FILED
12/04/2025
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 24-0560

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0560

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DONALD PAUL ROGERS,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Twenty-First Judicial District Court,
Ravalli County, the Honorable Howard F. Recht, Presiding

APPEARANCES:

TAMMY A. HINDERMAN
Division Administrator
KRISTEN L. PETERSON
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
kristpeterson@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT AND APPELLANT

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

WILLIAM E. FULLBRIGHT
Ravalli County Attorney
SEAN PETERSON
Deputy County Attorney
205 Bedford Street, Suite C
Hamilton, MT 59840

ATTORNEYS FOR PLAINTIFF AND APPELLEE

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

NOTICE OF RELATED CASES 3

STATEMENT OF THE FACTS 3

STANDARD OF REVIEW 12

SUMMARY OF THE ARGUMENT 13

ARGUMENT 15

I. The district court erred in admitting the blood draw result because the State failed to demonstrate Deputy Colgan was "under the supervision and direction of a physician or registered nurse" at the jail under Mont. Code Ann. § 61-8-1019(1). 15

II. Alternatively, the State did not present sufficient proof of the existence of the 1995 disputed prior conviction to justify a fifth offense sentence when it relied entirely on Donald's flawed NCIC report and purported certified driver's history 23

A. The State must present competent proof to establish a prior conviction for sentence enhancement purposes. 24

B. The State did not establish competent proof of Donald's prior disputed DUI conviction solely by a conviction's appearance in Donald's driver's history and his NCIC report. 30

C. To the extent *Letherman*'s dicta and *Holder* are not distinguishable, the Court should clarify and overrule those cases as to the categorical sufficiency of a third-party report to provide competent proof of a prior conviction. 38

III. Donald is entitled to resentencing if he prevails in reversing his 2022 prior offense conviction or reducing his sentence in DA 24-0252. 42

IV. Judgment corrections 43

A. Illegal audit hearing order 43

B. Illegal $500 surcharge 46

C. Non-conforming credit for time served 47

CONCLUSION 48

CERTIFICATE OF COMPLIANCE 50

APPENDIX 51

TABLE OF AUTHORITIES

Cases

Arizona v. Evans,
514 U.S. 1 (1995) 34

Arizona v. Rockwell,
775 P.2d 1069 (Ariz. 1989) 27

Bartel v. State,
217 Mont. 380, 704 P.2d 1067 (1985) 17

Bauer v. State,
1999 MT 185, 295 Mont. 306, 983 P.2d 955 .... 24, 31, 43

Clanton v. Cooper,
129 F.3d 1147 (10th Cir. 1997) 33

Evans v. Walter Industries, Inc.,
449 F.3d 1159 (11th Cir. 2006) 40

Finch v. Chapman,
785 F.Supp. 1277 (N.D.Ill. 1992) 34

Gilbert v. State,
2002 MT 258, 312 Mont. 189, 59 P.3d 24 .... 44, 45

Goble v. Montana State Fund,
2014 MT 99, 374 Mont. 453, 325 P.3d 24, 25

Herring v. United States,
555 U.S. 135 (2009) 32, 34, 36

In re N.A.,
2013 MT 255, 371 Mont. 531, 309 P.3d 27 25

In re Winship,
397 U.S. 358 (1970) 24

Mathews v. Eldridge,
424 U.S. 319 (1976) 25

McDonald v. Jacobsen,
2022 MT 160, 409 Mont. 405, 515 P.3d 777 41

Montana v. Egelhoff,
518 U.S. 37 (1996) 25

Rogan v. City of Los Angeles,
668 F.Supp. 1384 (C.D.Cal. 1987) 33

State v. Allport,
2015 MT 349, 382 Mont. 29, 363 P.3d 441 .... 18, 19, 20, 21

State v. Bailey,
2021 MT 157, 404 Mont. 384, 489 P.3d 889 23

State v. Bloomer,
2025 MT 93, 421 Mont. 481, 568 P.3d 513 .... 10, 43

State v. Calahan,
2023 MT 219, 414 Mont. 71, 538 P.3d 1129 .... 47, 48

State v. Cleary,
2012 MT 113, 365 Mont. 142, 278 P.3d 1020 .... 32, 40

State v. Decker,
251 Mont. 339, 828 P.2d 1342 (1991) 17, 20, 22

State v. Faber,
2008 MT 368, 346 Mont. 449, 197 P.3d 941 .... 38, 39

State v. Farnsworth,
240 Mont. 328, 783 P.2d 1365 (1989) 26

State v. Field,
2000 MT 268, 302 Mont. 62, 11 P.3d 1203 .... 44, 45

State v. Gatts,
279 Mont. 42, 928 P.2d 114 (1996) 41

State v. Hanners,
254 Mont. 524, 839 P.2d 1267 (1992) 44, 45

State v. Hatfield,
256 Mont. 340, 846 P.2d 1025 (1993) 44, 45

State v. Hirt,
2005 MT 285, 329 Mont. 267, 124 P.3d 147 .... 44, 45

State v. Holder,
2020 MT 61, 399 Mont. 214, 459 P.3d 1282 .... passim

State v. Incashola,
1998 MT 184, 289 Mont. 399, 961 P.2d 745 .... 15, 17

State v. Krebs,
2016 MT 288, 385 Mont. 328, 384 P.3d 98 .... 12, 24, 26, 39

State v. Letherman,
2023 MT 196, 413 Mont. 459, 537 P.3d 862 .... passim

State v. MacDonald,
2013 MT 105, 370 Mont. 1, 299 P.3d 839 46

State v. Maine,
2011 MT 90, 360 Mont. 182, 255 P.3d 64 26

State v. Martin,
2019 MT 44, 394 Mont. 351, 435 P.3d 73 26

State v. Merry,
2008 MT 288, 345 Mont. 390, 191 P.3d 428 .... passim

State v. Newill,
285 Mont. 84, 946 P.2d 134 (1997) 16

State v. Okland,
283 Mont. 10, 941 P.2d 431 (1997) 24, 26

State v. Otto,
2012 MT 199, 366 Mont. 209, 285 P.3d 583 38

State v. Pehringer,
2023 MT 146, 413 Mont. 122, 533 P.3d 657 .... 12, 47

State v. Perry,
283 Mont. 34, 938 P.2d 1325 (1997) 38, 39

State v. Radi,
176 Mont. 451, 578 P.2d 1169 (1978) 42

State v. Reavely,
2007 MT 168, 338 Mont. 151, 164 P.3d 890 15

State v. Rogers,
2001 MT 165, 306 Mont. 130, 32 P.3d 724 11

State v. Rogers,
2013 MT 22, 371 Mont. 239, 306 P.3d 348 .... 11, 36

State v. Sanchez,
2008 MT 27, 341 Mont. 240, 177 P.3d 444 31

State v. Zakovi,
2005 MT 91, 326 Mont. 475, 110 P.3d 469 .... 16, 18, 22

Travelers Cas. and Sur. Co. v. Ribi Immunochem Research, Inc.,
2005 MT 50, 326 Mont. 174, 108 P.3d 469 41

United States v. Brown,
510 F.3d 57 (1st Cir. 2007) 31

United States v. Bryant,
571 F.3d 147 (1st Cir. 2009) 39

United States v. Kattaria,
553 F.3d 1171 (8th Cir. 2009) 33

United States v. McDowell,
745 F.3d 115 (4th Cir. 2014) 33

United States v. Price,
409 F.3d 436 (D.C. Cir. 2005) 31

Statutes

Alaska Code Ann. § 12.55.145(b) 27
Mont. Code Ann. § 26-1-102(5) 40
Mont. Code Ann. § 46-18-203 45
Mont. Code Ann. § 46-18-116(3) 45
Mont. Code Ann. § 46-18-236(1)(a) 46
Mont. Code Ann. § 46-18-236(1)(b) 46, 47
Mont. Code Ann. § 46-23-1011 45
Mont. Code Ann. § 61-8-404(1)(a) 34
Mont. Code Ann. § 61-8-404(1)(b)(ii) 16
Mont. Code Ann. § 61-8-405(1) 16
Mont. Code Ann. § 61-8-406 34
Mont. Code Ann. § 61-8-1002(1)(b) 2
Mont. Code Ann. § 61-8-1002(1)(d) 3
Mont. Code Ann. § 61-8-1008(1) 14, 42, 48
Mont. Code Ann. § 61-8-1008(1)(a)(i) 7, 25
Mont. Code Ann. § 61-8-1008(1)(b)(ii) 16
Mont. Code Ann. § 61-8-1008(2) 7, 10, 25, 43
Mont. Code Ann. § 61-8-1008(3) 10
Mont. Code Ann. § 61-8-1018(1)(b)(ii) 15, 16
Mont. Code Ann. § 61-8-1019(1) .... passim

