IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0379

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CLAYTON LEE WELLKNOWN,

Defendant and Appellant.

# BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court, Yellowstone County, the Honorable Donald L. Harris, Presiding

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# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Rules**



**Constitutional Authorities**

Montana Constitution

United States Constitution



**Other Authorities**

## STATEMENT OF THE ISSUES

1. Did the district court violate the equal protection clauses when it allowed the State to peremptorily strike the only minority member of the venire?

2. Did the prosecutor's improper comments during his closing argument undermine Clayton's right to a fair trial?

3. Did the court err when it relied on an unconstitutional prior conviction to support an enhanced felony punishment?

## STATEMENT OF THE CASE

Appellant Clayton Wellknown was charged with alternative felony counts of Driving a Motor Vehicle Under the Influence of Alcohol or Drugs in violation of Mont. Code Ann. § 61-8-401 (2017) (DUI), and Operation of a Noncommercial Vehicle by Person with Alcohol Concentration of 0.08 or More, in violation of Mont. Code Ann. § 61-8-406 (2017) (DUI *per se*) (D.C. Doc. 35.) Clayton entered not guilty pleas. (D.C. Doc. 36.)

A jury trial commenced on February 5, 2020. The next day, an all-white jury found Clayton, a Native American man, guilty of DUI after the State exercised a peremptory strike to remove the only minority member of the venire—another Native American man—and the prosecutor made statements diluting the State's burden of proof,

implying Clayton bore the burden to prove his innocence and declaring his guilt.

Prior to sentencing, Clayton argued he should be sentenced for misdemeanor DUI only because one of his predicate convictions had been obtained in violation of his rights to a jury trial and to be present. (D.C. Doc. 53.) The district court disagreed and committed Clayton to the custody of the Department of Corrections for 84 months with 60 months suspended. (D.C. Doc. 69.) Clayton timely appealed. (D.C. Doc. 71.)

## STATEMENT OF THE FACTS

### I. Jury Selection

The only minority member of the venire was a Native American male named Shan Birdinground. Birdinground, like the other potential jurors, swore under oath to tell the truth. (2/5 Tr. at 10:7-13.)

During voir dire, the prosecutor recognized several members of the panel and asked those individuals if that relationship would affect their ability to be impartial. (2/5 Tr. at 14-18.) The prosecutor did not ask Birdinground if he knew her or her co-counsel or anyone else in the County Attorney's Office.

Regarding law enforcement, the prosecutor asked:

> Does anyone here think that law enforcement should not be trusted just in general based on any personal experience?

(2/5 Tr. at 26:15-17.) Birdinground did not answer affirmatively. The prosecutor asked:

> Would anyone not be willing to look at the evidence presented to determine if we have proven beyond a reasonable doubt that the Defendant was driving under the influence or would they expect more to be done?

(2/5 Tr. at 45:23-46:3.) Again, Birdinground did not answer.

Wrapping up, the State asked:

> I want one more time, if the State proves each element of DUI, will each of you agree to find the Defendant guilty if we prove beyond a reasonable doubt?

(Tr. 2/5 at 49:19-22.) Again, Birdinground did not answer affirmatively. The State then passed the jury for cause without directly asking Birdinground any questions. (2/5 Tr. at 50:1.)

Clayton's counsel addressed Birdinground:

> Mr. Birdinground, I haven't heard from you. How do innocent people get convicted?
>
> A Pretty much everything she said. Evidence, stuff like that.
>
> Q How does evidence convict an innocent person?

A Well, you know it is kind of a tough question.

Q It is.

A I really don't know what to say about that.

Q Do you want me to come back to you?

A Sure.

(2/5 Tr. at 54:9-19.) Defense later came back to Birdinground:

> Mr. Birdinground, I'm going to start with you. Are you ready?
>
> A Yes.
>
> Q Okay. This is a new question. I promise. What is beyond a reasonable doubt?
>
> A I'm not sure what that is.
>
> Q Right. We don't know either so we always ask you guys. But we have instructions but we don't have numbers. It is a really heard concept, right?
>
> A Yes.
>
> Q What are you thinking when you hear beyond a reasonable doubt?
>
> A What is it exactly?
>
> Q Fair point.

(2/5 Tr. at 72:1-14.) Defense also asked other potential jurors about the beyond a reasonable doubt standard and the seriousness of standing in

another's judgment. (2/5 Tr. at 72-82.) Some members said they would need to be 100 percent sure to convict. (2/5 Tr. at 72-82.) Defense returned to Birdinground:

> Mr. Birdinground, what do you think about all that? Has that cleared some things up for you?
>
> A I would have to be 100 percent sure to, you know, 'cause I guess that if you are not 100 percent sure, that is how innocent people get convicted.

(2/5 Tr. at 79:25-80:4.)

After defense passed the jury for cause, the State used a peremptory strike on Birdinground. Defense objected, explaining "[h]e is the only minority on this jury panel." (2/5 Tr. at 92:8.) The court asked the prosecution to explain the reasons for the peremptory strike. A different deputy than the one who conducted voir dire responded:

> MR. MORRIS: Your Honor, Mr. Birdinground was the victim in DC 18-0336. He was stabbed multiple times by his partner, Sarah Deporto. He refused to cooperate. He would never return our phone calls and was hostile to our office. Because of that, we believe he would be a partial juror towards the State because he was so hostile to us when he was a victim a year and a half ago. We ended up amending that charge from assault with a weapon to criminal endangerment because of his lack of cooperation.

(2/5 Tr. at 92:13-20.) The court immediately overruled Clayton's objection. (2/5 Tr. at 92:24-25.) The prosecutor later interjected, "Judge, if I could add a second part. He also said he would need to—someone to be 100 percent before he would ever convict, which is not the standard." (2/5 Tr. at 93:1-4.) The following exchange occurred:

> MS WEIR: Also, just to clarify the record, your Honor, there were several jurors that made the same comment 100 percent. The State haven't exercised their peremptory on them at this point.
>
> THE COURT: We haven't gotten there yet. They still have some peremptories, right?
>
> MS WEIR: For the purpose of perfecting the record.

