IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0543

STATE OF MONTANA,

Plaintiff and Appellee,

v.

AVA HICKMAN,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Second Judicial District Court,
Butte-Silver Bow County, the Honorable Robert J. Whelan, Presiding

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ISSUES PRESENTED

1. Whether the district court erred when it denied Ava's motion to suppress the contraband seized from her purse during a jailhouse inventory search and dismiss the drug and paraphernalia possession charges in this case where the State failed to prove the arresting officer knew Ava's driver's license was suspended at the time of her warrantless arrest or that he arrested her on that charge.

2. Whether the district court erred when it granted the State's motion to allow a forensic scientist employed by the Montana State Crime Laboratory to testify via Zoom that the substance seized from Ava's purse contained methamphetamine, where the State failed to show and the court failed to find the witness was unavailable to testify at trial despite the prosecution's reasonable good-faith efforts to obtain her presence, or that denying Ava's right to confront this witness face-to-face was necessary to further an important public policy other than judicial economy or convenience.

3. Whether the district court erred when it responded to the jury's mid-deliberations inquiries by providing prejudicial facts not

otherwise in evidence without notifying and consulting with Ava or her counsel first.

4. Whether Ava's judgment must be amended by: reducing the illegal three-year sentence imposed on her misdemeanor paraphernalia possession conviction; adding language indicating that sentence merged with her felony sentence; and striking the provisions that were not orally imposed by the district court and which resulted in increased punishment.

STATEMENT OF THE CASE

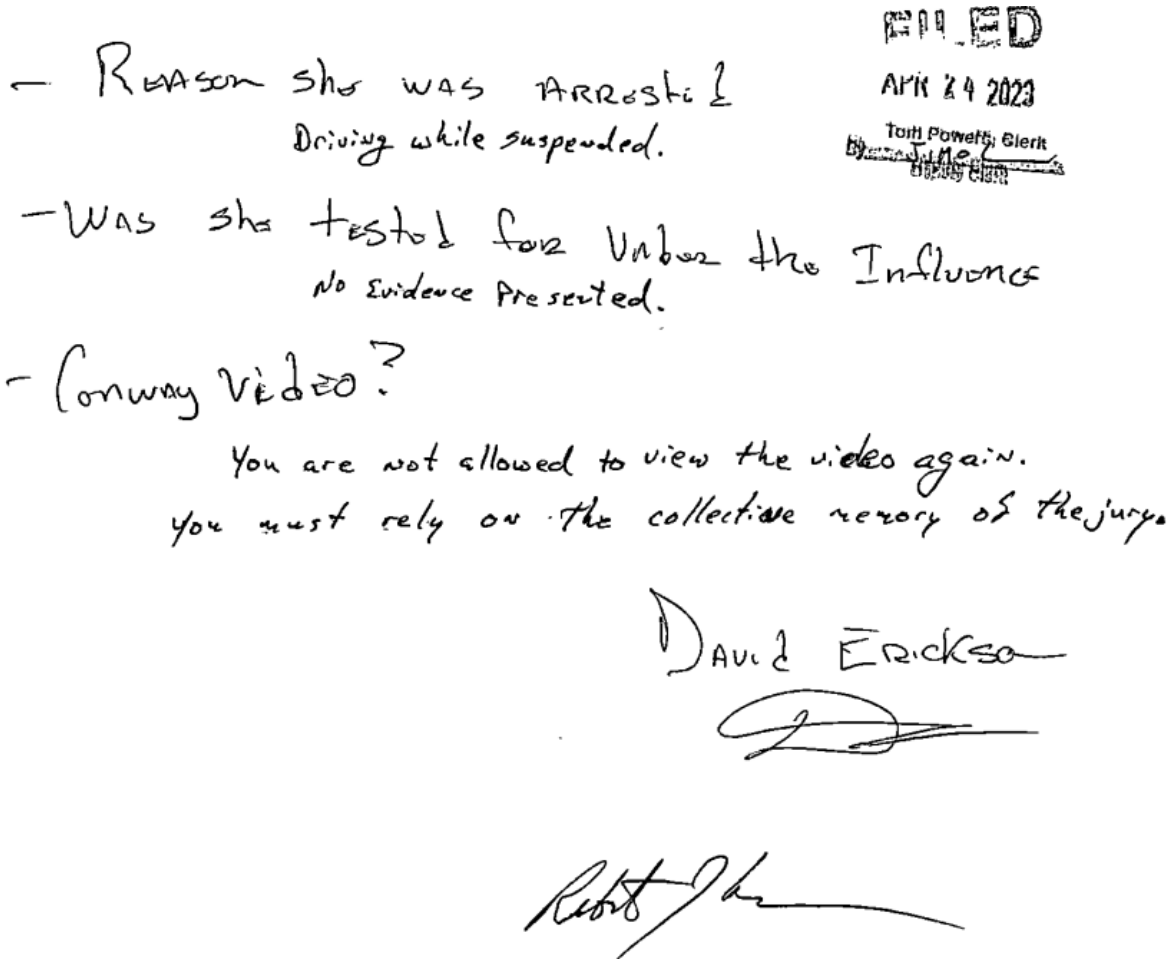
Ava challenges her convictions and sentences for possession of methamphetamine and possession of drug paraphernalia imposed after a one-day jury trial. Judgment, Doc. 115, attached as Appendix A.

Ava filed a motion to suppress the alleged contraband seized from her purse during a jailhouse inventory search and to dismiss the charges, arguing the alleged contraband was fruit of the poisonous tree of her unlawful arrest. Doc. 54. The court held an evidentiary hearing and orally denied Ava's motion. Transcript of Hearing on Motion to Suppress and Dismiss (Hr'g Tr.), Oral Ruling, Hr'g Tr. at 30-31,

attached as Appendix B. The court later issued a written order. Order Denying Motion to Dismiss, Doc. 77, attached as Appendix C.

Three business days before trial, the State identified Bahne Klietz, a forensic scientist employed by the Montana State Crime Laboratory (Crime Lab) in Missoula, as an expert witness for the State. Doc. 83 at 1-2. The State simultaneously filed a Motion for Witness Testimony by Video-Conference "due to the availability [*sic*.] of" Klietz. Doc. 84. The court granted the motion without allowing Ava to respond, finding the State showed "good cause" to do so. Order, Doc. 87, attached as Appendix D. Ava filed a written objection arguing the State failed to make any showing that deprivation of her confrontation rights was necessary to further an important public policy other than judicial economy or convenience. Doc. 90. Before voir dire, the court orally overruled the objection. Oral Ruling, Transcript of Jury Trial (Trial Tr.), at 8-9, attached as Appendix E. Klietz testified via Zoom, and her testimony and related report were the only evidence proving the substance seized from Ava's purse contained methamphetamine. Trial Tr. at 125, 129; State's Ex. 7, offered and admitted, Trial Tr. at 130.

