IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0013

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MICHAEL ROSS TROMBLEY,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana 20th Judicial District Court,
Lake County, the Honorable Kim Christopher, Presiding

APPEARANCES:

TAMMY A. HINDERMAN
Division Administrator
EMMA N. SAUVE
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
Emma.Sauve@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K PLUBELL
Bureau Chief
Appellate Services Bureau
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

JAMES LAPOTKA
Lake County Attorney
BENJAMIN ANCIAUX
Deputy County Attorney
106 4th Ave E
Polson, MT 59860

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 3

STANDARD OF REVIEW 5

SUMMARY OF THE ARGUMENT 5

ARGUMENT 7

I. Montana's bail jumping statute is unconstitutionally vague because the Legislature has not defined what constitutes a "lawful excuse." 7

A. The bail jumping statute is unconstitutionally vague on its face. 9

B. The bail jumping statute is vague as applied to Mr. Trombley. 19

II. The State did not have probable cause to charge Mr. Trombley with bail jumping because the State did not allege any facts about why Mr. Trombley missed court. 22

CONCLUSION 29

CERTIFICATE OF COMPLIANCE 30

TABLE OF AUTHORITIES

Cases

City of Chicago v. Morales,
527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) 7, 8, 15

Grayned v. City of Rockford,
408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) 7, 8, 15

Kolender v. Lawson,
461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) 8, 15, 16

Ramsey v. Yellowstone Cnty. Justice Court,
2024 MT 116, 416 Mont. 472, 549 P.3d 458 23

State v. Britton,
2001 MT 141, 306 Mont. 24, 30 P.3d 337 8

State v. Couture,
2010 MT 201, 357 Mont. 398, 240 P.3d 987 20

State v. Crisp,
249 Mont. 199, 814 P.2d 981 (1991) 10

State v. Dixon,
2000 MT 82, 299 Mont. 165, 998 P.2d 544 ..... 9, 18, 20

State v. Giffin,
2021 MT 190, 405 Mont. 78, 491 P.3d 1288 ..... 5, 22, 23

State v. Hilt,
99 Wash. 2d 452, 662 P.2d 52 (1983)..... 16, 17

State v. Martel,
273 Mont. 143, 902 P.2d 14 (1995) 11, 12

State v. Stanko,
1998 MT 321, 292 Mont. 192, 974 P.2d 1132 ..... 4, 7, 8, 9

State v. Thirteenth Judicial Dist. Court,
2009 MT 163, 350 Mont. 465, 208 P.3d 408 ..... 9, 18

State v. Vallie,
2022 MT 213, 410 Mont. 384, 519 P.3d 470 26

State v. White,
97 Wash. 2d 92, 640 P.2d 1061 (1982) 17

Statutes

Mont. Code Ann. § 45-2-211 ..... 24, 26
Mont. Code Ann. § 45-2-212 ..... 24, 25, 26
Mont. Code Ann. § 45-2-213 ..... 24, 25, 26
Mont. Code Ann. § 45-3-115 ..... 25, 26
Mont. Code Ann. § 45-7-308 ..... 1, 23
Mont. Code Ann. § 45-7-308(1) 10
Mont. Code Ann. § 46-11-201(1) 22
Mont. Code Ann. § 46-11-201(2) 22
Mont. Code Ann. § 46-16-204 26
Mont. Code Ann. § 46-15-323(2) 26

Constitutional Authorities

Montana Constitution

Art. II, § 17 7
Art. II, § 25 19

United States Constitution

Amend. V 7, 19
Amend. XIV, § 1 7

Other Authorities

2 Model Penal Code and Commentaries (Official Draft and Revised Comments) § 248.8 (Am. Law Inst. 1980) 13
Criminal Law Comission, Comment on § 45-7-308 13

Excuse, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/lawful (last visited Apr. 10, 2025).. 11
Lawful, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/lawful (last visited Apr. 10, 2025).. 11
Model Penal Code § 242.8 ..... passim

STATEMENT OF THE ISSUES

Issue One: Due process requires criminal statutes to be clear so that ordinary people can understand what is prohibited, and so that arbitrary and discriminatory enforcement is not encouraged. Here, the bail jumping statute criminalizes missing a required court date "without lawful excuse." However, "lawful excuse" is nowhere defined by the Legislature. Is the bail jumping statute unconstitutionally vague, both facially and as applied to Mr. Trombley?

