *Gibbons*. The State fails to explain why the Court's reasoning in *Gibbons* would not apply to the exact same mandatory-minimum fine in a different subsection of the same statute. Instead, for 20 pages of its brief, the State pivots to its ongoing crusade against the Court's decision in *Gibbons*.[3] (Appellee Br. at 9-29.)

The language of the statute applicable to Mr. Cole's appeal states, in pertinent part:

> (1) **Except as provided in subsection (3)**, if a person is convicted of a violation of 61-8-401, .

---

[2] The State is correct that Mr. Cole pled guilty to and was convicted of a fourth DUI. (*See* Doc. 1 at 4; Doc. 41 at 2; Doc. 43 at 2.) Counsel apologizes for her oversight.

[3] *See Montana v. Gibbons*, ___ U.S. ___, 145 S.Ct. 355 (2024) (denying State's petition for writ of certiorari); *State v. Vaska*, DA 23-0096, Appellee Br. at 12-31 (10/22/2024), and Appellee Supplemental Br. at 2, 7 (03/05/2025).

> . . , the person has . . . any combination of **three or more prior convictions** under . . . 61-8-401 . . . , the person is guilty of a felony and shall be punished by:
>
> . . .
>
> **and (iii) a fine in an amount of not less than $5,000 or more than $10,000[.]**

Mont. Code Ann. § 61-8-731(1)(a)(iii) (emphasis added). In nearly identical fashion, the language of the statutory subsection at issue in *Gibbons* provides, in pertinent part:

> (3) If a person is convicted of a violation of 61-8-401, . . . , the person has . . . any combination of **four or more prior convictions** under . . . 61-8-401 . . . , the person shall be sentenced to the department of corrections for a term of not less than 13 months or more than 5 years **or be fined an amount of not less than $5,000 or more than $10,000**, or both.

Mont. Code Ann. § 61-8-731(3) (emphasis added).[4] Neither subsection (1)(a)(iii) nor subsection (3) of § 61-8-731 allows a sentencing judge to impose a fine of less than $5,000, even if the judge determines a lower

[4] Mont. Code Ann. § 61-8-731(3) allows a sentencing judge to impose a custodial sentence *or* a fine between $5,000 and $10,000, while § 61-8-731(1)(a)(iii) requires a custodial sentence *and* a fine between $5,000 and $10,000. *See Gibbons*, ¶¶ 51 n.2, 61. (Appellee Br. at 19-20 and n.3.) Thus, the subsection at issue here is even more restrictive than that in *Gibbons*, because subsection (a)(1)(iii), unlike subsection (3), prohibits a judge from waiving the fine altogether.

fine is warranted that the defendant has the ability to pay. This is the same issue the Court resolved in *Gibbons*, albeit under subsection (3) not (1)(a)(iii). *Gibbons*, ¶ 66 (holding § 61-8-731(3) "facially unconstitutional to the extent that whenever the sentencing judge imposes a fine, the statute does not allow the judge to consider, before imposing the $5,000 mandatory minimum, the proportionality factors protecting an offender from excessive fines").

In his opening brief, Mr. Cole argued, "*Gibbons* makes clear, however, that the upfront imposition of the mandatory-minimum DUI fine – not just the subsequent enforcement of it – is facially unconstitutional. Mr. Cole's fine cannot survive the Court's ruling in *Gibbons*. *Gibbons*, ¶¶ 60, 64, 66." (Appellant Br. at 11.) Even though Mr. Cole mistakenly wrote his fine was imposed under § 61-8-731(3) (Appellant Br. at 12), his argument was articulated for the Court's resolution: the fine in Mont. Code Ann. § 61-8-731(1)(a)(iii)—which is for all intents and purposes the exact same fine at issue in *Gibbons*—is facially unconstitutional because it violates the Excessive Fine Clauses of the United States and Montana Constitutions. The Court should reject the State's contention Mr. Cole "does not sufficiently argue" the

mandatory-minimum fine under § 61-8-731(1)(a)(iii) is facially unconstitutional. (Appellee Br. at 8.)

III. Mont. Code Ann. § 61-8-731(1)(a)(iii) is facially unconstitutional under the Excessive Fines Clause of the Eighth Amendment to the United States Constitution and Article 2, Section 22 of the Montana Constitution.