During deliberations, the jury sent a note to the court, and the court provided written responses on it:



Doc. 96. Nothing in the record indicates the court notified Ava or defense counsel that the jury made these inquiries or consulted with them before responding. *See generally* Trial Tr.; Minutes, Doc. 92; Register of Actions. No evidence regarding the reason for Ava's arrest was presented at trial. *See generally* Trial Tr.

At sentencing, the State acknowledged Ava had served 311 days in custody pretrial and indicated they were not seeking additional incarceration. Transcript of Sentencing (Sent. Tr.) at 5. Consistent with the parties' recommendations, the court sentenced Ava to the custody of the Department of Corrections (DOC) "for a period of three years with all but 311 days suspended," and granted her credit for 311 days without discussing her two convictions separately. Oral Imposition of Sentence, Sent. Tr. at 9-10, attached as Appendix F. The judgment imposes the same sentence "with respect to" both counts, but is silent regarding how they run with respect to each other. Appendix A at 2.

The court orally imposed $80 in surcharges. Appendix F at 9. But the judgment ordered Ava to pay $145 in "statutory surcharges." Appendix A at 2.

The court orally imposed "any and all conditions that are in the presentence investigation." Appendix F at 9. However, the judgment ordered Ava's suspended sentence "subject to all terms and conditions as deemed appropriate" by her probation officer and specifically mandated she submit to random drug testing and attend chemical dependency counseling even though those conditions were not contained

in the presentence investigation report (PSI). Appendix A at 2; Doc. 114 at 6-8.

Ava timely appealed.

STATEMENT OF FACTS

On the afternoon of May 24, 2018, Ava, then age 58, and a friend, Austin Campbell, were together at a home in Butte and decided to borrow a car belonging to one of Austin's relatives to do a cigarette run. Trial Tr. at 91, 139. When Ava noticed a police car behind her, she returned to the house because she knew her driver's license was suspended and she was not supposed to be driving. *Id*. at 140. In addition, Ava "figured there was no insurance on" the car. *Id*. After she parked, she hurried inside, leaving her purse behind. *Id*. at 140-41. Ava would not see or touch her purse again for at least the next half hour. *Id*. at 141.

Butte-Silver Bow patrol officer Cole Conway started following a red car after something about it "caught [his] eye." Trial Tr. at 88, 106. He watched as the car parked in the driveway of a residence and the female driver got out of the car and ran into the house, leaving a male

passenger behind. Conway kept driving. *Id.* at 88-89, 105-07. In court, Conway identified Ava as the driver. *Id.* at 90-91.

Soon after, dispatch informed Conway the license plate on the car belonged on a green car, not a red one. Trial Tr. at 89, 107. Conway turned around and returned to the home, where he saw a man whom he later identified as Austin removing a purse and what appeared to be garbage from the car. *Id.* at 90, 108. When Conway approached, Austin placed the items on the ground outside the chain link fence surrounding the home's yard. *Id.* at 90, 108-09; *see also* Office Conway's Body Camera Footage, State's Ex. 6, offered, admitted and published in part[1] to the jury over objection, Trial Tr. at 10-11 (objection), 94 (offered and admitted), at 0:50-1:00 (showing fence and location of purse).

Conway began investigating the potentially fictitious license plates. Trial Tr. at 91. He was trying to determine the identity of the driver and the "status" of the car, *i.e.*, who owned it and whether it was

[1] The State also admitted into evidence Detective Sullivan's Body Camera Footage over defense objection. *See* State's Ex. 5; Trial Tr. at 94, 117. The State apparently did not play either video in full. The prosecutor stated he intended to play only two or three minutes of the videos from "her arrest, and then from her arrest to when she goes into the booking in the jail." Trial Tr. at 12-13. The record does not reveal precisely which portions were viewed by the jury.

stolen. *Id.* at 90-91. At least four other officers arrived on scene. State's Ex. 6 at 0:55-1:05. Conway told the jury, "we were able to identify the driver as the defendant," confirmed the car was not stolen, learned it belonged to Austin's relative, and removed the fictitious plates from the car. *Id.* at 91. Throughout this time, Ava remained inside the house.

Ava came out of the house "eventually" and began to argue with the officers. Trial Tr. at 91-92. Conway testified Ava was informed she was being placed under arrest. *Id.* at 92. Ava was asked, and then ordered to come out from behind the fence. State's Ex. 6 at 0:12-0:40; *see also* Trial Tr. at 92. When she refused, Conway turned and started walking towards the gate so that he could enter the yard and arrest Ava. *Id.* at 92-93. As he was doing so, Ava reached over the fence, grabbed the purse sitting on the ground outside of the fence, and "appeared like she was going to run from us," *id.* at 92-93, by which, Conway later explained, he meant she merely "turned and began to walk away." *Id.* at 109. Ava was immediately taken into custody by officers already inside the fenced yard, and the purse was seized. *Id.* at 95; State's Ex. 6 at 0:55-1:15.

Neither of the testifying officers stated why Ava was placed under arrest. *See id.* at 92-95 (Conway's testimony); *id.* at 115-16 (Officer Dan Sullivan's testimony). Conway's body camera footage of Ava's arrest does not show Ava was informed she was under arrest before she picked up the purse and turned to walk away, although one of the officers present told her she was "obstructing" and to come outside "so we don't have to lift you across the fence." *See generally* State's Ex. 6 at 0:00-0:55; *id.* at 0:15-0:30 (obstructing and fence comments).

Ava and the purse were transported to the detention center. Trial Tr. at 96. While there, Conway retrieved Ava's identification card out of the purse and then turned the purse over to detention staff to search. *Id.* at 96. A detention officer seized several empty syringes and one syringe containing a clear liquid substance and turned them over to Conway. Trial Tr. at 99-101, 123; State's Exs. 1-3, offered and admitted into evidence at Trial Tr. at 98, 100, 102. Conway suspected the liquid substance contained methamphetamine, so he collected it, and it was sent to the Crime Lab for analysis. Trial Tr. at 103-04.

Klietz testified by Zoom that the chemical analysis she performed on a small vial of clear liquid that she understood was associated with

this case showed the substance contained methamphetamine and authenticated her report indicating as much. Trial Tr. at 127-29. *See also* State's Ex. 7. No other witness testified to that fact.

Ava testified the seized purse belonged to her. Trial Tr. at 144. She explained she grabbed her purse off the ground because it was hers, and it contained her ID and her social security and insurance cards. *Id.* at 146. She denied the drugs were hers, denied putting them in her purse, and denied knowing they were in her purse. Trial Tr. at 144.

As discussed above, the court communicated in writing with the jury during jury deliberations. Nothing in the record indicates Ava or her counsel were consulted before the court responded to the jury's note. *See generally* Trial Tr.; Minutes, Doc. 92; Register of Actions.

The jury found Ava guilty of both counts. Doc. 97. Additional facts will be discussed below as appropriate.