Rules

Mont. Admin. R. 23.4.220(1) 16

Constitutional Authorities

Montana Constitution
Art. II, § 17 24

United States Constitution
Amend. XIV 24

Other Authorities

David Wallace, *Prior Convictions in Impaired Driving Prosecutions: Targeting Hardcore Impaired Drivers*, American Prosecutors Research Institute (Aug. 2004) 33

Mont. Sen. Jud. Comm., *Hearing on SB 111*, 47th Leg., Reg. Sess. 1 (Jan. 19, 1981) 17, 19

Wayne R. LaFave, et al., 6 Crim. Proc. § 26.6(b) (5th ed.) 26

STATEMENT OF THE ISSUES

Issue One: Montana Code Annotated § 61-8-1019(1) provides that for a non-physician's or non-registered nurse's blood draw to be admissible, the State must establish the person acted "under the supervision and direction of a physician or registered nurse." Donald's blood was drawn, not at a hospital, but at a jail by a deputy who was subject to only "distant" oversight by an off-site public health registered nurse. Did the district court err in admitting the blood draw results?

Issue Two: Alternatively, did the State present sufficient proof of the existence of disputed, undocumented prior convictions to justify a fifth offense felony DUI per se sentence when the State relied entirely on questionable reports from third-party reporting databases?

Issue Three: If this Court reverses the prior 2022 conviction on appeal in DA 24-0252, must the Court also reverse and remand this case for resentencing as a lesser-numbered DUI offense?

Issue Four: Does Donald's judgment require correction due to illegal provisions ordering a post-sentencing "audit" hearing, omitting jail credit, and imposing an illegal surcharge?

STATEMENT OF THE CASE

Donald Rogers was tried in the Twenty-First Judicial District Court and found guilty of Operation of a Vehicle with Blood Alcohol Concentration (BAC) of 0.08 or more ("DUI per se"), Mont. Code Ann. § 61-8-1002(1)(b). (4/8/24 Tr. (hereinafter "Trial") at 127-28; D.C. Doc. 38.[1]) During trial, Donald objected to the introduction of evidence obtained from an improper blood draw. (Trial at 76-77.) The objection was overruled. (Trial at 82-83, attached as App. A.)

The State sought to have Donald sentenced for a felony fifth DUI-related offense. (D.C. Docs. 24, 26; *see* 6/5/24 Tr. at 3.) Donald objected, arguing he only qualified for fourth offense sentencing. (6/5/24 Tr. at 3-5; D.C. Doc. 42; 7/3/24 Tr. (hereinafter "Sent.") at 4-6.) Based on the State's reliance on the PSI, a certified driving history, and a copy of a National Crime Information Center (NCIC) report, the district court sentenced Donald for felony DUI per se, fifth offense. (Sent. at 7-9, 22, attached as App. B; D.C. Docs. 46, 55 at 3.) The district court sentenced Donald to 10 years in prison, with two years suspended, to run

[1] The jury also convicted Donald of two misdemeanor offenses: driving a motorcycle without motorcycle endorsement and speeding. (Trial at 127-28; D.C. Doc. 38.)

concurrently with sentences in Ravalli County DC 22-62 and Missoula County DC 11-180. (Sent. at 22-24; D.C. Doc. 55 at 4, attached as App. C.) The district court's judgment imposed various illegal provisions addressed further below.

Donald timely appeals. (D.C. Doc. 60.)

NOTICE OF RELATED CASES

Six months before sentencing in this matter, Donald was sentenced in Ravalli County, DC 22-62, for a felony fourth DUI-related offense upon his conviction for Operation of a Vehicle with THC Concentration of 5 ng/ml or more, Mont. Code Ann. § 61-8-1002(1)(d); that matter is currently on appeal. (*State v. Rogers*, DA 24-0252.) At sentencing in the current matter (DC 23-188), Donald was also sentenced upon revocation of a suspended sentence out of Missoula County, DC 11-180, and that matter has also been appealed. (*State v. Rogers*, DA 24-0626.)

STATEMENT OF THE FACTS

Donald's Blood Draw:

Trooper Patrick Heaney initiated a traffic stop of Donald's motorcycle on the evening of September 16, 2023, for speeding. (Trial

at 59-62.) Heaney did not initially smell alcohol. (Trial at 71-72.) After running Donald's license information and approaching Donald a second time, Heaney said he smelled alcohol, and Donald said he had a couple of beers two hours prior. (Trial at 63-64; State's Ex. 1 at 3:51-3:59, offered and admitted, Trial at 64-65.)

After a brief discussion, Heaney arrested Donald for DUI. (Trial at 67-68.) Heaney transported Donald to the Ravalli County Detention Center. (Trial at 68.)

Heaney took Donald down to the jail's "DUI room." (Trial at 68.) Heaney read Donald the implied consent advisory. (Trial at 69.) Donald refused consent for a breath or blood sample. (Trial at 69.) Heaney testified he completed a search warrant, and Justice of the Peace Jennifer Ray approved it. (Trial at 69.)

Heaney did not transport Donald to a medical care center for the blood draw. Instead, Heaney requested that fellow law enforcement officer "Deputy Chris Colgan" conduct the blood draw at the jail. (*See* Trial at 68-70, 72-73, 86; D.C. Doc. 55 at 3.) Even though it's not Deputy Colgan's "everyday job," he testified he obtained his initial certification after 48 hours of training in a single month and now

conducts around six to sixteen blood draws a month. (Trial at 85, 90.)[2]

Deputy Colgan drew Donald's blood at the jail. (Trial at 68-70.) No doctor or registered nurse was present during the blood draw. (Trial at 73.) When the State asked Deputy Colgan if he was under any sort of supervision, he testified, "Yes. I'm supervised, as far as overseen by, a registered nurse." (Trial at 85.) That registered nurse was Tiffany Webber, the local director of the county's public health office. (Trial at 85, 91.) Webber was not on-site for this blood draw. (Trial at 73, 91.) Indeed, Webber had *never* been on-site at the jail for a DUI blood draw. (Trial at 91-92.) Deputy Colgan explained, "It's more of a distant supervision." (Trial at 92.) Deputy Colgan did not provide any specifics about what Webber's oversight consisted of.

After the blood draw, Deputy Colgan sealed and packaged the blood and gave it to Heaney. (Trial at 70.) Heaney took the blood to his office and refrigerated it. (Trial at 70.) Another trooper transported the blood to the Crime Lab around five days later. (Trial at 71; *see* State's

---

[2] The State objected when Donald asked what Colgan's "everyday job" was. (Trial at 90.) The objection was discussed "off the record," and the district court sustained it. (Trial at 90.) The judgment in this matter recounts Donald's blood was drawn by "*Deputy* Chris Colgan." (D.C. Doc. 55 at 3 (emphasis added).)

Ex. 6, offered and admitted Trial at 97-98.)

Donald moved to exclude the blood draw because, under Mont. Code Ann. § 61-8-1019(1), a person who is not a licensed physician or registered nurse must "act[] under the supervision and direction of a physician or registered nurse" while drawing blood on an officer's request. (Trial at 76-77.) The district court overruled the objection. (Trial at 82-83.)

The Crime Lab's analysis indicated a BAC level of 0.136. (Trial at 99; State's Ex. 6.) The State introduced no other evidence to prove Donald's BAC at trial. (*See* Trial at 119-120.)

Donald's Sentencing:

After trial, Probation and Parole filed a presentence investigation report (PSI). (D.C. Doc. 41.) Although the PSI reflected roughly fifteen years of no purported DUI offenses, the PSI alleged that Donald had prior DUIs as follows:

- 8/14/95 arrest or citation in City of Missoula for DUI, with the "Disposition" stated as *"Pending*";
- 2/28/05 arrest or citation in Missoula County for "DUI 2nd (M)" and no insurance with a generic "Disposition" as "Guilty";
- 11/13/06 arrest or citation in City of Missoula for "DUI 2nd (M)" with "Disposition" as "Guilty"; and
- 3/21/22 arrest or citation in Ravalli County for "DUI 4th (F)" with no noted disposition

(D.C. Doc. 41 at 2-4 (emphasis added).) Donald told the PSI author he had extensive irregularities on his alleged certified driving record and NCIC (National Criminal Information Center) report—explaining the "[d]ata bank is completely wrong in general." (D.C. Doc. 41 at 5.)