A. This Court already has rejected the State's argument that a fine's excessiveness should be gauged solely by examining the proportionality of the fine to the gravity of the offense without considering a defendant's ability to pay it.

In *Gibbons*, the Court addressed whether the Excessive Fines clause was measured only by the gravity of the offense and decided it was not:

> Here, the text, language, structure, and object of § 46-18-231, MCA, is clear and giving effect to legislative intent is straightforward. The Legislature, through § 46-18-231, MCA, intended that *the imposition of a fine be proportionate to the financial resources of the offender*.

Gibbons, ¶ 47 (emphasis added). The State disagrees vehemently with the Court's analysis, contending *Gibbons* is "manifestly wrong for four reasons" (Appellee Br. at 12.) Each of the State's reasons lack merit.

1. The State's reliance on legislative history to try to countermand the Court's plain-language interpretation of § 46-18-231 is unavailing.

The State disputes the Court's ruling that Mont. Code Ann. § 46-18-231 incorporates the Excessive Fines Clause of Article 2, Section 22 of the Montana Constitution.[5] (Appellee Br. at 12 – 17.)

The State begins by attacking *State v. Yang*, 2019 MT 266, 397 Mont. 486, 452 P.3d 897 (*en banc*). In this six-year-old precedent, the Court held the mandatory fine required by Mont. Code Ann. § 45-9-130(1), which sets a 35% market-value fine for dangerous-drug convictions, must be read in conjunction with § 46-18-231(3):

> A sentencing judge may not impose the 35% market-value fine contained in § 45-9-130(1), MCA, without considering the factors in § 46-18-231(3), MCA, thereby ensuring that the offender's fine is not grossly disproportional to the offense committed and protecting an offender's federal and state constitutional rights to be free from excessive fines. Because the District Court imposed the mandatory 35% market-value fine under § 45-9-130(1), MCA, without considering the nature of the crime Yang committed, Yang's

[5] The State confines its argument to Montana's Excessive Fines Clause, even though in *Gibbons* the Court determined § 46-18-231 incorporated the Excessive Fines Clause of both the Montana and United States Constitutions. *Gibbons*, ¶¶ 48-50. Mr. Cole relied on both the United States and Montana Constitutions' Excessive Fines Clauses in his opening brief. (Appellant Br. at 10-11.)

> financial resources, or the nature of the burden the imposed fine would have on Yang, we remand this case to the District Court for recalculation of Yang's fine consistent with this Opinion.

Yang, ¶ 28. Unlike *Gibbons*, the State did not file a petition for writ of certiorari in *Yang* with the Supreme Court. Nor has the State argued *Yang* is manifestly wrong.

Nevertheless, relying on the dissenting opinion in *Yang* to criticize *Gibbons*, the State asserts, "Relying on *Yang*, the *Gibbons* Court[6] 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[.]" (Appellee Br. at 13.) The State then embarks on a legislative-history analysis of § 46-18-231. The end-point of the State's journey is that because § 46-18-231 was enacted in 1981, before the Supreme Court's decision in *United States v. Bajakajian*, 524 U.S. 321, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998), which "set a test for what constituted an unconstitutionally excessive fine," the Montana

[6] The State uses the phrase "the *Gibbons* Court" 22 separate times in its brief, seemingly implying that "the *Gibbons* Court" is an entirely different entity than this Court.

Legislature could not have been considering Montana's Excessive Fines Clause when it enacted § 46-18-231. (Appellee Br. at 17.) The State's argument is misguided.

In the first place, *Bajakajian* addressed the Eighth Amendment's Excessive Fine Clause, not the Montana Constitution's Excessive Fine Clause. Second, the plain language of § 46-18-231(3) could not be clearer: a defendant may not be sentenced to pay a fine unless the defendant "is or will be able to pay the fine." *Gibbons*, ¶ 45 (quoting § 46-18-231(3) and emphasizing it "clearly and plainly requires" a sentencing judge to impose a fine "only" when an offender is able to pay). When the statutory language is clear and plain, a court does not consider legislative history to ascertain what the legislature meant when enacting a statute. "In the construction of a statute, the office of the judge is simply to 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." Mont. Code Ann. § 1-2-101.