Issue Two: To establish probable cause to charge a person with a criminal offense, the State must allege sufficient facts to inform the defendant of the allegations against him and allow him to prepare a defense. Here, the State did not allege any facts regarding Mr. Trombley's lack of a "lawful excuse," which is an essential element of bail jumping. Did the State establish sufficient facts in the Information to charge Mr. Trombley with bail jumping?

STATEMENT OF THE CASE

On February 21, 2023, the State charged Mr. Trombley with bail jumping in violation of Mont. Code Ann. § 45-7-308. (Information (District Court Document (Doc.) 3), attached as Appendix B). Mr.

Trombley filed a motion to dismiss on the basis that the State did not allege sufficient facts to support a charge of bail jumping and that the bail jumping statute is unconstitutionally vague on its face and as applied to Mr. Trombley. (Motion to Dismiss (Doc. 10), attached as Appendix C). The district court denied the motion. (September 11, 2023, Amended Minute Entry (Doc. 24)).

Mr. Trombley pled guilty as part of a global plea agreement on September 21, 2023. (September 21, 2023, Change of Plea Hearing Transcript (Plea Tr.) at 12). He reserved the right to appeal the denial of his motion to dismiss. (Acknowledgement of Rights and Plea Agreement (Doc. 26) at 12).

The district court sentenced Mr. Trombley to two years at the Montana State Prison, with 189 days of credit for time served. (Judgment (Doc. 29) at 3, attached as Appendix A). The sentence was consecutive to the other convictions Mr. Trombley would serve pursuant to the global plea agreement. (Doc. 29). In total, he was sentenced to twenty-two years at the Montana State Prison and thirteen months in the Department of Corrections. (Doc. 29). Mr. Trombley timely appealed. (Notice of Appeal (Doc. 33)).

STATEMENT OF THE FACTS

Mr. Trombley was charged with bail jumping after he missed a court date. (Doc. 3). In a felony revocation, Mr. Trombley had been released on the condition that he appear for a hearing on February 16, 2023, at 9:00 a.m. at the Lake County District Court. (Motion and Affidavit for Leave to File an Information (Doc. 1) at 2). In the motion and affidavit for leave to file an information, the State alleged that Mr. Trombley "purposely failed to appear… as ordered." (Doc. 1 at 2). The State alleged further that he had not "given any lawful excuse for his failure to appear." (Doc. 1 at 2). This is the entirety of the facts alleged by the State regarding the bail jumping charge. (Doc. 1 at 1-3).

Mr. Trombley filed a motion to dismiss, arguing that the information did not allege sufficient facts to support probable cause to charge him with bail jumping and that the bail jumping statute is unconstitutionally vague on its face and as applied to him. (Doc. 10). The State filed a reply, arguing that the phrase "without lawful excuse" created an affirmative defense, and so the State did not need to allege any facts as to Mr. Trombley's lack of lawful excuse. (State's Response to Defendant's Motion to Dismiss (Doc. 12) at 1-2).

On the issue of vagueness, the State argued that Mr. Trombley did not have standing to challenge the bail jumping statute as facially vague because his conduct clearly fell within the scope of the bail jumping statute. (Doc. 12 at 4). The State argued that the bail jumping statute was not unconstitutionally vague as applied to Mr. Trombley because the statute clearly criminalizes failing to appear, and Mr. Trombley had "provided no excuse much less a lawful one." (Doc. 12 at 4).

The district court held a hearing, at which the parties addressed the issues of probable cause and vagueness. (September 11, 2023, Continuation of Hearing Transcript (Motion Tr.) at 1-34). The district court denied Mr. Trombley's motion to dismiss. (Doc 24).[1]

[1] The district court did not orally rule on the motion to dismiss for vagueness. (*See* Motion Tr. at 1-34). The district court also did not issue a written order denying the motion or explaining its reasoning for doing so. The amended minute entry for the motion hearing said the court denied the motion despite an absence of a ruling in the transcript. (Doc. 24). The motion was clearly denied, albeit implicitly, given that it was a motion to dismiss, and the proceedings still continued forward.