Donald contested the accuracy of the PSI regarding his prior convictions and "triggered the State's burden to offer 'competent proof' of Defendant's prior convictions" under *State v. Letherman*, 2023 MT 196, 413 Mont. 459, 537 P.3d 862. (D.C. Doc. 42 at 3-4; *see also*, 6/5/24 Tr. at 3.) Donald argued the State's proof established the current offense was only a fourth, not a fifth, DUI offense. (6/5/24 Tr. at 5; Sent. at 6.) The maximum sentence for a fourth DUI offense is seven years, while a fifth offense may be punished by 10 years in prison. *See* Mont. Code Ann. § 61-8-1008(1)(a)(i), (2).

Donald contested the 1995 offense and pointed out the PSI listed it only as "Pending." (6/5/24 Tr. at 4; D.C. Doc. 42 at 2.) Donald pointed out that his NCIC, which he was provided in discovery, included a 2003 DUI that did not appear on the PSI. (D.C. Doc. 42 at 2.) Donald generally noted the NCIC report was "plagued with such substantial irregularity [that] it cannot and should not serve as the competent proof

. . . to substantiate Defendant's alleged prior convictions." (D.C. Doc. 42 at 4.) The State "needs to show something more, i.e. the prior judgments of conviction for these priors, in order to establish 'competent proof' of those convictions." (D.C. Doc. 42 at 4.)

In response, the State admitted the PSI author made some "simple" mistakes and attached a letter from the PSI author. (D.C. Doc. 46 at 2, Ex. D.) The PSI author did not address the 1995 DUI offense noted as "pending" in the PSI. The PSI author admitted a multitude of other purported mistaken omissions from the PSI, which included omitting a 2003 DUI misdemeanor offense. (D.C. Doc. 46, Ex. D.) Neither the State nor the PSI author explained how the mistakes were made. (D.C. Doc. 46, Ex. D.)

The State did not present any judgments of conviction but filed the NCIC report, the certified driver record, and an Excel spreadsheet that marked when purported convictions appeared in either the NCIC, the certified driver record, or the PSI. (D.C. Doc. 46, Ex. A-C.) The State argued "[t]here are no inconsistencies in the NCIC report, only with the PSI." (D.C. Doc. 46 at 2.) The State argued it had presented all it was required to under *Letherman*. (D.C. Doc. 46 at 2-3.)

The State's NCIC report consisted of 76 pages and is difficult to read. (*See generally*, D.C. Doc. 46, Ex. A.) It noted not only prior convictions for all criminal matters but prior arrests and charges, even though, on a close reading, many charges resulted in acquittals or dismissals. (*See*, *e.g.*, D.C. Doc. 46, Ex. A at 9/25, 10/25, 11/25, 13/25, 15/25, 17/25, 18/25 (noting dismissals or acquittals on various charges)[3].)

At the sentencing hearing, Donald clarified he challenged the 1995 "Pending" DUI and the purported 2003 conviction initially omitted from the PSI. (Sent. at 4-6, 21-22.) Donald explained he had contacted the sentencing courts. (Sent. at 5.) "[I]n the PSI as well as the Missoula Municipal Court's records that does show as pending, there is no, from the Court there, actually a record of conviction." (Sent. at 5.) Likewise, Donald explained the Missoula County Justice Court for the 2003 DUI had "no record of conviction whatsoever for that particular offense." (Sent. at 5.) Since Donald only had the 2005, 2008, and 2022 prior convictions, Donald asked the court to sentence him for DUI per

[3] The NCIC report is pin-cited by the notation in the bottom left-hand portion of the document.

se, fourth offense. (Sent. at 6, 9, 21-22.)

The State did not disagree with Donald's assertion as to the lack of supporting records of convictions for the purported 1995 and 2003 convictions. (*See* Sent. at 7.) Notably, it appears the State may have provided judgments to Donald for the other offenses. (*See* 6/5/24 Tr. at 4-5; D.C. Doc. 49 (documenting disclosure of "Missoula Judgments" to the defense).) However, the State argued that, regardless of the non-existence of court records and admitted mistakes from its PSI author, it provided "ample proof" of the prior convictions through their appearance as convictions on the NCIC and certified driving record. (Sent. at 7-8.)[4]

Donald explained during his allocution that he had contested his prior DUIs "since day one" and there were "too many irregularities to list" as to his NCIC report and certified driving history. (Sent. at 19-20.) These irregularities had wrongly prevented his release on

[4] The State noted that, with inclusion of both the 1995 and 2003 offenses, the current offense could qualify as a sixth offense but that the district court lacked authority to sentence Donald for a sixth offense since he had only recently been sentenced for a fourth offense in DC 22-62. (Sent. at 8; *see also*, Mont. Code Ann. § 61-8-1008(2)-(3); *State v. Bloomer*, 2025 MT 93, ¶ 12, 421 Mont. 481, 568 P.3d 513.)

supervision, and he had faced administrative hurdles in trying to correct them. (*See* Sent. at 18-20.)

Beyond the DUIs, Donald pointed to the NCIC report's listing of 1997 charges for two counts of assault and one charge for use of a weapon, which were eventually overturned by the Montana Supreme Court. (Sent. at 14; *see State v. Rogers*, 2001 MT 165, ¶¶ 6, 23, 306 Mont. 130, 32 P.3d 724 (reversing Donald's 1997 felony assault conviction and noting the district court removed the weapons enhancement due to a double jeopardy violation).) The NCIC report listed a disposition for one of the felony assaults of "remanded by Supreme Court ruling 6 months jail" but had no similar notation as to the second charge and the weapons enhancement, which each listed 10-year prison sentences. (D.C. Doc. 46, Ex. A at 9/25-10/25; *see also*, *State v. Rogers*, 2013 MT 221, ¶ 20 n.1, 371 Mont. 239, 306 P.3d 348 (noting the Court's reversal of the 1997 assault conviction and that "Rogers's criminal record does not indicate he was convicted of those charges on remand").) Notably, in its sentencing argument, the State perpetuated the confusion, arguing Donald had "multiple prior felonies" that included "assault with the use of a weapon" purportedly due to the 1997

case. (Sent. at 12; *see also*, D.C. Doc. 15.)

The district court concluded the State provided sufficient proof of the disputed 1995 conviction which, in combination with the 2005, 2008 and 2022 convictions, qualified his current offense as a fifth DUI offense. (*See* Sent. at 22; D.C. Doc. 55 at 3 (finding Donald had prior convictions in 1995, 2005, 2008, and 2024).)

Additional facts will be discussed as relevant below.

STANDARD OF REVIEW

The district court's interpretation of Montana's statutory requirements for the administration and admissibility of blood tests presents a conclusion of law that this Court reviews for correctness. *State v. Merry*, 2008 MT 288, ¶¶ 12-13, 345 Mont. 390, 191 P.3d 428.

"Whether a prior conviction may be used to enhance a criminal sentence is a question of law that we review for correctness." *State v. Krebs*, 2016 MT 288, ¶ 7, 385 Mont. 328, 384 P.3d 98.

The Court reviews sentences for legality. *State v. Pehringer*, 2023 MT 146, ¶ 7, 413 Mont. 122, 533 P.3d 657.

SUMMARY OF THE ARGUMENT

The district court erred in admitting the BAC evidence at Donald's trial because the blood draw did not satisfy Mont. Code Ann. § 61-8-1019(1)'s supervision or direction requirement. Deputy Colgan drew Donald's blood at a jail, not at a hospital. This Court has never approved of admitting a blood draw conducted at a jail, and Mont. Code Ann. § 61-8-1019(1) was never intended to sanction the admission of blood draw results retrieved in that setting. The State did not establish a public health nurse's ambiguous "distant" oversight of Deputy Colgan in a jail setting amounted to "supervision and direction" required by Mont. Code Ann. § 61-8-1019(1). As such, the blood draw results that formed the basis for the DUI per se conviction were inadmissible. Donald's conviction must be reversed.