Where there is no uncertainty or ambiguity in a statute, it must be applied as written. *State v. Fox*, 2001 MT 209, ¶ 16, 306 Mont. 353, 34 P.3d 484. "The legislative intent is to be ascertained, in the first

instance, from the plain meaning of the words used." *State v. Heath*, 2004 MT 126, ¶ 25, 321 Mont. 280, 288, 90 P.3d 426 (*en banc*) (citation, internal quotation marks omitted). "When the language of a statute is clear and unambiguous, we look no further than to the plain meaning of the statute for its interpretation." *State v. Dahlin*, 1998 MT 113, ¶ 19, 289 Mont. 182, 187, 961 P.2d 1247 (citation omitted). Only "[w]hen the plain meaning of a statute is subject to more than one reasonable interpretation ... we will examine the legislative history to aid our interpretation." *Heath*, ¶ 33 (citation, internal quotation marks omitted; formatting modified).

> We will not interpret the statute further if the language is clear and unambiguous and will only look to legislative intent if the language is not clear and unambiguous. . . . Moreover, our role is not to determine the prudence of a legislative decision ... it is for the legislature to pass upon the wisdom of a statute.

Matter of N.A., 2021 MT 228, 405 Mont. 277, 283, 495 P.3d 45 (*en banc*) (citations, internal quotation marks omitted; formatting modified). "[T]he purpose of the legislation does not have to appear on the face of the legislation or in the legislative history, but may be any possible purpose of which the court can conceive[.]" *Walters v. Flathead*

Concrete Prods., Inc., 2011 MT 45, ¶ 28, 359 Mont. 346, 249 P.3d 913 (citation, internal quotation marks omitted).

The State points to history purporting to indicate that by enacting § 46-18-231 the Legislature intended to ease rising costs of incarceration for counties by allowing defendants with the ability to pay a fine to avoid incarceration while poor defendants would "have to be incarcerated." (Appellee Br. at 15.) Even accepting the State's rendition of the entire legislative history as accurate, and even if resorting to legislative history were necessary to interpret § 46-18-231(3), which is it not, such a scheme would have been unconstitutional. *Gibbons*, ¶ 49 (collecting United States Supreme Court decisions requiring courts to conduct an ability to pay inquiry before revoking probation for failure to pay a fine, issuing a warrant for failure to pay a fine, or automatically suspending a driver's license for failure to pay a fine).

> The Excessive Fines Clause has provided 'a constant shield throughout Anglo-American history' designed to protect other constitutional rights, guarding against the government's use of fines to chill the speech of political enemies, to coerce involuntary labor by imposing a penalty unpayable by the offender, and to generate government revenue from unjust punishments.

Gibbons, ¶ 49 (quoting *Timbs v. Indiana*, 586 U.S. 146, 153, 139 S.Ct. 682, 689, 203 L.Ed.2d 11 (2019).)

The State obviously disagrees with *Gibbons*. But this Court, not the State, decides what a statute means. "[E]ach branch of the government has well-defined powers that are exclusive to that branch—the legislative branch makes the laws, the executive branch carries out the laws, and the judicial branch construes and interprets the laws. It is the exclusive power of the courts to determine if an act of the legislature is unconstitutional." *Merlin Myers Revocable Tr. v. Yellowstone Cnty.*, 2002 MT 201, ¶ 21, 311 Mont. 194, 53 P.3d 1268 (citation omitted).

Moreover, this Court declares what the Constitution requires. "[I]t is axiomatic that if a court can interpret a statute, it also can review its constitutionality." *Brown v. Gianforte*, 2021 MT 149, ¶ 14, 404 Mont. 269, 488 P.3d 548 (*en banc*) (citing *Driscoll v. Stapleton*, 2020 MT 247, ¶ 11 n.3, 401 Mont. 405, 473 P.3d 386; *see generally Marbury v. Madison*, 5 U.S. 137, 167, 177-78, 1 Cranch 137, 2 L.Ed. 60 (1803); *Gen. Agric. Corp. v. Moore*, 166 Mont. 510, 515-16, 534 P.2d 859, 862-63 (1975). "Since *Marbury*, it has been accepted that determining the constitutionality of a statute is the exclusive province of the judicial

branch." *Brown*, ¶ 25; *accord McLaughlin v. Montana State Legislature*, 2021 MT 178, ¶ 18, 405 Mont. 1, 493 P.3d 980 (*en banc*), *cert. denied*, 212 L. Ed. 2d 323, 142 S. Ct. 1362 (2022).