STANDARD OF REVIEW

Whether a statute is constitutional is a question of law. This court reviews a district court's application of the constitution for correctness. *State v. Stanko*, 1998 MT 321, ¶ 14, 292 Mont. 192, 974 P.2d 1132.

This Court reviews *de novo* whether the facts alleged by the State in an information are sufficient to support a finding of probable case. *State v. Giffin*, 2021 MT 190, ¶ 11, 405 Mont. 78, 491 P.3d 1288.

SUMMARY OF THE ARGUMENT

Due process prohibits vague criminal statutes. To survive a vagueness challenge, a statute must be clear enough that a person of ordinary intelligence can determine what conduct is criminalized, and it must not encourage arbitrary enforcement. A statute is vague on its face if it fails to give a person of ordinary intelligence fair notice of what conduct is forbidden. A statute is vague as applied if, in the context of the defendant's conduct, it failed to give the defendant fair notice that his conduct was prohibited.

Here, the bail jumping statute makes it illegal to miss court "without lawful excuse." The phrase "without lawful excuse" is nowhere defined in the statute and does not have a plain meaning. It is

impossible for an ordinary person to understand what would constitute a "lawful excuse." This leaves it up to the discretion of the fact finder to determine what excuse would be considered "lawful," leading to arbitrary enforcement with no legislative guidance. Mr. Trombley could not give the reason he missed his court date without risking self-incrimination, because he had no way to know what the State, court, or jury would accept as a "lawful excuse." The bail jumping statute is unconstitutionally vague both on its face and as applied to Mr. Trombley.

When the State files an information and supporting affidavit, it must allege facts sufficient to support a finding that there is a probability that the defendant violated the statute. To do so, the State must allege at least some facts going to each element of the crime charged. For bail jumping, that means the State must allege facts that (1) the person was set at liberty by the court on the condition that they appear at a specified time and place; (2) the person purposely failed to appear at that time and place; and (3) the person did not have a lawful excuse. Here, the State alleged no facts to support its allegation that

Mr. Trombley lacked a lawful excuse. This was not sufficient to support a finding of probable cause for the charge of bail jumping.

ARGUMENT

I. Montana's bail jumping statute is unconstitutionally vague because the Legislature has not defined what constitutes a "lawful excuse."

Both the Montana and United States constitutions provide that "no person shall be deprived of life, liberty, or property without the due process of law." Mont. Const. art. II, § 17; *see also* U.S. Const. amend. V; U.S. Const. amend. XIV, § 1. It is "a basic principle of due process" that a statute is unconstitutionally vague if it does not clearly define the conduct being criminalized. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited…" *Grayned*, 408 U.S. at 108. A vague law "may trap the innocent by not providing fair warning." *Grayned*, 408 U.S. at 108. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *City of Chicago v.*

Morales, 527 U.S. 41, 58, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) (internal citations and quotations omitted).

A statute may be challenged as unconstitutionally vague in two ways: the statute can be challenged as so vague that it is unconstitutional on its face, or it can be challenged as vague as applied to the specific facts of the case. *Stanko*, ¶ 17. If a statute is challenged as unconstitutional, the party challenging the statute must prove it to be unconstitutional beyond a reasonable doubt, with any doubt resolved in favor of the statute. *Stanko*, ¶ 16. To survive a vagueness challenge, a statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); *State v. Britton*, 2001 MT 141, ¶ 6, 306 Mont. 24, 30 P.3d 337. The latter is viewed as the more important factor: the Legislature must "establish minimal guidelines to govern law enforcement." *Kolender* 461 U.S. at 358 (internal citations and quotations omitted).

> … [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who

> apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned, 408 U.S. at 108 (internal citations omitted).

These two reasons a law could be vague are independent of one another. *Morales*, 527 U.S. at 56. In other words, a law that fails only one or the other test is unconstitutionally vague—it need not fail both tests to be vague. So, to survive a vagueness challenge, a statute must clearly give notice to ordinary citizens of what conduct is criminalized *and* give enforcement guidelines to those who will apply the law. The bail jumping statute fails both of these requirements.