STANDARD OF REVIEW

This Court "review[s] the denial of motions to suppress evidence and for dismissal of a criminal charge to determine whether any requisite findings of fact are clearly erroneous, and *de novo* as to whether the lower court correctly interpreted and applied the governing

law." *State v. Staker*, 2021 MT 151, ¶ 7, 404 Mont. 307, 489 P.3d 489. "A finding is clearly erroneous if it is not supported by substantial evidence, the court has clearly misapprehended the effect of the evidence, or this Court is left with a definite and firm conviction that the district court made a mistake." *State v. Bauer*, 2001 MT 248, ¶ 12, 307 Mont. 105, 36 P.3d 892.

This Court exercises plenary review of constitutional issues. *State v. Mercier*, 2021 MT 12, ¶¶ 11-12, 403 Mont. 34, 479 P.3d 967 (confrontation); *State v. Charlie*, 2010 MT 195, ¶ 21, 357 Mont. 355, 239 P.3d 934 (presence); *State v. Davis*, 2016 MT 102, ¶ 8, 383 Mont. 281, 371 P.3d 979 (right to counsel and due process).

This Court "review[s] any sentence imposed in a criminal case, if it is alleged that such sentence is illegal or exceeds statutory mandates, even if no objection is made at the time of sentencing." *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979). The legality of a sentence is a question of law reviewed de novo. *State v. DeMarie*, 2025 MT 115, ¶ 17, ___ Mont. ___, 569 P.3d 602.

SUMMARY OF THE ARGUMENT

The court erred when it denied Ava's motion to suppress the alleged contraband seized from her purse and to dismiss the possession charges in this case. In order to show Ava was lawfully arrested for driving with a suspended license, the State bore the burden to prove Conway knew at the time of the arrest that Ava's driver's license was suspended. But Conway testified he did not have the opportunity to run her driver's history at that time, and he arrested her for refusing to cooperate with him. The court's findings to the contrary were not supported by substantial evidence in the record and were based on a misapprehension of the effect of the evidence presented. Because the court's ruling was based solely on the alleged legality of her arrest for driving with a suspended license, and the State offered no other justification for her arrest below, her convictions must be reversed and the charges dismissed.

Alternatively, the court's order allowing Klietz to testify remotely violated Ava's right to confront that adverse witness face-to-face. The State did not prove, and the court did not find, Klietz was unavailable to testify despite the State's good faith efforts to secure her presence, or

that depriving Ava of her constitutional rights was necessary to promote some important public policy concern other than generic concerns of economy and convenience. Because Klietz was the only person who testified the liquid found in Ava's purse contained methamphetamine, the error was not harmless beyond a reasonable doubt and reversal of her convictions is required.

Additionally, the court violated Ava's rights to be personally present and to the assistance of counsel at all critical stages of her trial when it failed to consult with Ava and counsel before answering the jury's mid-deliberations request for information by providing prejudicial, disputed facts regarding the reason for Ava's arrest that were not otherwise in the record. Because the government completely deprived her of counsel at a critical stage of the trial that held significant consequences for her, the error is prejudicial per se and her convictions must be reversed. Alternatively, the State cannot show the errors were harmless beyond a reasonable doubt because the court's answer was incorrect as a matter of law and actually prejudiced her defense.

At a minimum, Ava's judgment must be amended to: reduce the sentence on her misdemeanor conviction to no more than the maximum allowed by law; indicate that sentence merged and ran concurrently with her felony sentence; and reflect the sentence orally imposed.

ARGUMENT

I. The court erred when it denied Ava's motion to suppress and dismiss.

A. Additional Facts

The State did not assert in the charging documents that Conway was aware of Ava's driving history when he decided to arrest her. Nor did it assert in those documents that Conway placed Ava under arrest for driving with a suspended license. *See generally* Docs. 1-4.

In its response to Ava's suppression motion, the State argued Ava's arrest was lawful because Conway had probable cause to charge her with displaying fictitious plates. Doc. 56 at 8. Again, the State did not assert Conway was aware of Ava's driving history when he decided to arrest her or that she was placed under arrest for driving while suspended.

In reply, Ava argued her arrest for displaying fictitious plates was unlawful pursuant to *Bauer* because that offense is not a jailable offense, *see* § 61-3-601, MCA. Doc. 63 at 3.

At the evidentiary hearing, Conway testified he returned to the home where the car was parked to investigate the potentially fictitious plates and learn the identity of the driver. Hr'g Tr. at 9. During the ensuing investigation, Conway learned the passenger's name was Austin Campbell; his Aunt Muriel owned the car; the car was not stolen; the driver was Austin's friend, Ava; and Austin did not know Ava's last name. *Id*. at 9-12. Another officer on scene conducted a search of the cops' "Swift Justice" database for persons with the first name, "Ava," and found a booking photograph of Ava Hickman. Austin identified the person in the photograph as the driver. *Id*. at 12.

The State asserted and the court found as a matter of fact that Ava exited the house mere "[m]oments later." *See* Doc. 1 at 3; Doc. 56 at 3; Appendix C at 2. When asked what he did then, Conway explained he confirmed through her appearance that she was the person he saw get out of the driver's side of the car earlier, approached her, and asked if

she was driving the car. Hr'g Tr. at 12-13. Ava refused to answer. *Id*. at 13.

Conway's direct examination continued:

> Q. And, once you were doing that, were you going to issue a citation for the fictitious plates?
>
> A. I was. Also, standard with how we operate would be when we identify somebody to ask dispatch to run them for a driver's history if it's traffic related and also check them for warrants.
>
> Q. *You didn't get a chance to do that, though; correct?*
>
> A. *At that time, I don't believe -- at that particular time, I don't believe that we had.* I believe that was done when we identified her through the Swift Justice picture.

Hr'g Tr. at 13 (emphasis added).

Conway testified when Ava refused to admit she was the driver and come outside of the fence, "[a]t that time, I did a refusal," and "told her she was going to be placed under arrest." Hr'g Tr. at 14, 18. *See also* Doc. 1 at 3 ("Hickman would not give the officer a straight answer so at this time Hickman was informed she was going to be placed under arrest."); Doc. 56 at 3 (same). Conway did not testify he asked dispatch to run Ava Hickman's driver's history, or that dispatch informed him that her license was suspended in the "moments" between when Austin identified Ava and when she exited the house. To the contrary, he

testified "at that time"—*i.e.*, when she came out of the house and he approached her to issue a citation for fictitious plates—the cops had not yet had a chance to ask dispatch to run her driver's history. *See id.* at 13. Nor did he testify he knew Ava's license was suspended when he decided to arrest her or that he decided to arrest her for driving with a suspended license before she was taken into custody.

The State offered as State's Exhibit A the tickets Conway later issued to Ava for displaying fictitious plates, driving with a suspended license, and no insurance, her guilty pleas to those offenses, and the city court sentencing order. Hr'g Tr. at 15-16. The defense objected, arguing the issue before the court was the legality of Ava's arrest and that "has nothing to do with what happened later with the driving citations that the officer issued. That's a total separate matter." Hr'g Tr. at 16; *see also* Doc. 1 at 4 (Conway wrote the traffic tickets at the jail). The State argued the city court's probable cause determination was "certainly relevant to this matter." Hr'g Tr. at 16. The court overruled Ava's objection and admitted the evidence. *Id.* at 16.