Alternatively, the district court erred in determining the State provided sufficient proof of Donald's 1995 disputed prior conviction for sentencing enhancement purposes. As this Court has held, the State bears the burden to produce competent proof establishing prior convictions for a sentencing enhancement. The State cannot meet that burden by relying entirely on a conviction's appearance in a report

derived from a third-party database where the record suggests that report is unreliable. The State nonetheless relied entirely on the 1995 conviction's appearance on Donald's NCIC report and certified driver's history to prove the conviction, despite Donald's continued objection to the reliability of those reports and his demonstration of consistent gross errors in his recorded criminal history. And no record of conviction existed. Donald's NCIC report and certified driver's history were not competent proof of the disputed prior conviction in this case without the State producing additional supporting evidence. To the extent such a conclusion is contrary to dicta in *Letherman* and statements in *State v. Holder*, 2020 MT 61, 399 Mont. 214, 459 P.3d 1282, the Court should clarify or overrule those decisions. The Court should reverse and remand for Donald to be sentenced for a fourth DUI offense under Mont. Code Ann. § 61-8-1008(1).

In the event the Court overturns Donald's 2022 prior conviction currently on appeal in DA 24-0252, this matter requires resentencing because the State used that 2022 conviction as an enhancing conviction in this case.

If the Court affirms Donald's conviction for DUI per se and his sentence as a fifth offense, the Court must order correction of Donald's judgment to strike an illegal audit hearing order, to correct credit for time served, and to reduce an illegal $500 surcharge.

ARGUMENT

I. The district court erred in admitting the blood draw result because the State failed to demonstrate Deputy Colgan was "under the supervision and direction of a physician or registered nurse" at the jail under Mont. Code Ann. § 61-8-1019(1).

Where a person's liberty hinges on the results of a blood sample in a DUI per se case, it is vital that the State establish the reliability and authenticity of the blood sample. *See State v. Incashola*, 1998 MT 184, ¶ 8, 289 Mont. 399, 961 P.2d 745 (explaining Montana's "close[] regulat[ion]" of "nearly all aspects of breath, blood and urine analysis procedures used to determine the alcohol concentration" in a DUI prosecution); *State v. Reavely*, 2007 MT 168, ¶ 11, 338 Mont. 151, 164 P.3d 890. Montana Code Annotated § 61-8-1018(1)(b)(ii) provides that for blood test results to be admissible at a DUI-related trial, the defendant's blood must have been drawn "by a person competent to do

so under 61-8-1019(1)." In turn, Mont. Code Ann. § 61-8-1019(1)[5] provides as follows:

> Only a licensed physician, registered nurse, or other qualified person acting under the supervision and direction of a physician or registered nurse may, at the request of a peace officer, withdraw blood for the purpose of determining any measured amount or detected presence of alcohol, drugs, or any combination of alcohol and drugs in the person.

Likewise, the Montana Administrative Rules require: "Blood samples will be collected from living individuals only by persons authorized by current law, upon written request of a peace officer or officer of the court." Mont. Admin. R. 23.4.220(1).

Evidence obtained in violation of Mont. Code Ann. § 61-8-1019(1) is inadmissible. Mont. Code Ann. §§ 61-8-1018(1)(b)(ii), -1019(1); *see State v. Zakovi*, 2005 MT 91, ¶ 35, 326 Mont. 475, 110 P.3d 469. The Legislature has provided heightened requirements for the admissibility of blood draw results from criminal investigations in light of the heightened need for authenticity and reliability where a person's liberty is at stake. *See State v. Newill*, 285 Mont. 84, 87-89, 946 P.2d 134, 136-

[5] These provisions were formerly codified as Mont. Code Ann. §§ 61-8-404(1)(b)(ii) and -405(1) until the 2021 Legislature moved the provisions to Mont. Code Ann. §§ 61-8-1018(1)(b)(ii) and -1019(1).

37 (1997); *Incashola*, ¶ 8; *Bartel v. State*, 217 Mont. 380, 389, 704 P.2d 1067, 1073 (1985) (explaining that in civil cases where criminal statutory procedures for blood tests need not be satisfied, the test procedures must at a minimum "'accord with good practice in the field to assure reliable results'").

When interpreting statutes, the plain language of the statute controls if the Court can discern legislative intent from the plain meaning. *Merry*, ¶ 12. Because the level of "supervision and direction" required by Mont. Code Ann. § 61-8-1019(1) is ambiguous, this Court has previously consulted legislative history establishing the statute was "not intended to 'take the process out of the hospital environment.'" *Merry*, ¶¶ 15-18 (quoting Mont. Sen. Jud. Comm., *Hearing on SB 111*, 47th Leg., Reg. Sess. 1, at 2 (Jan. 19, 1981)). And, in *State v. Decker*, 251 Mont. 339, 343, 828 P.2d 1342, 1344 (1991), the Court noted the statute's intent reflected "a desire to protect citizens from being subjected to blood drawn from, for instance, a police officer in the field without proper implements or sterilization techniques."

This Court has considered whether a phlebotomist was acting "under the supervision and direction of a physician or registered nurse"

in a hospital environment. *State v. Allport*, 2015 MT 349, ¶¶ 10-17, 382 Mont. 29, 363 P.3d 441; *Merry*, ¶¶ 11-26; *Zakovi*, ¶¶ 34-36.

In *Zakovi*, a phlebotomist working at a hospital drew the defendant's blood. *Zakovi*, ¶ 7. The phlebotomist was "continuously under the supervision of a registered nurse on duty in the emergency room" and her position was "subordinate and requires compliance with the registered nurse's orders under the hospital policy." *Zakovi*, ¶ 36. Based on this evidence, the district court concluded the phlebotomist withdrew the sample in accordance with the statutory supervision and direction requirement, and the Court upheld that determination as supported by substantial evidence. *Zakovi*, ¶ 36.

In *Merry*, a licensed practical nurse (LPN) drew the defendant's blood at McCone County Health Center. *Merry*, ¶ 7. That evening, the health center's director of nursing, also an RN, was on call as well as a physician's assistant. *Merry*, ¶ 23. The CEO of the facility testified a registered nurse is on call whenever an LPN is on duty. *Merry*, ¶ 23. The director of nursing provided LPNs training in blood drawing, after which they are permitted to draw blood. *Merry*, ¶ 24.

Merry argued the LPN was not acting under the supervision or direction of a physician or RN due to the lack of a physician or RN's physical presence at the hospital. *Merry*, ¶ 14. The Court considered the statute's legislative history since its plain language could encompass both Merry's and the State's interpretation. *Merry*, ¶¶ 16-17. The Court noted that a spokesman for the legislation from the Department of Justice explained the main intent of the "supervision and direction" requirement was to authorize technicians to take blood samples "but that it was not intended to 'take the process out of the hospital environment . . . .'" *Merry*, ¶ 18 (quoting Mont. Sen. Jud. Comm., *Hearing on SB 111*, at 2). Accordingly, in a hospital setting, the Court approved of a "more general level of 'supervision and direction.'" *Merry*, ¶ 19. Since the LPN working at the health center was subject to the offsite supervision and direction of an on-call RN, the Court concluded the LPN's supervision fell within the statutory language. *Merry*, ¶ 26.

In *Allport*, a medical technologist with a bachelor's degree in clinical laboratory science was working at Cabinet Peaks Medical Center in Libby and drew the defendant's blood. *Allport*, ¶¶ 4-5, 16.

The phlebotomist was working alone but explained the hospital's lab had a manager who was his direct supervisor and explained that the lab was supervised by an offsite medical doctor in Kalispell. *Allport*, ¶¶ 5, 16. Based on this testimony and under *Merry*, the Court concluded the blood draw was taken in compliance with the supervision requirement. *Allport*, ¶ 16.

None of these cases considered Mont. Code Ann. § 61-8-1019(1)'s supervision and direction requirement in the context of a blood draw at a jail. A jail is well outside the "hospital environment" in which the statute was intended to apply to. *Merry*, ¶ 18; *Allport*, ¶ 15. The Court has explained a setting of a blood draw by "a police officer in the field without proper implements or sterilization techniques" was against the intent of the statute. *Decker*, 251 Mont. at 343, 828 P.2d at 1344.

Here, Deputy Colgan, an officer whose "everyday job" was not a phlebotomist, drew Donald's blood down in the jail's "DUI room" in the presence of a trooper and two detention officers. (Trial at 68-70, 72-73, 90; *see* D.C. Doc. 55 at 3.) Deputy Colgan did not have the training of an LPN or a bachelor's degree in clinical laboratory science. No doctor or registered nurse was present for Donald's blood draw. (Trial at 73.)