A. The bail jumping statute is unconstitutionally vague on its face.

"A statute is void on its face if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *Stanko,* ¶ 22 (internal citations and quotations omitted). The law must make clear what conduct is criminalized. However, "[t]he failure to include exhaustive definitions will not automatically render a statute vague on its face, so long as the meaning of the statute is clear and provides a defendant with adequate notice of what conduct is

proscribed." *State v. Dixon*, 2000 MT 82, ¶ 21, 299 Mont. 165, 998 P.2d 544. A challenger must prove the statute is vague in that "no standard of conduct is specified at all." *State v. Thirteenth Judicial Dist. Court*, 2009 MT 163, ¶ 25, 350 Mont. 465, 208 P.3d 408 (internal citations and quotations omitted). Still, "no person should be required to speculate as to whether his contemplated course of action may be subject to criminal penalties." *Stanko*, ¶ 22.

The bail jumping statute is unconstitutionally vague on its face because it fails to define "lawful excuse," leaving it up to citizens to guess what the phrase may mean and giving discretion to the State, courts, and juries to determine what excuse is "lawful." The bail jumping statute provides, "A person commits the offense of bail-jumping if, having been set at liberty by court order, with or without security, upon condition that the person will subsequently appear at a specified time and place, the person purposely fails without lawful excuse to appear at that time and place." § 45-7-308(1). The Legislature never defines lawful excuse.

When a challenged word or phrase is not defined by the Legislature, the Court may look to the ordinary meaning of the words,

with reference to their dictionary definitions. *See*, *e.g.*, *State v. Crisp*, 249 Mont. 199, 204, 814 P.2d 981 (1991). Typically, words will be given their ordinary meaning if they are not otherwise defined in statute. However, the phrase "lawful excuse" appears to be a term of art. There is no ordinary meaning for "lawful excuse" as it is not a common phrase.

The words can be defined separately. "Lawful" means "being in harmony with the law" or "constituted, authorized, or established by law." *Lawful*, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/lawful (last visited Apr. 10, 2025). "Excuse" means "something offered as justification or as grounds for being excused," "an expression of regret for failure to do something," or "a note of explanation of an absence." *Excuse*, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/excuse (last visited Apr. 10, 2025). These ordinary definitions do not shed any light on what a "lawful excuse" to miss court would be. A "note of explanation of an absence that is authorized by the law" is still an unconstitutionally vague standard, given that the law does not specify which explanations are lawful and which ones are not. Together, it is unclear what the words mean; giving

the words their ordinary meaning does nothing to prevent the risks associated with vagueness.

In other cases, the ordinary meaning of the words in the statute can be used to survive a vagueness challenge. *See*, *e.g.*, *State v. Martel*, 273 Mont. 143, 150, 902 P.2d 14 (1995). In *Martel*, the defendant challenged the stalking statute as unconstitutionally vague because it failed to define "repeatedly," "harassing," "intimidating," "reasonable apprehension," or "substantial emotional distress." *Martel* at 150. This Court held that the words challenged were of "common usage" and so "[a] person of average intelligence would recognize and understand these terms without recourse to legislative definitions." *Martel* at 150.

Here, unlike in *Martel*, the phrase "lawful excuse" is not commonly used and does not have an ordinary definition in our society. Additionally, the term "lawful excuse" is circular. Lawful means "established by law," but in the bail jumping statute, the law does not establish what a lawful excuse is. If the law does not tell us what conduct is prohibited, there is no way to know what is "lawful" (i.e., established by law). Terms of art do not necessarily need explicit

definitions, but when the term of art hinges on the word "lawful," that is different—it necessarily requires a definition established in the law.

The origin of the phrase "without lawful excuse" also does not clarify its meaning. The Legislature modeled Montana's bail jumping offense after Model Penal Code (MPC) § 242.8 (1962), which states in relevant part, "A person set at liberty by court order, with or without bail, upon the condition that he will subsequently appear at a specified time and place, commits [bail jumping] if, without lawful excuse, he fails to appear at that time and place." MPC § 242.8; Crim. Law Comm'n Comments, § 45-7-308. Both § 45-7-308 and MPC § 242.8 require the defendant to fail to appear "without lawful excuse."

The section of the MPC that our bail jumping statute is modeled after was made intentionally vague. The comments to the Model Penal Code state,

> Section 242.8 also conditions liability on the absence of "lawful excuse" for failure to appear. The statute does not define the phrase, *leaving it to the courts to determine the validity of an excuse*. Obviously, this provision would exempt from liability persons prevented from appearance by accident, illness, and the like. However, *the full range of excuses that might be judged valid in one or another circumstance is impossible to identify in advance*.