On cross-examination, Conway explained he placed Ava under arrest "after speaking with her about driving the vehicle and her

refusing to cooperate with the investigation." Hr'g Tr. at 18. He acknowledged displaying fictitious plates is not a jailable offense. *Id*. at 19. He asserted he had been "instructed to place individuals driving on suspended licenses under arrest." *Id*. When asked what he advised Ava she was under arrest for, he asserted "[a]t that time, it would have been the fictitious license plates, suspended driver's license and obstructing for refusing to cooperate with our investigation." *Id*. at 19. Conway did not testify when this advisement occurred.

No video evidence was admitted at the hearing. Indeed, defense counsel had not received or watched *any* recordings prior to the suppression hearing—or trial. *See* Trial Tr. at 10.

The court orally ruled Ava's arrest was lawful because "I believe the officer testified here today that he arrested her for a suspended. They checked. She had a suspended license. . . ." Appendix B at 30. The court concluded, "So, as long as the arrest was done pursuant to one of those charges, which, obviously, she was cited for each of those and pled guilty, I believe the arrest was appropriate." *Id*. In its written order, the court held Ava's arrest was lawful because when "Conway learned [Ava] did not have a driver's license, he possessed the necessary probable

cause to arrest" her. Appendix C at 2, 5. The court did not specifically state when Conway learned that fact but the Order implies it was before her arrest. *See* Appendix C at 2.

B. Discussion

Article II, Section 10 of the Montana Constitution explicitly guarantees an individual's right to privacy, and this right applies to seizures of a person as well as searches. *Bauer*, ¶ 23. The Fourth Amendment to the United States Constitution and Article II, Section 11 of the Montana Constitution guarantee the right to be free from unreasonable seizures. *State v. Peoples*, 2022 MT 4, ¶ 12, 407 Mont. 84, 502 P.3d 129. Warrantless seizures are per se unreasonable except under certain "recognized and narrowly delineated exceptions to the warrant requirement," and it is the State's burden to demonstrate that a warrantless seizure falls within an exception to the warrant requirement. *Peoples*, ¶ 15.

In order to make a warrantless arrest, the arresting officer must have probable cause. *State v. Van Dort*, 2003 MT 104, ¶ 19, 315 Mont. 303, 68 P.3d 728. Probable cause exists if, "*at the time of the arrest*," there were "facts and circumstances within [the] officer's personal

knowledge, or related to the officer by a reliable source . . . sufficient" for a reasonable belief of wrongdoing. *State v. Ditton*, 2009 MT 57, ¶ 21, 349 Mont. 306, 203 P.3d 806 (emphasis added).

Ava's warrantless arrest was per se unreasonable. Thus, the State bore the burden to demonstrate that, *at the time that Conway placed Ava under arrest*, he was in possession of sufficient facts to support a reasonable belief that she had committed the offense of driving with a suspended driver's license. And in order to show Conway had probable cause to believe Ava had committed that offense, the State had to show Conway was aware *at the time he placed her under arrest* that her driver's license was suspended. But Conway did not testify he knew that fact before he decided to "do a refusal," told her she was under arrest, and proceeded to arrest her. Rather, he testified the officers had not yet had the opportunity to obtain Ava's driving history from dispatch at that time. Hr'g Tr. at 13.

Indeed, there was no time to do so. The cops did not learn Ava's last name until Austin identified her booking photo, and, as the court explicitly found, she came out of the house "moments later." Appendix C at 2. There is no evidence in the record that Conway was able to or

actually did learn about Ava's driving history in those mere "moments." To the extent the court implicitly found, as a matter of fact otherwise, that finding is not supported by substantial evidence in the record and is clearly erroneous.

The court also ruled Ava's arrest was "appropriate" because Conway later issued Ava a ticket for driving while suspended and she pled guilty to that offense. Appendix B at 30. But, as defense counsel argued at the suppression hearing, whether Conway had probable to believe Ava had committed that offense at the time Conway wrote Ava's citation is not the issue. Probable cause must exist *at the time of the arrest* for the arrest to be constitutional, not after the defendant has been taken into custody, transported to jail, and an inventory search is underway. *Ditton*, ¶ 21. The court misapprehended the effect of the evidence presented when it relied on the ticket as proof that the preceding arrest was legal or as proof that Conway knew about the suspended license at the time of the arrest. That was clear error.

Moreover, Conway never testified he arrested Ava for driving while suspended. Instead, he testified he decided to "do a refusal" because she refused to cooperate with his investigation. But the State

never asserted Conway had probable cause to arrest Ava for obstructing a peace officer, and it cannot change its legal theory on appeal.[2] *See State v. Morrison*, 2008 MT 16, ¶ 10, 341 Mont. 147, 176 P.3d 1027, *overruled on other grounds by State v. Stiffarm*, 2011 MT 9, 359 Mont. 9, 250 P.3d 300. And the court's order denying Ava's motion to suppress and dismiss was solely based on its determination that Conway had probable cause to arrest her for driving while suspended. Because that conclusion was based on clearly erroneous facts, the order must be reversed.

Moreover, additional evidence in the record supports the conclusion that, as Conway testified, when Ava exited the house, he did not have Ava's driving history "at that time." Hr'g Tr. at 13. The body camera videos admitted at trial show the officers meeting after Ava's arrest to discuss potential charges, including "all the traffic stuff."

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[2] Indeed, the record shows Ava did not obstruct the investigation by refusing to admit she was the driver or by refusing to walk outside the fenced-in area. *See City of Kalispell v. Cameron*, 2002 MT 78, ¶¶10-12, 309 Mont. 248, 46 P.3d 46. Both Conway and Austin had already confirmed Ava was the driver, Conway knew her full name, and there were multiple officers on scene, including two inside of the fence, who were able to arrest her immediately when she picked up the purse. *See* Hr'g Tr. at 12-14.

Conway admitted, "I don't have any of her" information and that "it just gave a Hickman." State's Ex. 6 at 3:08–3:15; State's Ex. 5 at 1:00-1:20.

This Court may consider evidence received by a court after its ruling on the motion because "a ruling denying a motion to suppress is not final and may be reversed at any time, and thus a reviewing court may consider evidence subsequently received during trial." *State v. Sharp*, 217 Mont. 40, 43, 702 P.2d 959, 961(1985). Here, the State offered the video evidence and it is in the record on appeal. It shows what Conway admitted at the hearing: he did not and could not have legally arrested Ava for driving while suspended because he did not know her license was suspended when he arrested her.

Evidence discovered or seized as a direct or indirect result of an illegal search or seizure is generally not admissible at trial pursuant to the exclusionary rule. *Peoples*, ¶ 27. Where an arrest is unlawful, a subsequent jailhouse inventory search is likewise unlawful and the fruits of that search must be suppressed. *See Bauer*, ¶ 34.