(2/5 Tr. at 92:5-92:11.) The court never revisited the topic.

II. Trial Testimony

After Clayton picked up a friend from work, a black SUV started following him. (2/6 Tr. at 59-60). He started to panic. (2/6 Tr. at 61:3.) The black SUV was tailing him so closely Clayton thought it was going to hit him. (2/6 Tr. at 61:14-16.) Clayton believed the driver might have been someone who threatened him earlier because Clayton spent time with the man's girlfriend. (2/6 Tr. at 76.) The SUV came around and

pulled in front of Clayton, causing Clayton to lose control and hit the curb. (2/6 Tr. at 61:16-62:4.)

Clayton's passenger was scared as well and asked Clayton to let her out. (2/6 Tr. at 62:25-63:1.) He slowed down, but she jumped out of the vehicle before he could fully stop. (2/6 Tr. at 63:8-10.) Clayton then parked on the street and grabbed his hat, anxiety medication, and a liquor bottle. (2/6 Tr. at 63:15-65:2.) His mind started racing. (2/6 Tr. at 65:20-21.) He went inside a nearby hotel. (2/6 Tr. at 66.) When inside, he panicked and took some shots straight out of the liquor bottle. (2/6 Tr. at 66-67.) When the police arrived, Clayton shut down because of his anxiety and was arrested. (2/6 Tr. at 68, 86-90.)

Brianne Fandek believed she witnessed two cars racing and driving recklessly. (2/5 Tr. at 145, 157.) The silver car, driven by Clayton, overcorrected and hit the curb. (2/5 Tr. at 145:11-12.) Ryan Snyder followed Clayton until Clayton parked and went inside the hotel because he believed Clayton was racing and driving recklessly. (2/5 Tr. at 115-120.) When Clayton entered the hotel, Ryan "pulled into where you would valet your car" at the hotel. (2/5/20 Tr. 120:9-10.)

The forensic toxicologist from the state crime lab who analyzed Clayton's blood sample testified his ethanol level was .185. (2/5 Tr. at 29:5.) A nurse took the sample from Clayton approximately 90 minutes after his arrest. (2/5 Tr. at 166:19 and State's Ex. 15.)

III. Closing Arguments

During closings, the prosecutor made the following comments about how Clayton could have proven his innocence:

> "Keeping in mind he was given every opportunity to perform field sobriety maneuvers to communicate with those officers to show that he is not [intoxicated]."

(2/6 Tr. at 109:7-10.)

> "He chose not to do those. He chose not to show the officers that he was not under the influence."

(2/6 Tr. at 109:15-16.)

The prosecutor also gave the following personal opinions about the credibility of its witnesses:

> "Let's start with Ryan Snyder. Doesn't know any of these people. Got drug out of work literally to come here and test[ify]. No bias. No motive. And no prejudice of any kind. The same with Brianna Fandek, no motive, no bias, no prejudice. The officers they have no interest in the case. The nurse that drew the blood, no interest in the case. Doug Lancon, the toxicologist, no interest."

(2/6 Tr. at 111:9-17.)

Additionally, while explaining the alternate charges on the verdict form, the prosecutor told the jury that Clayton was guilty:

> "It is very clearly telling you can enter guilt on one of them. And that['s] what he is."

(2/6 Tr. at 112:14-16.)

During rebuttal closing, the prosecutor argued about the beyond a reasonable doubt standard:

> "What big decisions have you made in your life? Depending on where you are in life, if you are 19 years old, it is possible which college to go to. That is a pretty big decision. If you are a little older, might be to get married. Who are you going to settle down with? Little older, it could be kids, jobs. Major decisions. All of you have made those decisions and you typically make them every year. This is not pulling off life support. It is the most important of your affairs. What are the important things in your life? What decisions have you made? That's what you look at."

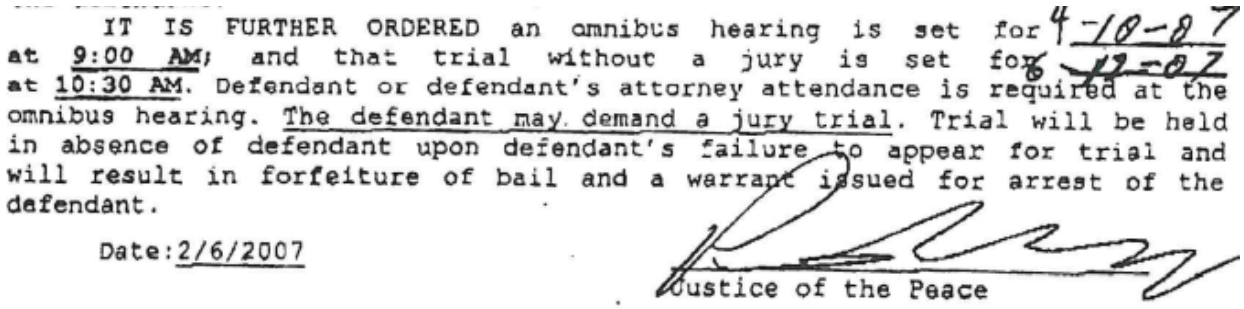
(2/6 Tr. at 123:19-124:5.)

## IV. Sentencing

Prior to sentencing, Clayton filed a motion challenging the constitutionality of his 2007 DUI conviction from Yellowstone County Justice Court. Clayton argued the conviction in absentia by bench trial violated his rights to a jury trial and to be present at trial. (D.C. Doc. 53 at 7-8); (4/27 Tr. at 17:10-11; 19:7-15.)