Deputy Colgan admitted no doctor or nurse is ever present at the jail for blood draws. (Trial at 91.) Deputy Colgan testified he was "supervised, as far as overseen" by a public health registered nurse but characterized it as only a "distant supervision." (Trial at 85, 92.) Deputy Colgan did not explain what actual oversight the public health nurse provided or whether she ever visited the jail.

Donald argued the statute required either direct observation by a physician or RN or at least that such a medical professional was available or on-call for a blood draw at the jail. (*See* Trial at 79-82.) Apparently relying on *Allport* and *Merry*, the State argued Deputy Colgan's oversight by a public health nurse satisfied the statute. (Trial at 80.) The district court relied on the Court's precedent that had only assessed a hospital setting to deny the motion to exclude the blood draw. (*See* Trial at 79-83.)

Here, the State took the entire blood draw process "out of the hospital environment" against the intent of Mont. Code Ann. § 61-8-1019(1). *Merry*, ¶ 18. *Allport* and *Merry* do not hold that Deputy Colgan's "distant" supervision by a public health nurse satisfied the statute outside of the hospital environment. In *Allport*, *Merry*, and

Zakovi, the medical professional who drew the blood was highly qualified, in a hospital environment, and subject to actual, on-call, or offsite supervision and direction of a physician or registered nurse. That was not the case at the "DUI room" at the jail.

A showing of "offsite or on-call" supervision and direction by a doctor or registered nurse is sufficient to satisfy the "general level of 'supervision and direction'" contemplated by the statute when it is applied in a hospital setting. *See Merry*, ¶¶ 19-26. However, such a showing is not sufficient in a jail setting where the statute was never intended to extend. A jail will typically be filled with law enforcement and detainees, not medical professionals. At a minimum, the State must show something more than generic "distant" oversight by a public health nurse. If a physician or RN is not physically present, the State must show that a physician or registered nurse is regularly ensuring that standard protocols are being followed, that proper implements and sterilization techniques are being used, that in-person visits to the jail are occurring, and that supervision is not merely "distant" but real. *See Merry*, ¶ 18; *Decker*, 251 Mont. at 343, 828 P.2d at 1344.

Since the State only demonstrated Deputy Colgan was subject to "distant," unparticularized oversight by a public health nurse at the time he drew Donald's blood at the jail, the State failed to demonstrate Deputy Colgan was authorized to draw Donald's blood under Mont. Code Ann. § 61-8-1019(1). Accordingly, the district court erred by admitting the inadmissible blood draw results. The error was prejudicial as, without the BAC evidence, the State would not have been able to prove the elements of DUI per se. *See State v. Bailey*, 2021 MT 157, ¶ 48, 404 Mont. 384, 489 P.3d 889 (concluding inadmissible BAC result testimony was not harmless at a DUI per se offense trial). The error requires reversal of Donald's DUI per se conviction.

II. Alternatively, the State did not present sufficient proof of the existence of the 1995 disputed prior conviction to justify a fifth offense sentence when it relied entirely on Donald's flawed NCIC report and purported certified driver's history.

In the event the Court does not order a new trial due to the inadmissible blood draw results, the Court must reverse Donald's sentence and remand for sentencing for a fourth offense DUI because the State failed to prove Donald was subject to a fifth offense sentence.

A. The State must present competent proof to establish a prior conviction for sentence enhancement purposes.

The United States and Montana Constitutions prohibit deprivations of life, liberty, and property without due process of law. U.S. Const. amend. XIV; Mont. Const. Art. II, § 17. Due process protects a defendant from being sentenced based on misinformation. *Bauer v. State*, 1999 MT 185, ¶ 21, 295 Mont. 306, 983 P.2d 955.

Accordingly, like any other fact necessary to impose a particular criminal sentence, *see In re Winship*, 397 U.S. 358, 364 (1970), due process dictates that it "is the State's burden to 'prove[] the fact of a prior conviction'" when that fact is necessary to enhance the applicable sentencing range for an offense. *Krebs*, ¶ 19 (quoting *State v. Okland*, 283 Mont. 10, 17, 941 P.2d 431, 435 (1997)); *see also*, *Letherman*, ¶ 9. The State cannot carry its burden through any mere evidence. The State must satisfy its burden to prove the prior convictions "by presenting '*competent proof* that the defendant in fact suffered the prior conviction.'" *Krebs*, ¶ 19 (emphasis in original) (citation omitted); *see also*, *Letherman*, ¶ 9.

"'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" *Goble v. Montana State Fund*,

2014 MT 99, ¶ 46, 374 Mont. 453, 325 P.3d 122 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)). To ascertain what due process requires, this Court may examine history and common practice, *e.g.*, *Montana v. Egelhoff*, 518 U.S. 37, 43-46 (1996) (plurality), and "employ a flexible balancing test to determine whether a particular safeguard is required in a specific circumstance." *In re N.A.*, 2013 MT 255, ¶ 23, 371 Mont. 531, 309 P.3d 27. The Court may consider (1) "the private interest" at stake, (2) "the risk of an erroneous deprivation," and (3) the State's interest and burden. *Mathews*, 424 U.S. at 335; *Goble*, ¶ 46.

Nowhere is a defendant's due process protection against sentencing misinformation more necessary than where the State seeks a sentencing enhancement. Defendants have an extremely weighty interest in the accurate determination of recidivism sentencing enhancements. The fact of a prior conviction establishing a recidivism sentencing enhancement is often as consequential in a case as any element of a charged offense. For example, in this case the difference in maximum sentence equals three years of liberty. Mont. Code Ann. § 61-8-1008(1)(a)(i), (2).

A defendant's due process right demands more when the State seeks to prove a prior conviction than when a defendant attacks the constitutional validity of an undisputed conviction. *See State v. Maine*, 2011 MT 90, ¶¶ 28-34, 360 Mont. 182, 255 P.3d 64; *State v. Okland*, 283 Mont. 10, 17-18, 941 P.2d 431, 435-36 (1997); *see also*, *Krebs*, ¶¶ 12, 19. There is no constitutional problem with a defendant bearing the burden to prove the invalidity of a prior conviction *so long as* the State first bears the burden to prove the existence of the prior conviction. *See Okland*, 283 Mont. at 17-18, 941 P.2d at 435-36; *see also*, *Krebs*, ¶ 12.

When a defendant disputes the existence of prior convictions, certified copies of prior judgments are commonly accepted as facially competent proof of prior convictions, and the State often relies on such evidence to prove a prior conviction. *See*, *e.g.*, *State v. Martin*, 2019 MT 44, ¶ 4, 394 Mont. 351, 435 P.3d 73 (documenting the State attaching a prior judgment to establish a persistent felony offender enhancement's applicability); *State v. Farnsworth*, 240 Mont. 328, 334, 783 P.2d 1365, 1369 (1989); *see also*, Wayne R. LaFave et al., 6 Crim. Proc. § 26.6(b) (5th ed.) ("Typically prosecutors must prove the defendant's past conviction through public records or witnesses subject to cross-

examination."); *Arizona v. Rockwell*, 775 P.2d 1069, 1078 (Ariz. 1989) (noting the government must "usually meet[] its burden of proving a prior conviction by offering into evidence a certified copy of the conviction"); Alaska State Ann. § 12.55.145(b) ("[P]rior convictions not expressly admitted by the defendant must be proved by authenticated copies of court records . . . .").

In *Letherman*, the Court held a prior conviction's appearance in a PSI does not provide competent proof of the prior conviction where the defendant disputes the conviction. *Letherman*, ¶ 12. The State presented only the PSI, which listed five prior DUI or BAC convictions, as proof of the prior convictions qualifying Letherman's current DUI for felony sentencing. *Letherman*, ¶¶ 4-6. Letherman objected and argued he only had two prior convictions. *Letherman*, ¶ 5.

This Court held the disputed PSI, without more, did not satisfy the State's burden to provide competent proof of disputed prior convictions. *Letherman*, ¶ 12. The State's sole reliance on a PSI's statements of prior convictions is allowed "only when the defendant does not object to the accuracy of the report's depiction of the defendant's criminal history." *Letherman*, ¶ 12. If a defendant objects,

the district court errs "by taking the disputed PSI, without more, as competent proof" of prior convictions. *Letherman*, ¶ 14.