All the alleged contraband in this case was discovered during the jailhouse inventory search. That evidence should have been suppressed

and the charges should have been dismissed. This Court must reverse the court's order to the contrary and order dismissal of this case.

II. The court erred when it granted the State's motion to allow Klietz's remote testimony.

A. Additional Facts

In 2018, the State endorsed an unnamed representative of the Crime Lab on the original Information in this case. Doc. 4. Yet, the prosecution never issued a trial subpoena for anyone from the Crime Lab. *See* Register of Actions.

On February 22, 2023, the court set a one-day jury trial for April 24. Docs. 74-75. The court confirmed that trial date with a first case setting on March 22. Doc. 79. The State did not indicate at either hearing that any of its witnesses were unavailable on April 24.

On April 19, *three business days before trial*, the State identified Klietz as the Crime Lab expert, Doc. 83 at 1-2, and filed a motion to allow her to testify remotely by Zoom. Doc. 84. The State indicated the reason for the request was "[d]ue to the availability of this witness" and "to aide in the efficiency of the judicial process." *Id*. Although the motion did not indicate Ava's position, the court immediately granted the

motion, finding the State's motion showed "good cause" to do so. Doc. 87.

Citing *State v. Bailey*, 2021 MT 157, 404 Mont. 384, 489 P.3d 889, defense counsel objected. Doc. 90. Prior to voir dire, the court noted it routinely allowed experts from the Crime Lab to testify by Zoom "due to their schedule and their whereabouts." Trial Tr. at 6. The State argued Zoom testimony was sufficient confrontation regardless of the reason for it. Alternatively, the State argued it would be "unduly burdensome" for Klietz to testify in person because she was "in Florida." Trial Tr. at 8.

The court overruled Ava's objection:

> Well, and, in my understanding, you know, in this particular case, we are dealing with a situation where the expert is out of state. And in the Court's – the Court has, in the past, allowed experts from crime labs from out of state to testify via Zoom. I don't believe that breaches the confrontation clause. I believe it is appropriate.

Trial Tr. at 8-9.

B. Discussion

Ava had "the right . . . to be confronted with the witnesses against" her at trial under the federal Confrontation and Due Process Clauses. U.S. Const. amends. VI, XIV. An essential element of that right is "the opportunity, not only of testing the recollection and sifting

the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43 (1895), *quoted in Mercier*, ¶ 16. That is, at its core, "'the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.'" *Maryland v. Craig*, 495 U.S. 836, 844 (1990), *quoting Coy v. Iowa*, 487 U.S. 1012, 1016 (1988).

The Montana Constitution also explicitly guaranteed Ava "the right . . . to meet the witnesses against [her] face to face[.]" Mont. Const. art. II, § 24. This provision ensured Ava the right to "confront and cross-examine adverse witnesses personally, face-to-face in the courtroom." *State v. Hogues*, 2024 MT 304, ¶ 27, 419 Mont. 322, 561 P.3d 1.

This Court requires the prosecution to first show "the personal presence of the witness is impossible or impracticable to secure" before dispensing with a defendant's right to confront that witness personally in court. *State v. Strommen*, 2024 MT 87, ¶ 19, 547 P.3d 1227 (discussing witness's unavailability under both constitutional

provisions). *Accord Hogues*, ¶ 30; *Mercier*, ¶ 20 (failing to distinguish between the analyses). *See also Bailey*, ¶ 42 (Montana Constitution). To meet this burden, the prosecution must "show[] that the witness is unavailable to personally testify at trial upon reasonable good-faith efforts undertaken prior to trial" by the prosecution to obtain the witness's presence. *Strommen*, ¶ 19, *citing Ohio v. Roberts*, 448 U.S. 56, 74-75 (1980), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 57 (2004) (witness is not unavailable under the Confrontation Clause "unless the prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial."). *Accord Hogues*, ¶ 30.

When a witness is unavailable, a "narrow" exception to the physical face-to-face confrontation requirement exists where the prosecution shows and the court makes a "case-specific finding" that "denial of such confrontation is necessary to further an important public policy" and "the reliability of the testimony is otherwise assured." *Craig*, 495 U.S. at 849-50, 857-58; *see also Mercier*, ¶¶ 17-18. Neither "generalized judicial economy," nor the avoidance of "'added expense or inconvenience,'" is sufficient justification for dispensing with a

defendant's constitutional rights to face-to-face confrontation. *Mercier*, ¶ 26, *quoting California v. Green*, 399 U.S. 149, 189 n. 22 (1970) (Harlan, J., concurring). The right to personal, physical, face-to-face confrontation in the courtroom cannot easily be dispensed with, *Craig*, 497 U.S. at 850, and this Court has accordingly "carefully guarded" that right. *Hogues*, ¶ 32. *See also United States v. Carter*, 907 F.3d 1199, 1206 (9th Cir. 2018) (exception reserved for "rare cases").

Here, the prosecution failed to meet its burden to show it was impossible or impracticable to secure in-person testimony from Klietz, let alone that denial of Ava's constitutional rights to face-to-face confrontation in the courtroom of this expert was necessary to further an important public policy other than mere judicial economy or convenience.

Klietz was a Crime Lab employee who worked in Missoula. The prosecution did not assert let alone prove that it made "reasonable, 'good-faith efforts'"—or any effort whatsoever—to secure her in-person testimony. *See Strommen*, ¶ 19, *quoting Roberts*, 448 U.S. at 74-75. The State did not subpoena her to testify at trial. *See* Register of Actions. There is no evidence the prosecution timely informed Klietz of the trial

date. Despite knowing the trial date for two months, *see* Docs. 74-75, the State did not name Klietz as its expert until three working days before trial, Doc. 83. There is no evidence regarding when Klietz made plans to travel to Florida or when the prosecution learned of those plans. In short, the record strongly suggests Klietz's absence was due to the prosecution's dilatory conduct and failure to take reasonable affirmative measures to secure her personal appearance at trial. *See Strommen*, ¶ 19. But regardless, the State bore the burden to show it was not reasonably possible to have secured Klietz's presence at trial. *Id*. The State did not prove that. Nor did the court ever find as much in this case.

In addition, the State did not meet its burden to prove it was necessary to deprive Ava of her constitutional right to confront Klietz face-to-face in court in order to further an important public policy concern besides convenience or judicial economy. In *Bailey*, ¶ 11, the Crime Lab toxicologist who conducted the blood alcohol concentration (BAC) tests on the defendant's blood and prepared a report of his findings was allowed to testify remotely in Bailey's driving under the influence (DUI) trial because of the distance, expense, and time

required for him to travel from Missoula to Helena to testify, the expected brevity of his testimony, and the Crime Lab's backlog of cases. In granting the motion, the court explained it "regularly allows State toxicologists to testify by video to aid the Crime Lab and hasten adjudication of the cases before it." *Bailey*, ¶ 11. The toxicology report was also admitted into evidence without objection. *Bailey*, ¶ 14.