At the hearing, Clayton testified that he remembered being arrested in 2007 and going to jail. (4/27 Tr. at 5:12-14.) He remembered appearing for a court hearing by video that lasted a couple of minutes. (4/27 Tr. at 14:3-4.) He explained he was likely still intoxicated during the hearing. (4/27 Tr. at 10:27.) When the jail released him, he was not given any papers. (4/27 Tr. at 6:14-16, 25-26.) He did not know who his attorney was. (4/27 Tr. at 6:27-7:1.) He did not know his next court date. (4/27 Tr. at 7:2-3.) His address was updated with the court, but he did not receive any mail. (4/27 Tr. at 8:2-17.) After being released, he went to fight fires for the Crow BIA Forestry. (4/27 Tr. at 7:4-7.)

Clayton's driving record and the 2007 justice court documents were admitted into evidence. (State's Ex. 3, admitted at Tr. at 9:4.) The documents included the release order, which contained the following:



IT IS FURTHER ORDERED an omnibus hearing is set for 4-10-07 at 9:00 AM; and that trial without a jury is set for 4-17-07 at 10:30 AM. Defendant or defendant's attorney attendance is required at the omnibus hearing. The defendant may demand a jury trial. Trial will be held in absence of defendant upon defendant's failure to appear for trial and will result in forfeiture of bail and a warrant issued for arrest of the defendant.

Date: 2/6/2007

Justice of the Peace

That is, the justice court automatically set Clayton's case for a bench trial, not a jury trial. The justice court handwrote the bench trial date on the form, which appears to be either June 12, 17, or 19. (State's Ex. 3 at 4.) The justice court set an omnibus hearing but did not require Clayton's appearance. (State's Ex. 3 at 4.)

On June 12, the justice court convicted Clayton after a bench trial without Clayton present. (State's Ex. 3 at 7.) The justice court checked a box on the sentencing order form indicating the defendant had knowledge of the trial date and was voluntarily absent. (State's Ex. 3 at 7.) The court issued a sentence the same day. (State's Ex. 3 at 7.)

The State called no witnesses and submitted no affidavits. The court found Clayton provided direct evidence of invalidity. (4/27 Tr. at 25.) However, the court concluded that "at the time of trial Mr. Wellknown was represented by counsel who was authorized to defend him, that trial was held in absence of the defendant, the Defendant had knowledge of the trial date which is also established by the record—of the date and time and is voluntarily absent." (4/27 Tr. at 25:24-26:1.) The court then sentenced Clayton for felony DUI in this case. (D.C. Doc. 69.)

## STANDARDS OF REVIEW

When considering a challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court reviews the application of the law *de novo. State v. Ford*, 2001 MT 230 ¶ 7, 306 Mont. 517, 39 P.3d 108. The Court defers to the trial court's findings of fact unless clearly erroneous. *Ford*, ¶ 7. "[E]rrors in the jury selection process" constitute structural errors requiring automatic reversal. *State v. Van Kirk*, 2001 MT 184, ¶ 39, 306 Mont. 215, 225, 32 P.3d 735, 744. "Structural error is presumptively prejudicial and is not subject to harmless error review..." *Van Kirk*, ¶ 38.

"With respect to questions of constitutional law, this Court's review is plenary, and we examine the district court's interpretation of the law for correctness." *State v. Sedler*, 2020 MT 248, ¶ 5, 401 Mont. 437, 473 P.3d 406. Plain error review is appropriate if the unpreserved error implicates a fundamental constitutional right and "failing to review the alleged error *may* result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process." *State*

*v. Valenzuela*, 2021 MT 244, ¶ 10, 495 P.3d 1061, 1065 (internal citation omitted; emphasis added).

The Court reviews *de novo* allegations of prosecutorial error, including improper comments during closing. *State v. Labbe*, 2012 MT 76, ¶ 11, 364 Mont. 415, 276 P.3d 848. The Court considers closing argument statements in the context of the entire argument. *State v. Cooksey*, 2012 MT 226, ¶ 40, 366 Mont. 346, 356, 286 P.3d 1174, 1182.

The use of a prior conviction to support a sentencing enhancement is a question of law and reviewed *de novo*. *State v. Maine*, 2011 MT 90, ¶ 12, 360 Mont. 182, 187, 255 P.3d 64, 68. The lower court's findings of fact will not be disturbed unless clearly erroneous. *Maine*, ¶ 12. "A trial court's findings are clearly erroneous if they are not supported by substantial evidence, if the court has misapprehended the effect of the evidence, or if our review of the record leaves us with a definite and firm conviction that a mistake has been made." *State v. Weaver*, 2008 MT 86, ¶ 9, 342 Mont. 196, 201, 179 P.3d 534, 537.

## SUMMARY OF THE ARGUMENT

The district court violated Clayton and Birdinground's rights to equal protection of the laws when it allowed the State to strike the only

minority member of the jury panel. The district court overruled Clayton's *Batson* objection without making any findings regarding the genuineness of the prosecutor's alleged race-neutral reason for the strike, and, in any event, the record does not support a finding that the prosecutor's reason was race-neutral or genuine and not purposeful discrimination. This structural error is grounds for reversal.

If this Court decides otherwise, it should construe the dignity clause and the right to a trial by an impartial jury in the Montana Constitution as prohibiting race or ethnicity as a factor in the use of a peremptory strike, whether it is the product of purposeful discrimination or a product of unconscious bias. Where the circumstances surrounding a strike show a reasonable probability that race or ethnicity was a factor in the use of a peremptory challenge, the challenge should be denied. Here, it is more than reasonably probable that Birdinground's race was a factor in the decision to strike him from the jury. This error infected the fairness of the proceedings and requires reversal.

During closing arguments, the prosecutor made multiple improper comments that invaded the province of the jury, watered down the

definition of beyond a reasonable doubt and shifted the burden of proof. These misleading and prejudicial comments undermined Clayton's right to a fair trial. His conviction must be reversed.