In dicta, the Court went on to reason the State could have satisfied its burden to prove a disputed prior conviction by offering "the NCIC report, a certified driving record, *or* the prior judgments of conviction." *Letherman*, ¶ 11 (emphasis added). However, the State did not attempt to produce any of those records in *Letherman*. Thus, *Letherman* did not hold a driver's history or NCIC report are competent proof of prior convictions if the defendant contests the accuracy of either such record.

Letherman's dicta as to an NCIC report cited *Holder*. In *Holder*, ¶ 4, the defendant contested the existence of a prior 1990 DUI conviction from Texas. The State relied on Holder's NCIC report, which noted a Texas arrest for driving under the influence of liquor with a listed "disposition" of "convicted." *Holder*, ¶ 4. Holder argued the NCIC report's failure to list the actual sentence disqualified the matter as being a "conviction" under Montana law based on how Montana law defines "conviction." *See Holder*, ¶¶ 5, 10, 12. The Court determined

the existence of the matter in the NCIC report with the notation "convicted" was competent proof of the conviction. *Holder*, ¶ 12.

Neither *Letherman* nor *Holder* assessed whether disputed third-party reports provide competent proof of a disputed prior conviction, especially where, as here, the presented reports contain consistent irregularities and refer to convictions in courts that do not have records of such convictions. And neither case assessed the reliability of third-party reports to suffice as competent proof of a disputed prior conviction in light of a defendant's due process rights. Thus, *Letherman's* dicta and *Holder* are not controlling as to this case.

Here, the PSI included the purported 1995 DUI offense only with a "Pending" disposition and did not include any 2003 DUI offense. (D.C. Doc. 41 at 2.) Donald disputed the existence of either a 1995 offense or 2003 offense. (6/5/24 Tr. at 4; Sent. at 4-6, 21-22; D.C. Doc. 42.) Donald's objection reiterated the State's burden to prove prior convictions by competent proof and explained the NCIC report and certified driver's history could not satisfy the State's burden due to "consistent irregularities." (D.C. Doc. 42 at 3-4; 6/5/24 Tr. at 3; Sent. at 4-6, 19-20.)

In response, the State agreed the PSI was wrong. (D.C. Doc. 46 at 2, Ex. D.) But the State relied on the listing of the 1995 and 2003 offenses in the NCIC report and certified driver's history as proof of those prior convictions. (Sent. at 7-8; D.C. Doc. 46.) The State did not dispute Donald's assertion the courts that supposedly presided over those offenses possessed no records of conviction for those offenses. Instead, the State asserted the NCIC and certified driver's history were categorically reliable proof of the existence of the prior convictions, despite the lack of any supporting records of conviction. (*See* Sent. at 7-8.) The district court accepted the State's proof and determined Donald had a prior 1995 qualifying DUI offense despite irregularities in Donald's history and the lack of records from the sentencing courts. (*See* Sent. at 22; D.C. Doc. 55 at 3.)

B. The State did not establish competent proof of Donald's prior disputed DUI conviction solely by a conviction's appearance in Donald's driver's history and his NCIC report.

In *Letherman*, this Court recognized that non-judicial records such as PSIs can be inaccurate. *See Letherman*, ¶ 11. Such concerns were born out in this case where the PSI author himself admitted no fewer than 19 mistakes in the PSI's listing of purported convictions and

infractions. (D.C. Doc. 46, Ex. D.) Due process protects a defendant "from a sentence predicated on misinformation about that defendant's criminal history." *Bauer*, ¶ 20. Criminal history information relied on for a sentence enhancement must be reliable. *See Letherman*, ¶ 11; *United States v. Brown*, 510 F.3d 57, 75 (1st Cir. 2007) (explaining the Government must demonstrate that a description in a presentence report "'is based on a sufficiently reliable source to establish the accuracy of that description'" (quoting *United States v. Price*, 409 F.3d 436, 444 (D.C. Cir. 2005)).

The same inaccuracy concerns with PSIs may also apply to certified driver's histories and NCIC reports. These reports are only as reliable as the underlying judgments or court records that support them as well as *someone* correctly *interpreting and entering* these records into the relevant database. At their core, these reports are out of court statements offered for the truth of the matter asserted—in other words, hearsay—for which reliability concerns abound. *State v. Sanchez*, 2008 MT 27, ¶ 117, 341 Mont. 240, 177 P.3d 444 (Nelson, J., dissenting, with Cotter, J., joining) (recognizing "the well-settled view that out-of-court statements are presumptively unreliable"). Any witness to the game of

"telephone" can testify to how relayed information can become significantly distorted. *See also*, *Herring v. United States*, 555 U.S. 135, 155 (2009) (Ginsburg, J., dissenting) (citing amici in a search and seizure case that "[t]he risk of error" "is not slim" as to "[e]lectronic databases [that] form the nervous system of contemporary criminal justice operations").

Indeed, this Court has experience with certified driver's histories being inaccurate, particularly as to old convictions like the purported decades-old convictions in Donald's case. In *State v. Cleary*, 2012 MT 113, ¶¶ 8-9, 365 Mont. 142, 278 P.3d 1020, the South Dakota Driver's Licensing Program mistakenly transmitted Cleary's 2007 charge, plea and suspended imposition of sentence to Montana despite a court order dismissing the case and sealing the records, and the Montana Motor Vehicle Division (MVD) posted it to Cleary's Montana driving record as a DUI. Although Cleary eventually had the matter removed from his driving record, the Montana MVD initially refused Cleary's request to fix his driver's history; the matter was only removed after Cleary underwent a "circuitous remedial route" and the South Dakota court sent a new order to the MVD. *Cleary*, ¶¶ 9-10.

This reflects what a nation-wide practice manual on DUI prosecutions warns about MVD records: "Be careful, though: these records may not be 100% accurate, depending upon when the prior conviction occurred, the location of the conviction, and the requirements to file DWI convictions with the DMV. DMVs' records are only as good as what was reported to them." David Wallace, *Prior Convictions in Impaired Driving Prosecutions: Targeting Hardcore Impaired Drivers*, American Prosecutors Research Institute, at 4 (Aug. 2004).[6]

It is well known that mistakes occur in NCIC reports, too. *E.g.*, *United States v. McDowell*, 745 F.3d 115, 118 (4th Cir. 2014) (NCIC report listed erroneous name and four inaccurate birthdays for the defendant); *United States v. Kattaria*, 553 F.3d 1171, 1177 (8th Cir. 2009) (NCIC inaccurately stated that defendant had a prior conviction); *Clanton v. Cooper*, 129 F.3d 1147, 1150-52 (10th Cir. 1997) (fire marshal transmitted false statements through NCIC to detain person); *Rogan v. City of Los Angeles*, 668 F.Supp. 1384, 1387-89 (C.D.Cal. 1987)

[6] Available at: https://cdn.ymaws.com/mcaa-mn.org/resource/resmgr/files/tsrp/Resources/Prior_Convictions_aug_2004.pdf.

(plaintiff arrested four times, three times at gunpoint, after stops for minor infractions based on incorrect and incomplete NCIC listing); *Finch v. Chapman*, 785 F.Supp. 1277, 1278–79 (N.D.Ill. 1992) (plaintiff wrongfully arrested and detained twice based on misinformation in NCIC); *see also*, *Arizona v. Evans*, 514 U.S. 1, 4-5 (1995) (computer database showing inaccurate information on warrant listing led to defendant's arrest); *Herring*, 555 U.S. at 137-38 (same).

As Donald explained, his criminal history has been continuously incorrect on third-party computer databases such as the NCIC and there are "consistent irregularities" throughout. (D.C. Doc. 42 at 2-4; 6/5/24 Tr. at 3-5; Sent. at 4-6, 19-20.)

For instance, Donald's certified driving record describes Donald having a 2008 conviction for "DUI Alcohol" under "61-8-401(1)(a)," but further refers to that conviction as a "DUI with BAC ≥ .08," which is consistent with a different statute, Mont. Code Ann. § 61-8-406 (2005). (D.C. Doc. 46, Ex. B at 8.) In addition, the certified driving record's listing of an undisputed 2008 conviction as a "Second Offense" puts into question whether Donald had any DUI convictions before his undisputed 2005 conviction. (D.C. Doc. 46, Ex. B. at 8.)

