

MONTANA SUPREME COURT

Docket No. DA 24-0250

STATE OF MONTANA,

Plaintiff/Appellee,

v.

TANNER DAVID ALFORD,

Defendant/Appellant

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**APPELLANT'S REPLY BRIEF**

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On Appeal from RAVALLI COUNTY DISTRICT COURT  
The Honorable HOWARD F. RECHT Presiding

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APPEARANCES:

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## REPLY

### **I. Tanner preserved his right to appeal his sentence.**

The State consented to Tanner’s ability to argue for a sentence other than what was contained in the Plea Agreement. And the record shows that Tanner preserved both facial and as-applied constitutional challenges to his sentence both in writing and orally before the district court. The State’s attempts to have this Court decide the case on anything other than the merits of the actual issues should be rejected.

#### **A. The State had notice and indicated “no issue” with Tanner arguing for a deviation from the Plea Agreement.**

In its response brief, the State has inexplicably made a complete 180-degree flip in its position regarding Tanner’s right to assert his argument at sentencing. On April 3, 2024, Tanner’s counsel emailed the State’s counsel, stating “I just want to give you a head’s up that I need to argue for a sentence outside of the plea agreement in this case in light of the recent *Gibbons* decision.” Counsel for the State responded, “OK thanks! I’m assuming that has to do with fines? If so I have no issue with that deviation. Not that I’d have much choice in the matter.” [See attached Email Correspondence as Exhibit A.]

The State had “no issue” with Tanner’s argument prior to the sentencing hearing, and it made no objection to Tanner’s argument at the hearing itself. Now, it disingenuously suggests that the very argument it had “no issue” with is some how “escaping the obligations of a plea bargain.” The State cannot be allowed to litigate from both sides of its face, and its argument here should be rejected. The State had notice of Tanner’s intent to make his argument, and it consented to the argument being made.

**B. Tanner raised both facial and as-applied constitutional challenges to his sentence at the district court level.**

This Court “will address a defendant’s facial constitutional challenge to a sentencing statute even if it is raised for the first time on appeal,” and it “will not address a defendant’s as-applied constitutional challenge to her sentence for the first time on appeal.” *State v. Ber Lee Yang*, 2019 MT 266, ¶ 11, 397 Mont. 486, 452 P.3d 897.

Tanner raised both facial and as-applied constitutional challenges to his sentence at the district court level. Plainly, Tanner argued in his Sentencing Memorandum that the sentence “is so excessive and disproportionate to the unique circumstances of this case that such a

punishment would be cruel and unusual.” Doc. 36, *Defendant’s Sentencing Memorandum*. Tanner detailed his “unique circumstances,” including the facts that the sentence went against the recommendations of all of his treating physical and mental health care providers as well as his supervising officer; and that his wife and 2-year-old daughter would be left destitute without his financial support. Additionally, at the Sentencing Hearing before the District Court, Counsel for Tanner specified that:

“one, [. . .] Mr. Alford does not have the financial ability to pay those minimum financial costs; number two, that he does not have the ability to pay the human costs, and that it would impose an undue burden and punishment upon his family were he to be sentenced to any in-custody time; and number three, that sentencing . . . Tanner to any significant in-custody time would violate his Eighth Amendment rights and his rights under Article II, Section 22 of the Montana Constitution as well.” [Transcript on Appeal, page 6.]

Tanner has preserved what the District Court Judge correctly characterized as his “right to appeal” this sentence. [*Id.* p. 14.] The State’s contention otherwise should be rejected.

**II. Tanner has standing to challenge the constitutionality of Montana’s mandatory minimum custodial sentencing for felony DUIs.**

The State correctly concedes that Tanner “has standing to

challenge the constitutionality of Mont. Code Ann. § 61-8-1008(1)(a)(i).” [State’s brief, p. 11.] However, it incorrectly suggests that Tanner lacks standing to challenge any other portions of Montana’s mandatory minimum custodial DUI statutes. The State bases its argument on the false assertion that “the district court imposed Alford’s sentence only pursuant to Mont. Code Ann. § 61-8-1008(1)(a)(i).” [*id.*] Nowhere does the District Court Judgment and Commitment indicate that Tanner was sentenced only pursuant to that narrow portion of the statute. Indeed, in specifying the conditions imposed upon Tanner as part of his sentence, the District Court plainly cites to “61-8-1008(1)(a)(i) or (ii), MCA; 61-8-1008(2) through (4) MCA)” as well as “61-8-1008(1)(b)(iv)(E) and (H), MCA.” [Doc. 45, Judgment and Commitment, p. 7.]<sup>1</sup>

“A defendant must show a direct, personal injury resulting from application of the law in question in order to successfully challenge the constitutionality of a criminal statute.” *State v. Lee*, 2025 MT 30, ¶ 12,

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<sup>1</sup> This Court heard arguments from the Defendant in *Gibbons* that were very similar to Tanner’s arguments. If Robert Gibbons had standing to argue the facial constitutionality of the mandatory minimum fines in Montana’s felony DUI statutes, which there is every indication that he did, then Tanner Alford also has standing to argue against the facial constitutionality of Montana’s mandatory minimum custodial DUI statutes.