Clayton provided direct evidence of irregularity in the process that resulted in his 2007 conviction, and the State failed to prove the conviction was not obtained in violation of his rights to a jury trial and to be present for trial. This Court should reverse and remand for resentencing as a misdemeanor.

## ARGUMENT

### I. The district court violated equal protection principles when it allowed the State to exercise a preemptory challenge to remove the only minority member of the venire.

#### A. The State's strike of Birdinground violated the federal Constitution.

In *Batson v. Kentucky*, 476 U.S. at 86, the Court held "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." "[E]ven a single instance of race discrimination against a prospective juror is impermissible." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2242 (2019).

Denying a person participation in jury service on account of his race also constitutes unlawful discrimination against the excluded juror. *Batson*, 476 U.S. at 87; *see also Powers v. Ohio*, 499 U.S. 400, 415 (1991) (defendants have standing to raise equal protection claims on behalf of excluded jurors). Moreover, "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community" by "undermin[ing] public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87.

The Court adopted a three-prong procedure to determine whether a *Batson* violation has occurred. First, the defendant must make a prima facie case of purposeful discrimination. *Batson*, 476 U.S. at 96. Next, the burden shifts to the State to provide a "neutral explanation related to the particular case to be tried" for the peremptory strike. *Batson*, 476 U.S. at 98. Finally, the trial court must consider "all relevant circumstances" and determine if the defendant established purposeful discrimination. *Batson*, 476 U.S. at 96.

This Court adopted the *Batson* framework for determining whether the State removed a juror in violation of the Equal Protection

Clause. *See State v. Parrish*, 2005 MT 112, 327 Mont. 88, 111 P.3d 671. Under this procedure, "[a] trial court *must* follow a three-prong procedure when determining whether a *Batson* violation has occurred." *Parrish*, ¶ 11 (emphasis added).

"[I]t is imperative that the trial court fully develop a record for review—a record that includes all relevant facts and information relied upon by the trial court to render its decision, as well as a full explanation of the court's rationale." *Ford*, ¶ 18. Because whether a party presents a case of purposeful discrimination is a factual question, this Court has repeatedly admonished trial courts for failing to develop a record for review of a *Batson* challenge. *Ford*, ¶ 18; *Parrish*, ¶ 19; *State v. Barnaby*, 2006 MT 203, ¶ 55, 333 Mont. 220, 235, 142 P.3d 809, 821; *State v. Warren*, 2019 MT 49, ¶ 38, 395 Mont. 15, 32, 439 P.3d 357, 368.

In *Parrish*, the district court overruled the defendant's *Batson* objection without making any findings of fact, simply stating that it believed the State's explanation was "credible." *Parrish*, ¶ 19. Applying a right for the wrong reason analysis, this Court affirmed on the alternative ground that Parrish failed to make a timely objection and

refused to reach the merits of the challenge. This Court explained the district court's omission was "not fatal to our decision" to affirm the conviction only because there was a non-merits-based reason to deny the *Batson* challenge. *Parrish*, ¶ 19. Shortly after, this Court upheld the district court's decision overruling a *Batson* objection despite the court's failure to provide a full explanation of its rationale, but only "because the [trial] court overruled Barnaby's *Batson* objection before our ruling in *Parrish*" and without the benefit of its analysis. *Barnaby*, ¶ 55.

*Parrish* was decided more than 15 years ago. Yet, the district court here repeated the same error from that case, which this Court indicated would be fatal to affirming a conviction involving a timely *Batson* challenge. Clayton made a prima facie showing of racial discrimination by timely objecting to the State's peremptory strike on the only non-white member of the jury panel. The court then properly inquired as to the State's reasons for the strike. The State responded that Birdinground was the victim in a stabbing by his partner a year and a half ago and refused to cooperate with the prosecution. The State indicated Birdinground "was hostile to us," apparently because he

"would never return our phone calls." The prosecutor then stated he "believe[d]" Birdinground would be a partial juror in this DUI case.

The court immediately overruled the objection without finding that the State's given reason was race-neutral, without allowing Clayton to respond to the State's allegedly race-neutral reason, without holding a hearing and without making detailed findings of fact or giving any explanation for its decision. As such, there is nothing for this Court to review. Under *Parrish* and *Barnaby*, this failure is "fatal" and ends the inquiry. This Court should reverse Clayton's conviction because the jury selection process was tainted and Clayton's conviction was obtained in violation of his and Birdinground's rights to equal protection of the laws and Clayton's right to an impartial jury of his peers.

The State may ask this Court to reach the merits of the *Batson* claim despite the lack of a full record and findings by the trial court. This Court should decline that offer. This Court recently reached the merits of a *Batson* challenge where evidence in the record supported the credibility of the prosecutor's allegedly race-neutral explanation. In *Warren*, the State claimed it struck a minority juror on the allegedly

race-neutral ground that it did not have a chance to question the juror. *State v. Warren*, 2019 MT 49. Because the record showed the State struck other jurors whom it likewise had not questioned, this Court affirmed the denial of Warren's *Batson* objection despite the court's lack of findings and failure to explain its rationale. *Warren*, ¶ 39.

Unlike *Warren*, the record here does not contain evidence supporting the State's alleged race-neutral reason. Nothing in the record substantiates the State's factual statements regarding Birdinground's history with the State, nor the prosecutor's subjective beliefs about Birdinground. Birdinground asserted under oath he could be fair and impartial and convict the defendant if the State proved its case. The State never probed those assertions in any way.