2 Model Penal Code and Commentaries (Official Draft and Revised Comments) § 242.8, p. 284 (Am. Law Inst. 1980) (emphasis added). The original drafters of the statute admitted that it purposefully gave courts discretion to decide what a lawful excuse is and that it is "impossible" for a person to "identify in advance" what excuse might be considered lawful. These are exactly the two issues at the core of a vagueness challenge.

A person of ordinary intelligence would have no way of knowing in advance whether his excuse for missing court would be considered lawful. This is a clear violation of Montanans' due process right to fair notice of what conduct is considered criminal. A person like Mr. Trombley, charged with the offense of bail-jumping, faces an impossible decision: exercise his right to remain silent and withhold an excuse for his absence that may be lawful or give a statement regarding the reason he missed court and risk incriminating himself. Because a person has no way of knowing what a lawful excuse is, they cannot give a reason for missing court without risking self-incrimination.

Suppose a defendant missed court and believed he had a legitimate excuse. The defendant would have no way of knowing *in*

advance of explaining his absence whether his proffered excuse would be considered lawful. If he proffered that excuse, but the factfinder did not consider the excuse "lawful," then the defendant would have irreparably incriminated himself, and he would be convicted of bail jumping based on his own unwitting, incriminating statement.

So, it is clearly "impossible" for a person of ordinary intelligence to "identify in advance" whether their contemplated conduct is prohibited. MPC § 242.8. The bail jumping statute is therefore vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Morales*, 527 U.S. at 60 (internal citations and quotations omitted).

The vague nature of "lawful excuse" also allows law enforcement, prosecutors, judges, and juries to enforce the bail jumping statute arbitrarily, "on an ad hoc and subjective basis." *Grayned*, 408 U.S. at 108. The statute "[leaves] it to the courts to determine the validity of an excuse." MPC § 242.8. In *Kolender*, the United States Supreme Court held that a loitering statute was unconstitutionally vague on its face. *Kolender*, 461 U.S. at 361. The statute required people who were

loitering or wandering the streets to provide "credible and reliable" identification and to account for their presence when requested by law enforcement. *Kolender*, 461 U.S. at 353. The statute did not define what constituted "credible and reliable" identification. *Kolender*, 461 U.S. at 358. The Court held that the statute was unconstitutionally vague, focusing on the fact that the "statute vest[ed] virtually complete discretion in the hands of the police to determine whether the suspect ha[d] satisfied the statute…" *Kolender*, 461 U.S. at 358. Ultimately, the statute was "unconstitutionally vague on its face because it encourage[d] arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." *Kolender*, 461 U.S. at 361.

Similarly, Montana's bail jumping statute is unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to define "without lawful excuse." Because a "lawful excuse" is never defined, it is entirely within the State's discretion to decide whether they see an excuse as "lawful" when charging a defendant with bail jumping. Then, it is up to the whim of the fact finder, with no guidance or instruction, to determine whether the excuse is "lawful."

The Washington Supreme Court agrees. That court held that Washington's former bail jumping statute—which was very similar to Montana's—was unconstitutionally vague on its face. *State v. Hilt*, 99 Wash. 2d 452, 455, 662 P.2d 52 (1983). That statute stated in relevant part, "Any person having been released by court order or admitted to bail with the requirement of a subsequent personal appearance before any court of this state, and who knowingly fails without lawful excuse to appear as required is guilty of bail jumping." *Hilt* at 453 (internal citations and quotations omitted). The Court held that the bail jumping statute was unconstitutionally vague because the phrase "lawful excuse" was "nowhere defined and predicting its potential application would be a guess, at best." *Hilt* at 455. The Court found that the bail jumping statute was "deficient in terms of providing guidelines to the meaning of lawful excuse." *Hilt* at 455. The Court relied on a previous case where it held that the "lawful excuse" language was unconstitutionally vague in a different statute, reasoning that "[t]he possible applications and interpretations [of the statute] are nearly endless" and the term "lawful excuse" makes is so a person "must

necessarily guess" whether their excuse will be considered lawful. *State v. White*, 97 Wash. 2d 92, 99, 100, 640 P.2d 1061 (1982).