2025 Mont. LEXIS 91.

Tanner has shown direct, personal injury resulting from the application of Montana’s mandatory minimum sentencing requirements for felony DUIs. As clearly laid out in the Sentencing Memorandum, Tanner demonstrates that the mandatory minimum custodial sentence of Montana’s felony DUI laws would significantly harm Tanner’s physical and mental health, devastate his ability to financially support his wife and 2-year-old daughter, and threaten his continuing success with sobriety. Tanner has standing to challenge Montana’s statutory mandatory minimum custodial sentencing laws for felony DUIs.

**III. Montana’s mandatory minimum custodial sentencing for felony DUIs is unconstitutional and the sentence Tanner received violates the Cruel and Unusual Punishment Clause.**

This Court has stated that Montanans have an even “greater [constitutional] protection from cruel and unusual punishment than [solely] the Eighth Amendment.” *Smith v. Dep’t of Corr.*, 2020 Mont. LEXIS 954, 399 Mont. 554, 460 P.3d 405.

The Department of Corrections [DOC] “must ensure that inmates’ basic human needs are being met—food, clothing, shelter, medical care, and reasonable safety.” *Wilson v. State*, 2010 MT 278, ¶ 28, 358 Mont.

438, 249 P.3d 28. The DOC, acting on behalf of the State, must not deprive anyone in its custody of “the minimal civilized measure of life’s necessities” and must not act “with deliberate indifference to the inmate’s health and safety.” *Id.* ¶ 30. This standard applies to mental health care, and the DOC may not “inflict a serious mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity.” *Id.* ¶ 32.

Due to Tanner’s brain injury and other physical and mental health conditions, his treating physician specified that taking Tanner out of the community “would be detrimental” to his progress and “he would likely regress in his conditions.” [Doc. 36, Ex. C.] In addition to Dr. Johnson’s statement that in-custody time would be “detrimental” to Tanner, his Licensed Addiction Counselor and his Mental Health Therapist both provided treatment plans that excluded in-custody time. Placing Tanner in a custodial situation that would be detrimental and cause him to regress is a violation of Tanner’s constitutional rights. The District Court did not consider this when it sentenced Tanner to 13 months with the DOC. Indeed, the Court was not permitted to consider these facts pursuant to Montana’s statutory minimal custodial

sentencing for felony DUIs.

This Court found in *Gibbons* that mandatory minimum penalties are impermissible because they prohibit judges from exercising sentencing discretion and prohibit judges from considering “whether a defendant will be able to pay for necessities, adequately feed and take care of children and other family obligations” among other factors. Just as the mandatory minimum fine requirement removes judicial discretion, so too does the mandatory minimum custodial sentencing for felony DUIs. The statute is unconstitutional, and this Court should find that the mandatory minimum sentencing provisions of Mont. Code Ann. § 61-8-1008 are contrary to Montana law, and this case should be remanded for re-sentencing.

## CONCLUSION

For the foregoing reasons, this Court should reject the State’s attempts to have this case decided on anything other than the merits. Further, the Court should find that the mandatory minimum sentencing provisions of Mont. Code Ann. § 61-8-1008 are contrary to Montana law. This Court should reverse and vacate the sentence imposed in Tanner’s judgment and remand for a new sentencing

hearing in which the District Court makes a proportionality and ability to pay analysis of both the financial and human costs related to any in-custody time imposed.

DATED this 24th day of February, 2025.

A&M LAW  
By: /s/ Misty D. Gaubatz  
Misty D. Gaubatz  
Counsel for Appellant

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Mont. R. App. P. 11 (4)(d), I certify that this Appellant's Brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points and is double-spaced. The word count calculated by Microsoft Word is 1419, exclusive of the tables of contents and authorities and the certificates of compliance and service.

## CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 24th day of February, 2025, a true and correct copy of the foregoing was served upon the following via Montana's e filing system:

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          /s/ Misty D. Gaubatz

# **EXHIBIT A**



Misty Gaubatz <misty@mymontanalawyer.com>

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**Fwd: [EXTERNAL] Tanner Alford, DC23-65**

1 message

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**Misty Gaubatz** <misty@judnichlaw.com>  
To: "misty@mymontanalawyer.com" <misty@mymontanalawyer.com>

Sat, Apr 27, 2024 at 9:15 PM

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----- Forwarded message -----

From: **Sean Peterson** <speterson@rc.mt.gov>  
Date: Wed, Apr 3, 2024 at 2:15 PM  
Subject: RE: [EXTERNAL] Tanner Alford, DC23-65  
To: Misty Gaubatz <misty@judnichlaw.com>

Ok thanks! I'm assuming that has to do with fines? If so I have no issue with that deviation. Not that I'd have much choice in the matter.

Thanks

Sean

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**From:** Misty Gaubatz <misty@judnichlaw.com>  
**Sent:** Wednesday, April 3, 2024 2:05 PM  
**To:** Sean Peterson <speterson@rc.mt.gov>  
**Subject:** [EXTERNAL] Tanner Alford, DC23-65

Hi Sean,

I just want to give you a head's up that I need to argue for a sentence outside of the plea agreement in this case in light of the recent *Gibbons* decision. I'll try to get a sentencing memo filed soon. Thanks, Sean.

Misty

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## CERTIFICATE OF SERVICE

I, Misty D. Gaubatz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 02-24-2025:

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Dated: 02-24-2025