"The purpose of voir dire in a criminal proceeding is to determine the existence of a prospective juror's partiality, that is, his or her bias and prejudice. This enables counsel to intelligently exercise their peremptory challenges." *State v. Herrman*, 2003 MT 149, ¶ 23, 316 Mont. 198, 70 P.3d 738. The State failed to ask Birdinground any questions. It appears the State purposely avoided Birdinground, as it had already made its mind up that he was "hostile" and would therefore

be "partial." In any event, because the State failed to use voir dire to make a record supporting its allegedly race-neutral reason, it was incumbent upon the State to do so after Clayton objected and made a prima facie showing of purposeful discrimination. Unlike in *Warren*, there is simply nothing in the record for this Court to hang its hat on to affirm the district court's decision.

Moreover, the State's subjective description of Birdinground as "hostile" and his belief that he would be partial—without any objective facts to support that assertion beyond his mere failure to return calls—cannot constitute a race-neutral reason for a peremptory strike. Such subjective impressions are often the product of implicit biases that correlate directly with racial and ethnic stereotypes. *See* Berkeley Law Death Penalty Clinic, *Whitewashing the Jury Box* (2020), at 44-52, https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf. While a prosecutor may understand why a white female might not wish to cooperate in the prosecution of her significant other, the same analysis may not be applied to a Native American male based on the prosecutor's own implicit biases and cultural stereotypes.

If the State truly believed Birdinground's experience as a victim in a prior prosecution would render him partial in this DUI case, then the State should have made a record establishing the basis for that belief. Its failure to do so is fatal to affirming Clayton's conviction, which was decided by a jury devoid of any minority members.

Nor can the conviction be saved by the prosecutor's belated reference to Birdinground's statement that he would want to be "100 percent" sure to convict. First, the court overruled Clayton's *Batson* objection before the State offered this alleged reason for the strike and, thus, the court could not and did not rely on this explanation. Second, several jurors made similar comments, including juror Patsy Bentz. During voir dire, Ms. Bentz stated that if the evidence does not "make you feel 100 percent that he's guilty, then there is reasonable doubt." (2/5 Tr. at 82:5-6.)

Yet Ms. Bentz was allowed to sit on the jury. (2/5 Tr. at 95:15.) Additionally, the State used three other peremptory challenges on jurors that did not make the "100 percent" comment. (2/5 Tr. at 93-94.) If Birdinground's statement was a genuine reason for the State's peremptory challenge, then the State should have also used a challenge

on Ms. Bentz. Instead, the State did not use a peremptory challenge to remove that white woman—only the Native American male.

The record here consists of Birdinground, under oath, stating by omission that he could be fair in answer to the prosecutor's questions to the venire as a whole. The State's pre-planned, unsubstantiated claim that the only minority member of the panel would be partial shows pretext. For that reason, racial discrimination tainted jury selection and this Court must reverse.

### B. Alternatively, this Court should conclude the State's removal of Birdinground from the jury violated his and Clayton's right to equal protection and Clayton's right to an impartial jury under the Montana Constitution.

Article II, Section 4, of the Montana Constitution provides: "The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws." This section embodies "a fundamental principle of fairness: that the law must treat similarly-situated individuals in a similar manner." *Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶¶ 15, 325 Mont. 148, 104 P.3d 445, quoting *McDermott v. Montana Dept. of Corrections*, 2001 MT 134, ¶ 30, 305 Mont. 462, 29 P.3d 992.

Montana's Constitution provides even more individual protection than the Equal Protection Clause of the United States Constitution. *Cottrill v. Cottrill Sodding Serv.*, 229 Mont. 40, 42, 744 P.2d 895, 897 (1987). In addition, the Montana Constitution also guarantees defendants the right to a "speedy public trial by an impartial jury…" Mont. Const. art. II, § 24.

Peremptory challenges are a facially neutral mechanism that have historically been used to eliminate minority jurors from juries. In his concurring opinion in *Batson*, Justice Marshall warned that *Batson's* three-step procedure would fail to end racially discriminatory peremptory strikes. He anticipated that prosecutors would be able to produce "race-neutral" explanations and judges would be ill-equipped to second-guess those reasons. [1] *Batson*, 476 U.S. at 106. Justice Marshall doubted *Batson's* efficacy because it did nothing to curb strikes motived

[1] For example, a nearly all-white jury was chosen to sit in the current trial of three white men accused of chasing down and killing Ahmaud Arbery in Georgia. Although prosecutors objected the defense's use of eight peremptory challenges on Black jurors and Judge Timothy R. Walmsley said that there appeared to be "intentional discrimination," the judge felt that his hands were tied because defense attorneys were able to give race-neutral explanations for the challenges. https://www.npr.org/2021/11/03/1052107690/jury-mostly-white-ahmaud-arbery-georgia (accessed 11/4/21).

by unconscious racism, such as implicit bias or institutional bias.[2] *Batson*, 476 U.S. at 106.

"Ultimately, Justice Marshall's two concerns proved prescient," and "*Batson* has overwhelmingly been criticized as failing to prevent racial discrimination in jury selection." Annie Sloan, *"What to Do About Batson?": Using A Court Rule to Address Implicit Bias in Jury Selection*, 108 Cal. L. Rev. 233, 239 and n.35 (2020). "There is perhaps no arena of public life or governmental administration where racial discrimination is more widespread, apparent, and seemingly tolerated than in the selection of juries." Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* (2010), at 4, https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf.

In the 35 years since *Batson*, this Court has never found purposeful discrimination under the *Batson* test. Yet, there can be little doubt that racial discrimination exists in the criminal justice system in

[2] While explicit bias is consciously held, "implicit bias refers to…attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner." Cheryl Staats et al., Kirwan Inst. for the Study of Race and Ethnicity, *Implicit Bias* at 62 (2015), http://kirwaninstitute.osu.edu/implicit-bias-training/resources/2015-implicit-bias-review.pdf.