The phrase "lawful excuse" means only what the fact finder in any given bail jumping case decides it means. There is no way for a person to determine in advance what constitutes a "lawful excuse" for missing court. As Mr. Trombley's counsel put it, "Would getting sick count? Is a cold different from the flu, or COVD-19, or a heart attack? What about a vehicle malfunction? Does traffic congestion count? An accident? Does a hospitalization? What about a medical appointment? A sick child? An employer who requires one's presence at work?" (Doc. 10 at 7).

The vagueness of the phrase "without lawful excuse" allows for arbitrary application by law enforcement, prosecutors, judges, and juries. It is possible that one jury would find COVID-19 to be a serious illness and a "lawful" reason to miss court, while another jury could believe COVID-19 to be overblown and therefore not a lawful excuse. What is considered illegal conduct could therefore differ from county to county, jury to jury, and day to day. The statute "leav[es] it to the courts to determine the validity of an excuse." MPC § 242.8. Because of this—and because it is "impossible to identify in advance" what might be

considered a lawful excuse—the bail jumping statute is unconstitutionally vague on its face. MPC § 242.8.

B. The bail jumping statute is vague as applied to Mr. Trombley.

When a statute is challenged as vague as applied, this Court will look at whether the statute provided the defendant with actual notice that his conduct was prohibited and whether the statute provides law enforcement with minimal guidelines. *State v. Thirteenth Judicial Dist. Court*, ¶ 32. The statute will be examined in the context of the defendant's conduct to determine whether the defendant could have reasonably understood that his conduct was prohibited. *Dixon*, ¶ 28.

Mr. Tromley had no way of knowing if his conduct was prohibited, because he had no way of knowing what would constitute a "lawful excuse." The State alleged only that Mr. Trombley missed court. There are no alleged facts about *why* Mr. Trombley missed court; in other words, there are no facts going to the element of "without lawful excuse." Mr. Trombley had no way of reasonably understanding what excuse would be considered "lawful." The fact Mr. Trombley did not proffer an excuse does not necessarily prove he did not have one; it just

as easily proves he had one, did not know if it would be considered "lawful," and did not want to risk self-incrimination.

The Montana and United States constitutions protect people from forced self-incrimination. Mont. Const. art. II, § 25; U.S. Const. Amend. V. Mr. Trombley could not give an explanation for missing his court date because he had no way of knowing if a statement about his "excuse" would exonerate him or incriminate him. The vagueness of the statute itself forces defendants not to give a statement about their "excuse" because they have no way of knowing if the court will accept it. Defendants like Mr. Trombley are forced to choose: invoke their fifth amendment right to stay silent and risk withholding an excuse that would lead to dismissal or exoneration, or waive their right to remain silent, give a statement about why they missed their court date, and risk incriminating themselves if the fact finder decides on a whim that excuse is not "lawful." This forces a person charged with bail jumping to decide between exercising their fifth amendment privilege against self-incrimination or exercising their due process right to be convicted only upon proof beyond a reasonable doubt of every element of the offense. A defendant should not be forced to choose between constitutional rights.

See, *e.g.*, *State v. Couture*, 2010 MT 201, ¶ 88, 357 Mont. 398, 240 P.3d 987.

The bail jumping statute also failed to provide law enforcement and the fact finder with minimal guidelines. In an as applied challenge, this Court reviews whether the law provided sufficient guidelines to prevent arbitrary and discriminatory enforcement in regards to the defendant's conduct. *Dixon*, ¶ 31. Here, the State and the district court had no guidelines about what excuse would be "lawful."

Again, consider the comments to the Model Penal Code, which created the "without lawful excuse" language. MPC § 242.8. The statute intentionally leaves "to the court to determine the validity of an excuse." MPC § 242.8. Additionally, the drafters acknowledged that "the full range of excuses that might be judged valid in one or another circumstance is impossible to identify in advance." MPC § 242.8. The comment admits that the statute was intentionally drafted to allow arbitrary enforcement. Each fact finder gets to "determine the validity of an excuse" themselves. The "excuse" that would be considered lawful could vary from one court to another. An officer, a prosecutor, a judge, and a jury might all have different ideas on what constitutes a lawful

excuse. Those ideas about what constitutes a lawful excuse might also vary from officer to officer, courtroom to courtroom, jury to jury, and county attorney's office to county attorney's office. Determining whether a defendant has a "lawful excuse" is therefore left up to the arbitrary and unguided discretion of law enforcement and fact finders.