The NCIC in this case has irregularities, too. The NCIC report lists the 2008 conviction as a "Driving Under the Influence of Alcohol" conviction, while another portion of the report inconsistently calls it a "Second BAC" conviction. (D.C. Doc. 46, Ex. A at 2/13, 4/13.) The identifying numbers for the cases do not match numbers provided on the certified driver's history. (*Compare* D.C. Doc. 46, Ex. A *with* Ex. B.) Neither the NCIC nor the certified driver's history noted the 1995 offense as "pending," despite the PSI author's report of that, which the PSI author never said was a mistake. (Sent. at 5.)

Donald further pointed out his NCIC report incorrectly references two felony assault convictions and a separate use of a weapon conviction from 1997, which were overturned by the Montana Supreme Court. (Sent. at 14; D.C. Doc. 46, Ex. A at 9/25-10/25.) Nonetheless, the PSI author asserted he mistakenly omitted these 1997 convictions from the PSI, and the State relied on an "assault with the use of a weapon" conviction in its sentencing recommendation. (D.C. Doc. 46, Ex. D;

Sent. at 12.[7]) Donald's judgment includes a chart of his criminal history cut-and-pasted without edits from the PSI, even though the PSI author himself admitted it contained a multitude of errors. (D.C. Doc. 55 at 10-14.) It is apparent that mistakes in Donald's criminal history reports are haunting him. For Donald to receive a sentencing enhancement "simply because some bureaucrat has failed to maintain an accurate computer data base" would constitute a grave injustice. *Herring*, 555 U.S. at 155-56 (Ginsburg, J., dissenting from ruling that exclusionary rule did not apply for police recordkeeping error).

Despite the State's arguments below, the State did not meet its burden by merely introducing third-party reports which, like the PSI report, contained inconsistencies. (D.C. Doc. 46 at 2-3 (State arguing it was "blatantly against" *Letherman* that it had to show "something more" than a certified driver's history or NCIC report).) To be sure, a certified driver's history or NCIC report can be probative of the

---

[7] Notably, in *Rogers*, 2013 MT 221, ¶ 44, this Court reversed prior convictions of Donald's because the State improperly cross-examined Donald at trial about his criminal history, which included the State informing the jury of a prior "felony assault with a weapon" conviction as well as that Donald "had gotten" the conviction "set aside" on appeal.

existence of a disputed prior conviction in the event that, for example, there is evidence that documents from the sentencing court that *once existed* have been destroyed. And the State need not demonstrate any additional documentation such as sentencing court documents where the defendant does not dispute a reported conviction. *Letherman*, ¶ 12. But where a defendant disputes a prior conviction and demonstrates consistent errors in his reported criminal history, then those reports cannot suffice to prove the existence of the disputed conviction, particularly, as here, where the record reflects the underlying sentencing courts lacked any records of convictions.

The State did not establish competent proof of Donald's disputed prior DUI conviction by relying entirely on Donald's NCIC report and certified driver's history.[8]

///

///

///

[8] The district court only relied on the 1995 offense and did not rely on the disputed 2003 offense that did not appear in the PSI. (D.C. Doc. 55 at 3.) Regardless, the 2003 conviction was not sufficiently proved for the same reasons argued above.

C. To the extent *Letherman*'s dicta and *Holder* are not distinguishable, the Court should clarify and overrule those cases as to the categorical sufficiency of a third-party report to provide competent proof of a prior conviction.

As stated above, in *Letherman*, the Court expounded in dicta that a "NCIC report or a certified copy of Letherman's driving record showing the prior convictions" would provide competent proof of prior convictions. *Letherman*, ¶¶ 11, 14; *see also*, *State v. Otto*, 2012 MT 199, ¶ 17, 366 Mont. 209, 285 P.3d 583 (noting dicta is not "controlling precedent"). The Court cited *State v. Perry*, 283 Mont. 34, 36-37, 938 P.2d 1325, 1326-1327 (1997) and *State v. Faber*, 2008 MT 368, ¶¶ 29-30, 346 Mont. 449, 197 P.3d 941, for the proposition that the Court had held a certified driver's history was competent proof of a disputed prior conviction. *Letherman*, ¶¶ 10-11.

However, in neither *Faber* nor *Perry* did the defendants dispute whether the State had provided competent proof of the existence of prior convictions. Instead, *Perry* and *Faber* addressed the distinct issue of the defendants' collateral attacks on the validity of prior convictions based on purported violations of the defendants' constitutional rights.

Faber, ¶¶ 25-30; *Perry*, 283 Mont. at 36-37, 938 P.2d at 1326-28; *see also*, *Krebs*, ¶ 19.

As stated above, *Letherman's* dicta and *Holder* are not controlling as to this case. Nevertheless, the Court should not hold that a prior conviction's appearance in a certified driver's history or NCIC report categorically suffices as competent proof of a disputed prior conviction. The possible unreliability and fallibility of such records, as demonstrated in Donald's case, do not support such a holding. Such a holding would wrongly equate the reliability of a judgment of conviction with the reliability of an NCIC report or certified driver's history. Non-judicial records "should not be afforded the same presumption" of reliability "as certified convictions or other comparable judicial records." *United States v. Bryant*, 571 F.3d 147, 155 (1st Cir. 2009).

Consistent with the State's burden to provide competent proof of a prior conviction, the burden must remain on the State to inquire into and potentially obtain relevant judgments of conviction to verify the reliability of disputed computer records. If, as the State argued here, it "is only required to produce ***either*** the NCIC report [or] certified record" (D.C. Doc. 46 at 2-3 (emphasis in original)), then the State's

burden is diluted to showing merely what is reflected in a third-party report rather than what actually happened in the criminal court of law. While the State decried having to "hunt down" judgments (D.C. Doc. 46 at 3) despite that being consistent with core prosecutorial functions, it is also inefficient for sentencing courts to parse through NCIC reports, which include irrelevant history such as arrests and initial charges and require a close reading for proper interpretation.

Nor should the burden be misallocated to the defense to provide "direct evidence" to rebut a prior conviction's appearance in a certified driver's history. *See Letherman*, ¶¶ 9-10. A prior conviction that does not exist often lacks any such obtainable, "direct" evidence. *See* Mont. Code Ann. § 26-1-102(5) (defining "Direct evidence"). Further, it is difficult for a private citizen to get inaccurate third-party reports corrected, as demonstrated in this case. *See*, *e.g.*, *Cleary*, ¶¶ 9-10.

The State should be the party bearing the burden to obtain and present necessary evidence of prior convictions from the original sentencing court consistent with the State's burden to prove the existence of a prior conviction. A burden should usually fall on "the party most capable of bearing it," *Evans v. Walter Industries, Inc.*, 449

F.3d 1159, 1164 n. 3 (11th Cir. 2006), and not require a party "to prove a negative," *Travelers Cas. and Sur. Co. v. Ribi Immunochem Research, Inc.*, 2005 MT 50, ¶ 32, 326 Mont. 174, 108 P.3d 469.

To the extent the Court believes *Letherman*'s dicta and *Holder* are controlling and that a certified driver's history or an NCIC report categorically satisfies the State's burden to provide competent proof of a disputed prior conviction—even when those reports themselves contain errors and the underlying sentencing courts lack records of convictions—then the Court should clarify or overrule those decisions as manifestly wrong for the reasons explained above. *McDonald v. Jacobsen*, 2022 MT 160, ¶ 30, 409 Mont. 405, 515 P.3d 777 ("'Court decisions are not sacrosanct, . . . and stare decisis is not a mechanical formula of adherence to the latest decision. Indeed, we have held that stare decisis does not require us to follow a *manifestly wrong* decision.'" (quoting *State v. Gatts*, 279 Mont. 42, 51, 928 P.2d 114, 119 (1996)) (emphasis added in *McDonald*)).

Here, the State did not meet its burden to prove Donald's disputed prior 1995 conviction to authorize the district court's fifth offense sentence. Because the State failed to meet its burden, Donald must be

resentenced for a fourth offense under Mont. Code Ann. § 61-8-1008(1). *See Letherman*, ¶¶ 15-19 (concluding the appropriate remedy for the State failing to meet its burden to prove felony DUI sentencing enhancement was to remand for resentencing as a misdemeanor offense).

III. Donald is entitled to resentencing if he prevails in reversing his 2022 prior offense conviction or reducing his sentence in DA 24-0252.