Montana. While Native Americans make up 6.6% of the population in Montana, they represented 18% of those arrested statewide in 2016 and comprised 22% of the jail population. *Bordertown Discrimination in Montana*, Montana Advisory Committee to the United States Commission on Civil Rights (2017), at 3, https://www.usccr.gov/files/pubs/2019/05-29-Bordertown-Discrimination-Montana.pdf. The report focused on Yellowstone County, where Clayton's trial was held. In 2015, Native Americans made up 4.4% of the population, but represented 23% of those arrested and comprised 31% of the jail population in Yellowstone County. *Id*. These discrepancies cannot be justified based on race-neutral reasons alone.

Numerous courts, legislatures, and commentators have concluded the problem lies with *Batson*'s framework itself: because *Batson* focuses on purposeful, intentional, conscious discrimination, it has failed to stop implicit or institutional forms of racial discrimination during jury selection. *See, e.g.*, Sloan at n.35. The Washington Supreme Court adopted a rule of court that modified *Batson's* purposeful discrimination requirement. Wa. R. Gen. 37. The rule requires the trial judge to

determine if race or ethnicity was "a factor" in the use of a peremptory challenges, and requires the judge to consider "implicit, institutional, and unconscious biases, in addition to purposeful discrimination" when making this decision. Wa. R. Gen. 37(f). The rule also provides a list of factors the court should consider:

> (i) the number and types of Questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to Question the prospective juror about the alleged concern or the types of Questions asked about it;
>
> (ii) whether the party exercising the peremptory challenge asked significantly more Questions or different Questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;
>
> (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;
>
> (iv) whether a reason might be disproportionately associated with a race or ethnicity; and
>
> (v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

Wa. R. Gen. 37(g).

In addition, the Washington Supreme Court identified reasons that are presumptively invalid because they have historically been associated with unlawful discrimination:

> (i) having prior contact with law enforcement officers;
>
> (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
>
> (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;
>
> (iv) living in a high-crime neighborhood;
>
> (v) having a child outside of marriage;
>
> (vi) receiving state benefits; and
>
> (vii) not being a native English speaker.

Wa. R. Gen. 37(h).

Other jurisdictions have modified *Batson* as well. The New Jersey Supreme Court changed *Batson's* third step to preclude a peremptory challenged based on unintentional bias. *State v. Andujar*, 254 A.3d 606, 623, 247 N.J. 275, 303 (2021). California eliminated the first step of the *Batson* procedure and put the burden on the court to determine if there is a "substantial likelihood" that bias played a role in the challenge. Cal. Civ. Proc. Code Ann. § 231.7. The Arizona Supreme Court recently

amended the rules of criminal and civil procedure, eliminating peremptory challenges in criminal and civil trials altogether. *In the Matter of Rules 18.4 and 18.5, Rules of Criminal Procedure and Rule 47(e), of the Arizona Rules of Criminal Procedure*, No. R-21-0020 (filed 8/30/2021). *See* https://www.azcourts.gov/Portals/20/2021%20Rules/R-21-0020%20Final%20Rules%20Order.pdf?ver=2021-08-31-105653-157.

This Court should construe the Montana Constitution's heightened protections against unlawful discrimination as requiring the trial court to deny a State peremptory challenge where the court cannot be confident that unlawful discrimination has not occurred, *i.e.*, where the record indicates there is a reasonable probability that the juror's inclusion in a protected class was a factor in the State's decision to exercise the challenge. In doing so, this Court should instruct trial courts to explicitly consider both intentional and unintentional bias, including implicit bias and institutional bias.

When making this determination, courts should be instructed to consider factors similar to those in Washington: the number of types of questions posed to the juror, which includes consideration of whether the party failed to question the juror about the alleged concern or the

types of questions asked about it; whether the party exercising the strike singled out the juror by asking significantly more or different questions in contrast to other jurors, including question that would manipulate the juror into providing answers that would tend to disqualify from service; whether other jurors provided similar answers but were not subject of a peremptory strike by that party; whether a reason might be disproportionately associated with a race or ethnicity; and whether there is a pattern of the party using peremptory strikes in the present case or past cases.

Additionally, reasons that have been historically associated with improper discrimination or that have a disparate impact on minorities, such as expressing a distrust of law enforcement or the criminal justice system, having prior contact with law enforcement, or having a close relationship with people who have been arrested or convicted of a crime, should be presumptively invalid. Finally, reasons not supported by the record during voir dire should not be considered.

Here, it is reasonably probable that race was a factor in the State's use of a peremptory challenge on Birdinground. The prosecutor's explanation was not supported by the record in voir dire. To the

contrary, the prosecutor avoided questioning Birdinground about the State's alleged concern or any other matter during jury selection. At the same time, the State singled Birdinground out by using its unilateral research power to investigate him. Researching one juror and then not asking him any questions indicates the State intended to use a peremptory strike on the only minority juror from the beginning.

The State's explanation was also unrelated to the facts of this case. No other jurors were removed for a similar reason. Also, if the State's unsubstantiated claim about Birdinground failing to cooperate with the prosecution in a prior case was true, it merely shows Birdinground harbored some distrust of law enforcement or the criminal justice system. That reason is not race-neutral; instead, that reason has been historically associated with improper discrimination and used as a way to strike minority jurors who often have just cause to believe the system is not fair to people like them. In all, either explicit or implicit bias seeped its way into Clayton's jury selection. Having a pre-planned answer to a *Batson* objection based on information available only to the challenging party is an example of improper racial discrimination. This compromised the integrity of the judicial process

and fundamentally affected the fairness of Clayton's trial. This structural error requires reversal.

## II. The prosecutor's improper comments during his closing argument violated Clayton's right to a fair trial.

Throughout his closing argument, the prosecutor made multiple improper comments that denied Clayton a fair trial by violating his right to be presumed innocent, undermining the State's burden to prove every element beyond a reasonable doubt and invading the province of the jury.