This Court reversed, concluding the State provided "only vague and unverified claims of the burden" in-person testimony would cause the toxicologist or the Crime Lab and failed to meet its burden to show that dispensing with in-person testimony was necessary to further any important public policy aside from judicial economy. *Bailey*, ¶ 48. The court's reasoning, thus, was not based on case-specific findings but rather was based on generalized judicial efficiency and economy concerns and the court's regular practice to allow such remote testimony. *Bailey*, ¶¶ 43-45 & n. 6 (describing justice court rationale). Bailey's confrontation rights were violated, and the error was not harmless, because the toxicologist's testimony and report were the only evidence proving the defendant's BAC level exceeded 0.08 percent, an element of Bailey's crime of conviction—DUI *per se*—that the State had

to prove and the jury had to find beyond a reasonable doubt in order to convict. *Bailey*, ¶ 48.

Similarly, the State's only proffered justifications for depriving Ava of her rights were judicial economy—"to aide in the efficiency of the judicial process," Doc. 83—and convenience—in-person testimony would be "unduly burdensome" to the State and the witness. Trial Tr. at 8. Those reasons are exactly the type of justifications that are insufficient on their face.

In addition, the court did not make any case-specific findings that depriving Ava of her confrontation rights was necessary to further an important public policy other than judicial economy or convenience. The court's initial ruling was based solely on the State's asserted inadequate justification in its motion—judicial economy. Docs. 84, 87. And the court's reasoning on the day of trial was no better. That the court had, "in the past, allowed experts from crime labs from out of state to testify via Zoom" did not constitute a case-specific finding that it was necessary to allow Klietz, a Montana resident and state employee who was in Florida temporarily, to testify remotely in this case and thereby deprive Ava of her right to confront her face-to-face. *See* Trial Tr. at 8-9.

Ava's federal and state constitutional rights to personally confront Klietz face-to-face in the courtroom were violated. As in *Bailey*, that error was not harmless because Klietz was the only person who testified the liquid seized from Ava's purse contained methamphetamine, a necessary element of her conviction for drug possession and a strong contributing factor to her conviction for possessing drug paraphernalia for injecting methamphetamine. Ava's convictions must be reversed.

III. The court violated Ava's rights to counsel and to be personally present during a critical stage of her trial when it crafted a response to the jury's questions without consulting Ava or her attorney.

The Sixth and Fourteenth Amendments to the United States Constitution guaranteed Ava the right to be present and to the assistance of counsel during all "critical" stages of the criminal proceedings against her where "potential substantial prejudice to defendant's rights inheres" and the provision of counsel or her personal presence and participation could help avoid that prejudice. *See Coleman v. Alabama*, 399 U.S. 1, 7, 9 (1970) (counsel); *Snyder v. Massachusetts*, 291 U.S. 97, 105–106 (1934) (presence); *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) (presence). The Montana Constitution also expressly guaranteed Ava the "right to appear and defend in person and by

counsel" in "those stages of the proceedings that are deemed 'critical,'" *i.e.*, those stages where there is potential for substantial prejudice to the accused. Mont. Const., art. II, §§ 17, 24; *Ranta v. State*, 1998 MT 95, ¶ 17, 288 Mont. 391, 958 P.2d 670 (counsel); *State v. Matt*, 2008 MT 444, ¶ 17, 347 Mont. 530, 199 P.3d 244 (presence), *overruled on other grounds by State v. Charlie*, 2010 MT 195, ¶ 45, 357 Mont. 355, 357 P.3d 934 ("To the limited extent that *Matt* imposed a presumption of prejudice where the defendant is excluded from a critical stage of the proceedings in matters of non-structural error, it is overruled.")

With respect to communications with the jury during deliberations, Montana law provides:

> After the jury has retired for deliberation, if there is any disagreement among the jurors *as to the testimony* or if the jurors desire to be informed on any point of law arising in the cause, they shall notify the officer appointed to keep them together, who shall then notify the court. The information requested may be given, in the discretion of the court, *after consultation with the parties*.

§ 46-16-503(2), MCA (emphasis added).

The record does not reflect that Ava or her attorney were consulted before the court responded to the jury's inquiries during deliberations. The failure to do so violated each of the rights above.

A. This court should reach the merits of Ava's claims.

Ava did not object to the court responding to the jury without her or her counsel's input. Conversely, she did not waive her rights to be present and to counsel during the formulation of the court's response to the jury. She could do neither of those things because the record indicates neither she nor her counsel was aware that the jury had asked the court for additional information during deliberations or that the court had responded.

In *State v. Zitnik*, 2023 MT 131, ¶¶ 12-13, 413 Mont. 11, 532 P.3d 477, the defendant argued his right to be present was violated when, during deliberations, the court answered the jury's substantive written questions about the law and facts of the case without first consulting him and counsel on the record. Although Zitnik did not raise this issue below, the Court nonetheless reached the merits under plain error review because the claim implicated Zitnik's fundamental right to be present and the lack of a record meant failure to review the claim would leave unsettled the fundamental fairness of the proceedings. *Zitnik*, ¶ 13.

Ava's claims are nearly identical to Zitnik's. Her appellate claims implicate her fundamental rights to defend herself in person and through counsel at all critical stages of her trial. And like *Zitnik*, Ava had no opportunity to object below because, contrary to the mandatory requirements in § 46-16-503(2), MCA, neither she nor counsel were notified of or consulted regarding the jury's communication to the court. Thus, failure to reach the merits of her claims would leave unsettled the fundamental fairness of the proceedings and could result in a manifest miscarriage of justice. This Court should review her claims.

B. The court's formulation of a response to the jury's inquiries was a critical stage of the proceedings.

"Jury deliberations are the apex of the criminal trial." *Musladin v. Lamarque*, 555 F.3d 830, 840 (9th Cir. 2009). When a jury reaches out to the court and seeks advice, something in the presentation of the evidence, arguments, or instructions is troubling them to the point that they feel they cannot continue without guidance. *Musladin*, 555 F.3d at 841. As such, any response at that time—including a lack of one—will necessarily be important to the ultimate determination of the case. For this reason, "defense counsel has an important role to play in helping to shape that communication." *Musladin*, 555 F.3d at 841 (discussing

Shields v. United States, 273 U.S. 583, 588-89 (1927) (jury should not be given supplementary instructions without notice to counsel and an opportunity to object)). The Montana legislature long ago recognized that premise by requiring the court to consult with the parties before giving any further instructions to the jury. § 46-16-503(2), MCA.