The district court relied on Donald's 2022 prior offense in DC 22-62, which is currently on appeal in DA 24-0252, to enhance Donald's sentence in this case. (Sent. at 9, 21-22; D.C. Doc. 55 at 3.) While predicate convictions pending appeal can be used to enhance a sentence, if the conviction is reversed on appeal, the enhancing effect of the prior conviction "ceases" and the defendant must "be resentenced without regard" to the enhancement. *State v. Radi*, 176 Mont. 451, 471, 578 P.2d 1169, 1181 (1978).

In the event this Court does not overturn Donald's conviction in this matter but the Court reverses Donald's conviction or sentence in DA 24-0252, Donald must be resentenced for a lesser DUI offense in this matter. Not only does Donald's due process rights compel such a

result, but reversal of Donald's fourth DUI offense conviction or sentence would statutorily disqualify this matter from being subject to fifth offense sentencing. Mont. Code Ann. § 61-8-1008(2); *Bloomer*, ¶ 12; *Bauer*, ¶¶ 31-32 (holding defendant was entitled to resentencing for a due process violation where prior convictions were vacated after imposition of current sentences).

IV. Judgment corrections

In the event the Court affirms Donald's conviction for DUI per se and his sentence as a fifth offense, the Court must order correction of Donald's judgment in three independent respects.

A. Illegal audit hearing order

At sentencing, the district court ordered it would set an "audit hearing" in the judgment. (Sent. at 24.) When Donald expressed confusion, the court explained an audit hearing as "an opportunity for the Court to review whether you have complied with the requirements of the sentence, particularly financial requirements . . . prior to the end of your sentence so that any of those issues can be considered and resolved." (Sent. at 24-25.) The judgment sets an audit hearing in nine years ("Wednesday, July 6, 2033 at 9:00 a.m.") "to review the status of

fines/fees owing and incomplete condition requirements" and requires Donald's personal appearance. (D.C. Doc. 55 at 14.)

The audit hearing order must be struck from Donald's judgment because it is illegal.

"It has been well established in Montana once a valid judgment and sentence have been signed, the court imposing that sentence had no jurisdiction to vacate or modify it except as provided by statute." *State v. Hanners*, 254 Mont. 524, 526, 839 P.2d 1267, 1268 (1992) (district court lacked authority post-sentencing to change the manner of incarceration based on the Department of Institution's request); *see also*, *State v. Field*, 2000 MT 268, ¶¶ 15-17, 302 Mont. 62, 11 P.3d 1203 (provision of judgment granting "broad sweeping authority" to Department of Corrections to modify a sentence post-sentencing was illegal); *State v. Hatfield*, 256 Mont. 340, 346-47, 846 P.2d 1025, 1029 (1993) (sentencing court could not delegate discretion to impose jail time to probation officer). District courts lack authority to "reserve the right to change the sentence or add conditions at a later time" and "revisit" a person's ability to pay imposed costs "at a later hearing." *Gilbert v. State*, 2002 MT 258, ¶ 17, 312 Mont. 189, 59 P.3d 24; *State v.*

Hirt, 2005 MT 285, ¶¶ 19-20, 329 Mont. 267, 124 P.3d 147 (district court could not reserve authority to revisit sentence regarding reimbursement of counsel costs).

The district court's order of an audit hearing is illegal because it lacks any statutory authority. It is akin to other provisions this Court has declared illegal where district courts sought to exercise post-sentencing authority that does not exist. *Hirt*, ¶¶ 19-20; *Gilbert*, ¶ 17; *Hanners*, 254 Mont. at 526, 839 P.2d at 1268; *see also*, *Field*, ¶ 17; *Hatfield*, 256 Mont. at 346-47, 846 P.2d at 1029. The Legislature has tasked the Department of Corrections, not the district court judge, with supervising probationers. Mont. Code Ann. § 46-23-1011. Likewise, a district court's authority to revoke a suspended or deferred sentence begins with the State's filing of a petition under Mont. Code Ann. § 46-18-203. Under Mont. Code Ann. § 46-18-116(3), the district court's inherent power to amend a judgment sua sponte is limited to "correct[ing] a factually erroneous sentence or judgment[.]" The Legislature has not granted district courts broad authority to sua sponte supervise probationers, modify their sentence conditions, revoke a suspended or deferred sentence, or release probationers from

supervision, all options the district court's audit hearing requirement leaves open for the court's consideration.

The district court lacked authority to set a generic post-sentencing "audit" hearing at which Donald must personally appear to review financial obligations and conditions. This Court should hold the audit hearing provision illegal and remand for the district court to strike it from the judgment. *See State v. MacDonald*, 2013 MT 105, ¶ 13, 370 Mont. 1, 299 P.3d 839.

B. Illegal $500 surcharge

Donald's judgment imposes a fee of $530 for "Total Statutory Surcharge Fee." (D.C. Doc. 55 at 5.) The authority for $500 of this fee comes from Mont. Code Ann. § 46-18-236(1)(b), which authorizes a surcharge of "the greater of $20 or 10% of the fine levied for each felony charge." (*See* D.C. Doc. 55 at 5.[9]) For Donald's single felony offense, the district court imposed a fine of $5,000, all suspended. (Sent. at 22; D.C. Doc. 55 at 4.) The judgment apparently calculated the applicable

[9] The remaining $30 arises from the two $15 misdemeanor surcharge fees under Mont. Code Ann. § 46-18-236(1)(a), although the judgment improperly labeled these fees as imposed under § 46-18-236(1)(b). (D.C. Doc. 55 at 5.)

surcharge under § 46-18-236(1)(b) as 10% of the $5,000 suspended fine for a surcharge of $500. (D.C. Doc. 55 at 4-5.)

The $500 surcharge is illegal under *Pehringer*. "[T]he 10% calculation of the charge" for levied fines in Mont. Code Ann. § 46-18-236(1)(b) is limited to fines "that are not suspended." *Pehringer*, ¶ 20. In *Pehringer*, ¶¶ 6, 19-20, the district court imposed an illegal $200 surcharge since it constituted a surcharge of 10% of a $2,000 suspended fine. Likewise, here, the district court imposed an illegal $500 surcharge as 10% of the $5,000 suspended fine. The authorized statutory surcharge was limited to $20, not $500. Thus, the Court must remand to amend the statutory surcharge imposed for DUI per se to the flat legal $20 amount. *Pehringer*, ¶¶ 20-21.

C. Non-conforming credit for time served

At oral pronouncement, the district court ordered Donald to receive credit for "291 days served," consistent with the State's recommendation. (Sent. at 12, 22.) However, the written judgment credits Donald with only "two hundred and one (201) days served." (D.C. Doc. 55 at 4.) The oral sentence "is the legally effective sentence and valid, final judgment." *State v. Calahan*, 2023 MT 219, ¶ 27, 414

Mont. 71, 538 P.3d 1129 (internal quotation marks and citation omitted). Accordingly, the Court must order amendment of the judgment to order jail credit of 291 days of time served. *Calahan*, ¶ 29.

CONCLUSION

Donald requires a new trial because the district court erred in failing to exclude the result of Donald's improper blood draw at the jail under Mont. Code Ann. § 61-8-1019(1). Alternatively, Donald respectfully asks this Court to reverse the felony fifth offense sentence and remand for resentencing for a fourth offense under Mont. Code Ann. § 61-8-1008(1) since the State failed to adequately prove any 1995 purported conviction.

Alternatively, Donald requires resentencing in this matter if the Court grants relief as to his conviction or sentence currently on appeal in DA 24-0252.

Alternatively, Donald's judgment must be corrected in three respects as to an illegal audit hearing order, an illegal surcharge, and omitted credit for time served.

Respectfully submitted this 4th day of December, 2025.

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

By: /s/ Kristen L. Peterson
KRISTEN L. PETERSON
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 9,591, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Kristen L. Peterson
Kristen L. Peterson

APPENDIX

Oral Ruling on Blood Draw .... App. A

Oral Ruling on Prior Convictions and Oral Pronouncement of Sentence .... App. B

Judgment and Commitment .... App. C

CERTIFICATE OF SERVICE

I, Kristen Lorraine Peterson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-04-2025:

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

William E. Fulbright (Govt Attorney)
205 Bedford St #C
Hamilton MT 59840
Representing: State of Montana
Service Method: eService

Electronically signed by Kim Harrison on behalf of Kristen Lorraine Peterson
Dated: 12-04-2025