The Montana and federal Constitutions guarantee the right to a fair trial. U.S. Const. amend. VI; Mont. Const. art. II, § 24. "A prosecutor's misconduct may be grounds for reversing a conviction and granting a new trial if the conduct deprives the defendant of a fair and impartial trial." *State v. Hayden*, 2008 MT 274, ¶ 27, 345 Mont. 252, 258, 190 P.3d 1091, 1096.

The Court uses a two-step analysis to determine whether a prosecutor's improper comments require reversal. *State v. Lindberg*, 2008 MT 389, ¶ 25, 347 Mont. 76, 196 P.3d 1252. First, the Court determines whether the prosecutor made improper comments.

*Lindberg*, ¶ 25. Second, the Court determines if the improper comments prejudiced the defendant's right to a fair trial. *Lindberg*, ¶ 25.

### A. The prosecutor's comments that Clayton could have proven his innocence shifted the burden of proof.

"[D]efendants should not have to struggle for the right to be presumed innocent." *State v. Newman*, 2005 MT 348, ¶ 37, 330 Mont. 160, 127 P.3d 374 (J. Nelson, concurring).[3] The Court must guard against any practice that dilutes the presumption of innocence. *In re Winship*, 397 U.S. 358, 361–362, 364 (1970). A prosecutor's comments dilute the presumption by shifting the burden and implying that the defendant should exonerate themselves. *See Newman*, ¶ 29.

Burden shifting can take shape in the form of improper comments during closing argument. *See State v. Stewart*, 2000 MT 379, ¶¶35-36, 303 Mont. 507, 16 P.3d 391. The prosecutor need not explicitly state that the defendant is responsible for establishing his innocence to be improper; the risk that the prosecutor's statements would suggest to the jury to disregard the presumption of innocence is sufficient to find the defendant was denied a fair trial. *Newman*, ¶¶ 32-33.

[3] Four justices ordered reversal but on separate grounds, resulting in two special concurring opinions joined by two justices each. *Newman*, ¶ 2.

For instance, in *State v. Favel*, 2015 MT 336, 381 Mont. 472, 362 P.3d 1126, the prosecutor overstepped the line of commenting on the inference of intoxication by a breath test refusal in § 61-8-404(2), MCA, when he stated the defendant could have proven her innocence by taking a breath test. Although the Court declined to reverse the conviction under the plain error doctrine, the Court agreed that the prosecutor's comments were improper. While a prosecutor may introduce evidence of a defendant's refusal to argue consciousness of guilt, such comments "have the potential to blur the distinction between a defendant's state of mind and the State's burden of proof." *Favel*, ¶ 26.

Here, the prosecutor harped on Clayton's refusal to perform "field sobriety maneuvers" during his closing argument. (2/6 Tr. at 109.) He went beyond commenting on the inference of intoxication and twice asserted that Clayton had the "opportunity" to show the officers that he was not under the influence—an element the State needed to prove. (2/6 Tr. at 109:7-10; 109:15-16.) Further, Clayton admitted to being intoxicated by the time the officers showed up, so the prosecutor's comments distracted the jury from the actual issues. The prosecutor shifted the jury's attention from what the State needed to prove to what

Clayton could have proved. This violated Clayton's right to be presumed innocent and undermined the State's burden to prove every element beyond a reasonable doubt.

### B. The prosecutor misstated the law by giving his own definition of beyond a reasonable doubt.

Although counsel may comment on the burden of proof as it relates to facts presented in trial, it may not misrepresent the law as instructed by the judge.[4] *Stewart*, ¶ 40.

The prosecutor here argued that beyond a reasonable doubt "is not pulling off life support." (2/6 Tr. at 124:2-3.) He stated that terminating someone's life "happens," but it is "rare" and that the instructions do not "say that is the standard. What it says most important of your affairs." (2/6 Tr. at 123:16-18.) He then asked the jury to think of what big decisions they have made in their lives. He gave his own examples of picking what college to go to, getting married, having kids and finding a job. He said these are the "[m]ajor decisions" contemplated in the beyond a reasonable doubt standard. (2/6 Tr. at 123:24-25.)

[4] Clayton notes that the Montana Pattern Instruction on the law of proof beyond a reasonable doubt is currently being challenged before this Court in *Montana v. Wienke*, DA 20-0242 (opening brief filed 9/21/21).

Similar examples, such as "choosing a spouse, a job, a place to live, and the like" have been heavily criticized. *Victor v. Nebraska*, 511 U.S. 1, 24 (1994) (Ginsburg, J., concurring) (quoting Fed. Jud. Ctr. Pattern Crim. Jury Instr. No. 21 (1987)); *see also United States v. Velazquez*, 1 F.4th 1132 (9th Cir. 2021) (court's recitation of reasonable doubt pattern instruction insufficient to overcome multiple statements by the prosecution diluting the standard of reasonable doubt by analogizing it to decisions made in everyday life).

A committee of federal judges reporting to the Judicial Conference of the United States denounced beyond a reasonable doubt formulations containing such examples because they "generally involve a very heavy element of uncertainty and risk-taking" and are therefore "wholly unlike the decisions jurors ought to make in criminal cases." *Victor,* 511 U.S. at 24.

Here, the jury should have relied on the definition of beyond a reasonable doubt given by the court. The prosecutor's argument misled the jury.

### C. The prosecutor's comments encouraging the jury to believe the State's witnesses undermined the jury's role of determining witness credibility.

"It is for the jury, not an attorney trying a case, to determine which witnesses are believable and whose testimony is reliable." *Hayden*, ¶ 32.

"An attorney invades the jury's province and engages in highly improper behavior when an attorney characterizes the defendant or witnesses as liars or offers personal opinions on a witness's credibility." *State v. Racz*, 2007 MT 244, ¶ 36, 339 Mont. 218, 225, 168 P.3d 685, 691. The "Court has been unequivocal in its admonitions to prosecutors to stop improper comments and we have made it clear that we will reverse a case where counsel invades the province of the jury." *State v. Stringer*, 271 Mont. 367, 381, 897 P.2d 1063, 1072 (1995).