In *Zitnik*, this Court held "the absence of both counsel and Zitnik," when the court considered and crafted an answer to the jury's substantive inquiry about the law and facts of the case constituted "a critical stage of his trial because there was a potential for substantial prejudice." *Zitnik*, ¶¶ 16, 25 (internal quotation marks and citation omitted). In a trial where Zitnik was charged with resisting arrest, the jury asked the court to define "arrest" and to tell them at what point Zitnik was first under arrest. *Zitnik*, ¶ 8. The court answered by referring the jury back to the original instructions. The Court found it was error to deprive Zitnik of the opportunity:

> to argue that a response more tailored to the facts should be given; from objecting to the response that was given and making a record; from proposing an argument in support of a different response; or from making further motions at a critical stage of the proceedings against him.

Zitnik, ¶ 25.

Although this Court was addressing only a claimed violation of Zitnik's right to personal presence in that case, this Court defines a critical stage the same for both right to counsel and personal presence claims: any step of the proceeding where there is potential for substantial prejudice to the defendant. *See Matt*, ¶ 17 (quoting and adopting *Ranta*'s critical stage test for counsel claims in a presence case). And the Court's reasoning in *Zitnik* would have applied with full force to a right to counsel claim in that case as well. Indeed, it appears the Court's reasoning was actually focused more specifically on how *counsel* could have obviated the prejudice to the defendant at the statutorily-required consultation on the jury's questions than the effect that Zitnik's personal presence might have had.

Like in *Zitnik*, by crafting a response to substantive jury questions regarding the law and facts of Ava's case, the court denied Ava the right to be personally present at a critical stage of the trial. It also denied her the right to the assistance of counsel at that critical stage of the trial. The jury sought new information not introduced into evidence at trial or discussed in the original set of instructions. And the court provided new information to the jury—that Ava was arrested for "driving while

suspended"—without consulting with counsel or Ava first, and even though no one testified regarding the reason for Ava's arrest. Although the evidence was closed, the court sua sponte supplemented the record with new information that was not in evidence.

Worse, the information provided was not innocuous. The jury sought three pieces of information: the reason for Ava's arrest, whether she had been tested for being under the influence, and the opportunity to re-watch Conway's video of her arrest. Again, Ava's defense was that the contraband in her purse did not belong to her, she did not put it there, she did not know it was there, and her purse had been out of her possession and control for over a half hour and was last seen in Austin Campbell's possession and control. Thus, the jury's questions were aimed at obtaining additional information that might support, or refute, the inference that the drugs actually belonged to Ava, specifically any information indicating she was a drug user or was high at the time of her arrest, including whether she was under investigation and arrested for DUI. By telling the jury that Ava was arrested for driving while suspended, the judge revealed prejudicial evidence that Ava's driver's license had been suspended—a fact that rendered it highly likely that

she had a history of impaired driving. The fact was not innocuous but was prejudicial to Ava's defense.

And worse yet, the court conversely refused to provide a substantive answer to the jury's question regarding whether Ava was tested for DUI—*i.e.*, the jury did not learn that Ava had not been tested for DUI. And without further instructing the jury not to speculate regarding facts not in evidence, even though the jury clearly had been engaging in conjecture regarding facts not in evidence that could affect its ultimate determination of her guilt or innocence, the court allowed the jury to continue to speculate whether Ava, someone who likely had a history of impaired driving, was under investigation for DUI or not.

And even worse yet, as discussed above in Section I., the court's answer was incorrect as a matter of fact. The record shows Conway did not know Ava's license was suspended when he placed her under arrest and did not arrest her for that offense.

Had Ava and her trial counsel been present as the statute required, they could have informed the court that the State had failed to present any evidence regarding the reason for Ava's arrest and thus no answer could be given; argued that the court's proposed answer was

prejudicial; advocated for the court to respond substantively in a different manner, *e.g.*, by telling the jury affirmatively that Ava was not under investigation or arrested for DUI and was not asked to perform any field sobriety tests; or advocated for the court to either provide a supplemental instruction to the jury regarding basing their decision solely on the evidence presented at trial and not speculating regarding evidence not in the record, or to instruct the jury to refer back to the portions of the original instructions discussing the jury's duty to decide the case based solely on the evidence presented at trial and not on conjecture. *See, e.g.*, Doc. 95, Instr. No. 3.

Based on the foregoing, Ava and her counsel were prevented from attending a critical stage of the trial where the potential for substantial prejudice was present.

C. Reversal is required because Ava was completely denied the assistance of counsel at a critical stage of her trial that held significant consequences for her.

"[A] trial is unfair if the accused is denied counsel at a critical stage of his trial," and the actual or constructive denial of counsel at such a stage constitutes prejudice *per se* that invalidates the defendant's conviction. *United States v. Cronic*, 466 U.S. 648, 659

(1984). A critical stage of the trial is one that holds "significant consequences for the accused." *Bell v. Cone*, 535 U.S. 685, 695–96 (2002). Thus, the Supreme Court has found constitutional error without requiring any showing of prejudice when the government prevented counsel from assisting the accused during an overnight recess in the trial, *Geders v. United States*, 425 U.S. 80 (1976); from presenting closing argument at a bench trial, *Herring v. New York*, 422 U.S. 853 (1975); from timely advising defendant regarding whether to testify due to a requirement that defendant be first defense witness, *Brooks v. Tennessee*, 406 U.S. 605, 612–613 (1972); and from conducting direct examination of the defendant, *Ferguson v. Georgia*, 365 U.S. 570, 593–596 (1961). *See also Perry v. Leeke*, 488 U.S. 272, 280 (1989) (collecting cases).

Other courts have concluded that *Cronic* applies to substantive *ex parte* communications between the judge and jury regarding the law or facts of the case. *See, e.g., Musladin*, 555 F.3d at 842 (where jury requested additional instructions on the law and judge responded, "refer to instructions"); *Caver v. Straub*, 349 F.3d 340, 349 n. 6 (6th Cir. 2003) (jury reinstructed on offense elements); *French v. Jones*, 332 F.3d

430, 436, 438 (6th Cir. 2003) (judge provided supplemental deadlocked jury instruction); *Curtis v. Duval*, 124 F.3d 1, 4-5 (1st Cir. 1997) (judge provided supplemental jury instruction). As the Ninth Circuit explained, any communication to the jury during deliberations carries significant consequences as discussed in *Cronic* and *Cone*. *Musladin*, 555 F.3d at 841. But even if some *ex parte* communications between the judge and the jury after deliberations have begun may not rise to that level, this one surely did. This was not a communication regarding dinner orders, or parking passes, or scheduling. The court did not merely refer back to instructions previously given and approved by defense counsel, or to evidence in the record. Rather, the jury sought extra-record evidence to help it determine a disputed fact in the case, the court provided inculpatory facts not otherwise in evidence, and it did not reinstruct or remind the jury to decide the case based solely on the evidence presented without resorting to conjecture. This step in the proceedings carried significant consequences for Ava. The court's conduct, which prevented Ava and her attorney from being present at that stage, was *per se* prejudicial under *Cronic* and *Cone*.