The Court should reject the State's claim that neither the plain language nor the legislative history of Mont. Code Ann. § 46-18-231 "was meant to embody Montana's Excessive Fines Clause." (Appellee Br. at 12.)

2. Mont. Code Ann. § 46-18-231(3) cannot be harmonized with Mont. Code Ann. § 61-8-731(3) or § 61-8-731(1)(a)(iii).

The State next contends "the *Gibbons* Court" should not have reached "the constitutional question" because Mont. Code Ann. § 61-8-731(3) "should be harmonized with" Mont. Code Ann. § 46-18-231(3). (Appellee Br. at 17.) Two preliminary points are in order.

First, Mr. Cole's appeal is not the proper vehicle for the State to seek rehearing of *Gibbons*. Moreover, the State's attempt to convince the United States Supreme Court that *Gibbons* misinterpreted the Eighth Amendment's Excessive Fines Clause failed. *Montana v. Gibbons*, 145 S.Ct. at 355. Without question, *Gibbons* now is binding precedent.

Second, the State's choice to embrace a "harmony" argument is curious. In *Gibbons*, and again at the United States Supreme Court, the State argued this Court's decision in *Mingus* should control the result in *Gibbons* as a matter of statutory interpretation.[7] *Gibbons*, ¶ 61. Yet the State's brief here does not mention *Mingus* even once. Abandoning its former contention that a mandatory-minimum fine must be imposed pursuant to § 61-8-731(3) and the ability-to-pay analysis required by § 46-18-231(3) is inapplicable, the State now asserts § 61-8-731(3) can be "harmonized" with § 46-18-231(3). (Appellee Br. at 18.) The State fails to explain its statutory-interpretation about-face.

Turning to the merits of the State's new harmonizing approach, nothing in the State's argument overcomes this Court's holding in *Gibbons*. Even though the State now concedes that an ability to pay inquiry under § 46-18-231(3) is required before a judge can impose a

---

[7] *See State v. Gibbons*, DA 21-0413, Brief of Appellee at 29-32, 35 (06/21/2023); *Montana v. Gibbons*, Docket No. 24-55, Reply Brief of Petitioner at 7-8 (09/09/2024), available at https://www.supremecourt.gov/DocketPDF/24/24-55/325463/20240909122321733_Reply%20Brief.pdf (last visited 03/22/2025).

mandatory-minimum fine under § 61-8-731(1)(a)(iii), the State still maintains if a judge decides to impose a fine, the fine can be no less than $5,000. (Appellee Br. at 18-20.) The State ignores that the statutory prohibition against a fine between $1 and $4,999 is the issue this Court squarely addressed in *Gibbons* when it held this mandatory-minimum sentencing scheme facially unconstitutional. *Gibbons*, ¶¶ 63-64 and n.3.

In tacit acknowledgment its logic fails, the State resorts to invective: "the *Gibbons* Court disregarded statutory construction;" "the *Gibbons* Court showed its hand;" "61-8-731(3) (2019) is not legally unconstitutional, but rather it is unconscionable to the *Gibbons* Court[.]" (Appellee Br. at 20.) According to the State, the "disregard" of "settled practice" resulted in "the *Gibbons* Court creating a 'bad decision'" affecting "the Legislature's ability to set proportional penalties and the safety of Montana citizens." (Appellee Br. at 20.) Ultimately, the State concludes the doctrine of *stare decisis* requires the Court to overrule *Gibbons*. (Appellee Br. at 20.) The State misunderstands the *stare decisis* doctrine.

Stare decisis "protects those who have taken action in reliance on a past decision and reduces the incentive for challenging existing precedent, thus saving parties and courts the time and expense of endless litigation. It fosters reliance on judicial decisions and contributes to the actual and perceived integrity of the judicial process." *Gibbons*, ¶ 62 (citation omitted). When it comes to *Gibbons*, the State appears dedicated to pursuing endless litigation, refusing to acknowledge *Gibbons*'s precedential effect.

It is the job of the judiciary to interpret statutes and their constitutionality – as every high-school civics student learns. And although the State vehemently disagrees with *Gibbons*, it does not point to any part of the Court's analysis overruling *Mingus* that is allegedly wrong. *Gibbons*, ¶¶ 62-64. The State does not even attempt to argue that *Mingus* was correct. (Appellee Br. at 7-29.)