Not only did Mr. Trombley have no way of ascertaining what excuse might be considered lawful, he had no way of ascertaining what excuse might be considered lawful *to that court*. He could not make a statement to the police, the State, or the court regarding his reason for missing his hearing without the possibility of incriminating himself. The bail jumping statute is, therefore, vague as applied to Mr. Trombley.

II. The State did not have probable cause to charge Mr. Trombley with bail jumping because the State did not allege any facts about why Mr. Trombley missed court.

A criminal charge must be supported by probable cause. To initiate a criminal case, the State "may apply directly to the district court for permission to file an information against a named defendant." Mont. Code Ann. § 46-11-201(1). To do so, "[a]n application must be by affidavit supported by evidence that the judge… may require. If it

appears that there is probable cause to believe that an offense has been committed by the defendant, the judge… shall grant leave to file the information, otherwise the application is denied." § 46-11-201(2).

The State must allege facts sufficient to support a finding of probable cause. "The supporting affidavit [of a motion for leave to file criminal charges] does not have to make out a prima facie case that the defendant committed an offense; rather, a probability that the defendant committed the offense is sufficient." *Giffin*, ¶ 15. So, "…while the evidence needed to establish probable cause need not be as complete as the evidence necessary to establish guilt… there still must be sufficient evidence to establish the probability that a defendant committed the crime for which they are being accused*."Ramsey v. Yellowstone Cnty. Justice Court*, 2024 MT 116, ¶ 16, 416 Mont. 472, 549 P.3d 458 (internal citations omitted).

The Information must "reasonably apprise the accused of the charges against him to enable him an opportunity to prepare a defense." *Giffin*, ¶ 15. To establish probable cause to charge a person with a crime, the State must allege facts for each element of the crime. "When parties raise the issue of the sufficiency of the evidence to establish

probable cause, the issue is whether the alleged facts satisfy the statutory elements of the crime charged…" *Giffin*, ¶ 11.

The bail jumping statute can be broken into the following elements: (1) the person was set at liberty by the court on the condition that they appear at a specified time and place; (2) the person purposely failed to appear at that time and place; and (3) the person did not have a lawful excuse. § 45-7-308. For a person to be charged with bail jumping, the State is required to allege facts for each of these elements. *See Giffin*, ¶ 11. "Without lawful excuse" is an element of bail jumping. The State was required to allege facts going to whether Mr. Trombley's reason for missing court was a "lawful excuse." The State did not allege any facts about *why* Mr. Trombley missed court and so failed to allege facts showing he committed the "without lawful excuse" element of bail jumping.

In the district court, the State conceded that it did not allege facts regarding the element of "without lawful excuse." (Doc. 12 at 2). Instead of arguing that they had provided sufficient facts to establish probable cause, the State claimed that a "lawful excuse" is an affirmative defense to the offense of bail jumping. (Doc. 12 at 2). The State argued that facts

regarding the "lawful excuse" or lack thereof "should not be required to make a probable cause determination." (Doc. 12 at 2). However, "without lawful excuse" is an element of the crime of bail jumping, not an affirmative defense.

When the Legislature creates an affirmative defense, it does so explicitly and outside the statutory elements of the offense. A few examples of affirmative defenses are consent, compulsion, and entrapment. Mont. Code Ann. §§ 45-2-211; 45-2-212; 45-2-213. These statutes explicitly create defenses. Section 45-2-211 states, "The consent of the victim to conduct charged to constitute an offense or to the result thereof *is a defense*." (Emphasis added). Section 45-2-212 states, "*A person is not guilty of an offense*, other than an offense punishable with death, by reason of conduct that the person performs under the compulsion of threat or menace of the imminent infliction of death or serious bodily harm if the person reasonably believes that death or serious bodily harm will be inflicted upon the person if the person does not perform the conduct." (Emphasis added). Section 45-2-213 states, "*A person is not guilty of an offense* if the person's conduct is incited or induced by a public servant or a public servant's agent for the purpose

of obtaining evidence for the prosecution of the person." (Emphasis added). Likewise, the Legislature clearly defined justifiable use of force as a defense: "A defense of justifiable use of force based on the provisions of this part *is an affirmative defense*." Mont. Code Ann. § 45-3-115 (emphasis added).