In *Zitnik*, the defendant did not raise a right to counsel claim and the Court did not apply or otherwise discuss *Cronic*. Still, this Court, citing *Charlie,* stated in dicta: "We have previously held that the absence of a defendant *and counsel when a deliberating jury makes an inquiry of the court* does not constitute structural error but *should be considered under the harmless error analysis*." *Zitnik*, ¶ 28 (emphasis added). But that statement is incorrect in two respects. First, the critical stage at issue in *Charlie* was a telephonic conference call between counsel and the court regarding newly discovered evidence; that is, *Charlie* had absolutely nothing to do with mid-deliberations questions from the jury. *See Zitnik*, ¶ 20, *discussing Charlie*, ¶¶ 7, 41. Second, *Charlie* did not involve a claimed violation of the right to counsel because Charlie's attorney attended the telephonic conference at issue; the issue was whether Charlie had a personal right to be present at the conference as well. *Zitnik*, ¶ 20, discussing *Charlie*, ¶ 7. Thus, *Charlie* does not foreclose a *Cronic* claim here.

In this case, the government prevented Ava's counsel from attending and participating in a critical stage of Ava's trial that carried

significant consequences for Ava. His presence could have made a difference. Ava's convictions must be reversed under *Cronic*.

D. Regardless, the State cannot show the constitutional errors were harmless beyond a reasonable doubt.

Even if this Court concludes harmless error analysis applies, Ava's convictions must be reversed because the State cannot show the government's conduct preventing Ava and her counsel from participating in this critical stage of her trial was harmless beyond a reasonable doubt. *See Chapman v. California,* 386 U.S. 18, 24 (1967).

Based on the facts discussed above in Section III.C., there is a reasonable possibility that had Ava and counsel been present for the proceeding, the outcome of the interaction between the judge and jury would have been different. Indeed, as this Court previously held, "[i]n determining whether [a defendant] was prejudiced," when the jury's question and the judge's response appear in the record, "the issue is whether the court's response to the jury was incorrect as a matter of law." *State v. Sinz*, 2021 MT 163, ¶ 40, 404 Mont. 498, 490 P.3d 97.

Here, the judge's response was incorrect as a matter of law and fact because the judge had no authority to *sua sponte* supplement the record with facts not in evidence prior to the close of evidence and the

beginning of deliberations. *See, e.g.,* § 46-16-401(3), MCA (court may allow *either party* to offer evidence "at any time *before* the close of evidence"). Thus, there *is* a conceivable way that had Ava and her counsel been given an opportunity to consult with the judge, their presence could have changed the outcome of the interaction between the judge and jury. As such, their absence from the proceeding cannot be deemed harmless beyond a reasonable doubt.

What's more, as discussed above, the court provided information to the jury that was inculpatory and prejudicial to Ava's defense. The errors were not harmless. Ava's convictions must be reversed.

IV. The court imposed an illegal sentence and the judgment conflicts with the oral pronouncement. The judgment must be amended.

A. Ava's misdemeanor sentence exceeds the maximum penalty.

The maximum sentence for possession of drug paraphernalia is six months in jail. § 45-10-103, MCA. Here, the court imposed a single three-year suspended sentence, less 311 days of time served, on both Ava's felony drug possession and misdemeanor paraphernalia convictions. It is clear from the sentencing transcript that the parties and the judge intended both of Ava's sentences to merge into a single

sentence, *i.e.*, to run concurrently with each other, with the three-year suspended felony sentence controlling. However, by imposing Ava's sentence in the manner it did, the sentence imposed on the misdemeanor conviction exceeds the maximum sentence authorized by law and is illegal. And by not designating in the written judgment that two sentences merged or were running concurrently, they are running consecutively by default. *See* § 46-18-401(4), MCA. The judgment must be corrected. Ava's misdemeanor sentence should be reduced to the maximum sentence of six months in jail, with 311 days of credit for time served, running concurrently with her existing sentence for the felony drug possession conviction. Doing so would effectuate the parties' and the court's intent that Ava not serve any more jail time and to impose a net sentence of 3 years of probation less the 311 days she spent in jail presentencing.

B. The judgment must be amended to reflect the sentence orally imposed by the court.

A court's "oral pronouncement of sentence . . . is the legally effective sentence and valid, final judgment." *State v. Lane*, 1998 MT 76, ¶ 40, 288 Mont. 286, 957 P.2d 9. If conflicts exist between the oral pronouncement and the written judgment, the oral pronouncement

controls. *Lane*, ¶ 48. The written judgment must be amended if it substantively increased the defendant's sentence without first offering her an opportunity to respond. *State v. Johnson*, 2000 MT 290, ¶ 23, 302 Mont. 265, 14 P.3d 480.

Ava's judgment conflicts with the court's oral pronouncement of sentence. First, the court orally ordered Ava to pay $80 in surcharges, Sent. Tr. at 9, but the written judgment orders her to pay $145 in surcharges, Appendix A at 2. Second, the court ordered Ava to abide by "any and all conditions" in the PSI. Sent. Tr. at 9. In contrast, the judgment states, "[t]he Defendant will be subject to all terms and conditions as deemed appropriate by Adult Probation and Parole." Appendix A at 2. In addition, the PSI author recommended Ava be required to "obtain a chemical dependency evaluation by a state-approved evaluator," "pay for the evaluation and follow all of the evaluator's treatment recommendations." Doc. 114 at 8 (condition 18). The PSI author also recommended Ava be required to submit to drug or alcohol testing "on a random or routine basis," as determined by her probation officer. Doc. 114 at 7 (condition 10). But the judgment orders Ava to submit to random drug testing and to attend chemical

dependency counseling, regardless of the results and recommendations of the chemical dependency evaluation. Appendix A at 2. Neither condition is in the PSI.

The written judgment imposed on Ava a substantively greater financial obligation and increased her loss of liberty without giving her an opportunity to respond. *See Johnson*, ¶ 24. The written judgment must be amended by:

- Replacing the $145 surcharge total with the $80 total imposed orally;
- Replacing the language requiring Ava to be subject to all terms and conditions as deemed appropriate by her probation officer with language requiring her to abide by the terms and conditions set forth in the PSI with the exception of condition 13 regarding fees and surcharges; and
- Striking the requirement that Ava submit to random drug testing and attend chemical dependency counseling.

CONCLUSION

Ava's convictions must be reversed and the charges must be dismissed because the alleged contraband was obtained in violation of her constitutional rights. Alternatively, her convictions must be reversed and this case remanded to court for further proceedings because her rights to counsel and to be present at all critical stages of

her trial and her right to confront adverse witnesses face-to-face were violated. At a minimum, her misdemeanor sentence must be reduced to 6 months with credit for 311 days time served, running concurrently with her felony sentence, and the judgment must be amended to conform with the oral pronouncement of sentence as set forth above.

Respectfully submitted this 16th day of July, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,893, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Tammy A. Hinderman
Tammy A. Hinderman

APPENDIX

CERTIFICATE OF SERVICE

I, Tammy Ann Hinderman, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 07-16-2025:

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