Gibbons does not prevent the Legislature from enacting a fine structure for DUI offenders that allows a sentencing judge to consider a defendant's ability to pay the fine. *Gibbons* merely prohibits a mandatory-minimum fine that strips judges of discretion to impose a

fine less than the statutorily authorized floor if the defendant lacks an ability to pay the minimum fine.

The State's contention the Court has failed to "harmonize" § 46-18-231(3) with § 61-8-731(1)(a)(iii), (3), is inapposite to *Gibbons*'s holding or to the issue on appeal, which is that the mandatory-minimum $5,000 imposed in Mr. Cole's judgment is facially unconstitutional under *Gibbons*.

3. A fine's proportionality is measured against both the gravity of the offense and its impact on the offender.

The State retreats to a position fully litigated in *Gibbons* and presented to the United States Supreme Court in the State's denied petition for writ of certiorari in *Gibbons*. According to the State, proportionality under the federal and state excessive fines clauses is limited to deciding whether the fine is proportional to the gravity of the offense. (Appellee Br. at 21-25.) This Court unequivocally rejected that proposition in *Gibbons*. *Gibbons*, ¶¶ 49, 64.

Moreover, the State's brief fails to acknowledge authority from other states holding, similarly to *Gibbons*, that an ability to pay analysis is required under the proportionality requirement of either the

Eighth Amendment's Excessive Fines Clause or a combination of the Eighth Amendment and the individual state's excessive fines clause. *Gibbons*, ¶ 49 and n.1. *See City of Seattle v. Long*, 493 P.3d 94, 111-13 (Wash. 2019) (*en banc*) ("A number of modern state and federal courts have joined the chorus of legal scholars to conclude that the history of the clause and the reasoning of the Supreme Court strongly suggest that considering ability to pay is constitutionally required."); *Dep't of Labor & Emp't v. Dami Hosp., LLC*, 442 P.3d 94, 101 (Colo. 2019) (*en banc*); *People v. Cowan*, 47 Cal. App. 5th 32, 47 (2020); *Oregon v. Goodenow*, 282 P.3d 8, 17 (Or. App. 2012); *State v. Madden*, 910 N.W.2d 744, 749, 750 (Minn. Ct. App. 2018); *Pennsylvania v. 1997 Chevrolet*, 106 A.3d 836, 871 (Pa. Commw. Ct. 2014) (*en banc*), *aff'd*, 160 A.3d 153 (Pa. 2017). For all of these courts, the "ability to pay" a fine is required under either the Eighth Amendment alone, *see Goodenow*, 282 P.3d at 12 n.2 (finding state constitutional argument forfeited), or under a combination of the federal and state constitutional provisions, *see, e.g.*, *Long*, 493 P.3d at 107.

The State rehashes arguments already rejected by this Court. Notwithstanding the State's stroll through many decades of the

legislative history of DUI fines, the State has not established that *Gibbons* is manifestly wrong and should be overturned under the Excessive Fines Clause in either the Eighth Amendment to the United States Constitution or Article 2, Section 22 of the Montana Constitution. An offender's ability to pay a fine is constitutionally required before a criminal fine may be imposed.

4. A constitutional challenge to a criminal sentencing statute mandating a mandatory-minimum fine is not "more appropriately considered" an as-applied challenge rather than a facial challenge.

The State argues that ability to pay should be raised as an as-applied constitutional challenge, not in a facial challenge to the statute mandating the fine. The State is wrong. As the State itself explains, a facial challenge is one made to the constitutionality of the statute itself, while an as-applied challenge goes toward a valid statute's application to an individual litigant. (Appellee Br. at 26-27.) These are two different types of challenges. The appellant, here, Mr. Cole, gets to choose claims brought on appeal, not the appellee. The State cannot avoid an appellant's facial challenge by purporting to re-characterize it as an unpreserved as-applied challenge.