Unlike these affirmative defenses, the Legislature did not define a "lawful excuse" as an affirmative defense. Instead, it decided to make "without lawful excuse" an element of the crime. This is clear because the Legislature did not use the language or structure in the bail jumping statute that it uses when creating an affirmative defense. The Legislature did not say, for example, "it is a defense to bail jumping to have a lawful excuse for missing court," or "a person is not guilty of the offense of bail jumping if they had a lawful excuse." Similarly, the Legislature did not separate "without lawful excuse" into its own statute or subsection. The Legislature clearly knows how to create an affirmative defense. If the Legislature had wanted to make "without lawful excuse" an affirmative defense, it would have used the language it used to create other affirmative defenses. *See*, *e.g.*, §§ 45-2-211; 45-2-212; 45-2-213, 45-3-115. Instead, the Legislature made "without

lawful excuse" an element of bail jumping.

The State is required to prove every element of a crime beyond a reasonable doubt. Mont. Code Ann. § 46-16-204. If there is an affirmative defense, the defendant bears an initial burden regarding the affirmative defense and must provide the State notice of the affirmative defense. *See*, *e.g.*, *State v. Vallie*, 2022 MT 213, ¶ 14, 410 Mont. 384, 519 P.3d 470 ("The burden of establishing entrapment as an affirmative defense rests with the defendant…"); Mont. Code Ann. § 46-15-323(2). So, the distinction between an element and an affirmative defense is important in determining probable cause for a charge. If "without lawful excuse" was an affirmative defense, the State would not be required to allege any facts about it to establish probable cause for the charge. However, because "without lawful excuse" is an element, the State was required to allege facts supporting a finding that Mr. Trombley probably did not have a lawful excuse.

The State did not allege any facts to support a finding that Mr. Trombley probably did not have a lawful excuse. In the affidavit in support of leave to file the information, the State alleged that Mr. Trombley had been released on the condition that he appear for a

hearing on February 16, 2023, at 9:00 a.m. at the Lake County District Court and that he "purposely failed to appear… as ordered." (Doc. 1 at 2). The State alleged that Mr. Trombley had not "*given* any lawful excuse for his failure to appear." (Doc. 1 at 2 (emphases added)). This is the entirety of the facts alleged by the State regarding the bail jumping charge. (Doc. 1 at 1-3). The State did not allege where it believed Mr. Trombley may have been when he missed court or why he may have missed court. In fact, the State conceded that it did not allege sufficient facts to establish this. Instead of arguing the Information was sufficient as to the element of "without lawful excuse," the State argued that it was an affirmative defense to have a lawful excuse, and so the State did not need to allege *any* facts regarding Mr. Trombley's reason for missing court. (Doc. 12 at 2).

The State was required to allege some facts to indicate Mr. Trombley did not have a lawful excuse to miss court. It did not do so. It was not enough for the State to simply say that Mr. Trombley had not affirmatively given a lawful excuse for his failure to appear. This was an element of the offense that the State had to show, not an affirmative

defense. Mr. Trombley was not required to show he did have a lawful excuse; the State was required to show he did *not* have one.

CONCLUSION

This Court should vacate Mr. Trombley's conviction for bail jumping, as the bail jumping statute is unconstitutionally vague on its face and as applied to Mr. Trombley.

Alternatively, this Court should vacate Mr. Trombley's conviction for bail jumping because the State failed to allege sufficient facts in the Information to support a finding of probable cause for the charge.

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/ Emma N. Sauve
EMMA N. SAUVE
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 5,908, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Emma N. Sauve
EMMA N. SAUVE

APPENDIX

Judgment.....App. A

Information.....App. B

Motion to Dismiss.....App. C

CERTIFICATE OF SERVICE

I, Emma Nelson Sauve, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 04-10-2025:

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

James Allen Lapotka (Govt Attorney)
106 4th Ave E
Polson MT 59860
Representing: State of Montana
Service Method: eService

Tammy Ann Hinderman (Attorney)
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena MT 59620
Representing: Michael Ross Trombley
Service Method: eService

Electronically signed by Zoe McBride on behalf of Emma Nelson Sauve
Dated: 04-10-2025