Notably, the State advanced a similar as-applied argument in *Gibbons*. There, the State claimed because the 2019 version of the statute allowed a sentencing judge to impose only a custodial sentence without any fine, § 61-8-731(3) was not facially unconstitutional and could only be litigated through an as-applied challenge. The Court addressed this argument and rejected it. *Gibbons*, ¶ 61 ("Far from remedying the constitutional deficiency, as the State argues, this application of the ability-to-pay inquiry runs afoul of the basic prohibition against incarcerating an offender solely for his poverty.") (citations omitted). Unsatisfied with the Court's rejection of its proposition, the State recycles the same argument to try to bolster its overarching theme, i.e., "the *Gibbons* Court" got it wrong when it "impermissibly conflated the two available constitutional challenges, rendering *Gibbons* manifestly wrong." (Appellee Br. at 28.)

The Court again should reject the State's contention. There is no basis for overruling *Gibbons*'s facial unconstitutionality holding. The Court did not conflate a bona fide facial challenge into an as-applied challenge.

IV. A DUI fine may not be imposed under Mont. Code Ann. § 46-18-213, and the District Court did not impose Mr. Cole's fine under Mont. Code Ann. § 46-18-231.

The State asserts that "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)" (Appellee Br. at 29.) This assertion misses the mark. To begin, "if *Gibbons* applies," as it clearly does, the mandatory-minimum fine in § 61-8-731(1)(a)(iii) is facially unconstitutional and cannot be applied. Abuse of discretion does not factor into this analysis. Indeed, the constitutional problem with a mandatory-minimum fine is that it removes discretion from the sentencing judge to impose a fine lower than the minimum floor. *Gibbons*, ¶ 52. A sentencing court cannot impose a fine pursuant to a statute that violates the United States and Montana Constitution's Excessive Fines Clauses.

Next, the State contends a $5,000 fine is authorized by Mont. Code Ann. § 46-18-213. It is not. The State incorrectly summarizes that statute by writing it applies "when an offender is convicted of a felony offense with no *financial* penalty stated[.]" (Appellee Br. at 29 (emphasis added).) In fact, the statute provides, in-full:

> The court, in imposing sentence upon an offender convicted of an offense which is

> designated a felony and *no penalty is otherwise provided*, may sentence the offender for any term not to exceed 10 years in the state prison or may fine the offender in an amount not to exceed $50,000 or may impose both such fine and imprisonment.

Mont. Code Ann. § 46-18-213 (emphasis added). By its plain language, this statute applies only to a felony offense where "no penalty is otherwise provided," not, as the State avers, to any felony offense where no *financial* penalty is provided. Mont. Code Ann. § 61-8-731 contains numerous, detailed penalties for felony DUI offenders. Only the mandatory-minimum fines have been declared facially unconstitutional; the remaining penalties remain intact. Therefore, § 46-18-213 cannot apply to Mr. Cole.

Finally, the State contends that even though § 46-18-231(3) is inapplicable to § 61-8-731(1)(a)(iii), despite earlier arguing the two statutes should be "harmonized," the District Court correctly used its discretion under § 46-18-231(3) to consider Mr. Cole's ability to pay the $5,000 fine and suspend a portion of it. (Appellee Br. at 31-32.) The State's argument is difficult to discern. The entire point of *Gibbons*'s holding is that mandatory-minimum fines are facially unconstitutional because they strip a sentencing court of discretion to impose a fine of

less than the mandated floor. *Gibbons*, ¶ 51. None of the State's befuddling assertions undermine this central tenet of *Gibbons*.

The record is clear Mr. Cole cannot afford a $5,000 fine. (Sent. Tr. at 8-10; [redacted] The District Court imposed a suspended fine because it *had* to impose the fine under § 61-8-731. Under these circumstances, it is unnecessary to remand for a recalculation of the fine under § 46-18-231. The Court should order it struck.

CONCLUSION

For the foregoing reasons and those set forth in his opening brief, Neil Cole requests the Court to reverse the District Court's decision to impose a $5,000 mandatory-minimum fine and remand with instructions to issue an amended judgment without the fine.

///

///

///

Respectfully submitted this 9th day of April 2025.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Deborah S. Smith
DEBORAH S. SMITH
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,906, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Deborah S. Smith
Deborah S. Smith

CERTIFICATE OF SERVICE

I, Deborah Susan Smith, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 04-09-2025:

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

Cori Danielle Losing (Govt Attorney)
215 North Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Electronically signed by Kim Harrison on behalf of Deborah Susan Smith
Dated: 04-09-2025