Here, the State's case relied on the credibility of its witnesses. Clayton acknowledged he was driving and was intoxicated when the police arrived. The State needed Ryan Snyder to establish that Clayton did not drink anything after he exited the vehicle and before officers arrived. The prosecutor told the jury that Ryan "[d]oesn't know any of these people. Got drug out of work to come here and test[ify]. No bias.

No Motive. No prejudice of any kind." (2/6 Tr. at 111:9-11.) Rather than allowing the jury to decide Ryan's credibility, the State insisted he was. This undermined the jury's role as sole determiners of witness credibility.

### D. The prosecutor improperly told the jury that Clayton was guilty.

The prosecutor asked the jury to find Clayton guilty because "that['s] what he is." (2/6 Tr. at 112:16.) However, "[i]t is true and, indeed, well settled in Montana that closing arguments which reflect a prosecutor's personal opinion as to the guilt of the defendant are improper." *State v. Gladue*, 1999 MT 1, ¶ 21, 293 Mont. 1, 8, 972 P.2d 827, 832. "In addition, we have recognized that the Rules of Professional Ethics prohibit a lawyer from asserting personal opinions as to the credibility of a witness, or the guilt or innocence of the accused." *Stringer*, at 380.

The Court cannot justify the prosecutor telling the jury that Clayton was guilty. He was not commenting on evidence. He invited the jury to adopt his view about guilt instead of letting them evaluate the evidence and exercise their own independent judgment. By doing so, he undermined the jury's authority to decide guilty or innocence.

### E. Looking at the multiple improper comments in the context of his short closing argument, the prosecutor's comments cumulatively prejudiced Clayton's right to a fair trial and undermined confidence in the jury's verdict.

The error here implicates Clayton's constitutional right to a fair trial and the failure to review may leave unsettled the question of the fundamental fairness of the proceedings. Therefore, plain error review is appropriate. *See Valenzuela*, ¶ 10.

Here, the prosecutor did not make just one improper comment during closing but made multiple improper comments about different legal principles. "Repeated improper statements create cumulative prejudice, and we accordingly view them collectively rather than individually." *Anderson v. BNSF Ry.,* 2015 MT 240, ¶ 78, 380 Mont. 319, 346, 354 P.3d 1248, 1268.

Prosecutors have special influence as representatives of the *State v. Newman*, ¶ 31. Jurors believe prosecutors. *State v. Lawrence*, 2016 MT 346, ¶ 18, 386 Mont. 86, 91–92, 385 P.3d 968, 972 ("When the prosecutor told the jury the presumption of innocence no longer existed and his lawyer raised no objection or argument in opposition to that

assertion, the jury could well have concluded that the prosecutor was correct.")

Looking at the comments together, the comments shifted the burden of proof, minimized beyond a reasonable doubt, bolstered witness credibility and declared Clayton's guilt, which invited the jury to adopt the prosecutor's opinions rather than make a decision based solely on the evidence. All of this occurred during a short closing argument. (*See* 2/6 State's Closing Tr. at 106-112; Rebuttal Closing Tr. at 122-125.) Further, there was no admonition or curative instruction given after the prosecutor's comments. Even if the court had admonished the jury, "[j]ury instructions and prosecutorial comments to the jury that it is the jury's duty to evaluate the witnesses' credibility do not cure or erase the State's multiple improper questions to witnesses or comments made in closing arguments." *Montana v. Byrne*, 2021 MT 238, ¶ 32, 405 Mont. 352, 369, 495 P.3d 440, 452.

This amount of misconduct cannot be ignored. The prosecutor's comments violated Clayton's constitutional right to a fair trial. For this reason, this Court should reverse the conviction and remand for a new trial.

## III. The district court erred when it relied upon Clayton's unconstitutional and invalid 2007 DUI conviction to support the felony sentencing enhancement.

The State cannot use a constitutionally infirm conviction to support an enhanced punishment. *Maine*, ¶ 28. "The due process clauses of the United States Constitution and Article II, Section 17, of the Montana Constitution protect a defendant from being sentenced based upon misinformation." *State v. Phillips*, 2007 MT 117, ¶ 17, 337 Mont. 248, 253, 159 P.3d 1078, 1081. "A constitutionally infirm prior conviction used for enhancement purposes constitutes misinformation of constitutional magnitude." *Maine*, ¶ 28 (internal citation omitted). Montana law affords a defendant the opportunity to be heard on the imposition of a sentence enhancement penalty at the sentencing hearing. Mont. Code Ann. §46-18-115(1).

This Court adopted a three-step analysis to determine if a prior conviction is constitutionally firm for sentencing enhancement purposes. *State v. Weldele*, 2003 MT 117, ¶ 16, 315 Mont. 452, 458, 69 P.3d 1162, 1169. First, a rebuttable presumption of regularity attaches to a prior criminal conviction, including prior DUI convictions. *Weldele*,

¶ 16. The presumption includes the assumption that the defendant was properly informed of and waived any constitutional rights at issue. *Weldele*, ¶ 16.

Next, a defendant overcomes the presumption by providing direct or circumstantial evidence of irregularity. *State v. Hass*, 2011 MT 296, ¶ 16, 363 Mont. 8, 13, 265 P.3d 1221, 1226. Once the defendant provides evidence of irregularity, the burden shifts to the State to prove by a preponderance of evidence that the prior conviction was not obtained in violation of the defendant's rights. *Weldele*, ¶ 16.

### A. The justice court violated Clayton's constitutional right to a jury trial when the court set Clayton's case for a bench trial without a waiver or nonappearance.

The Montana Constitution guarantees the right to a jury trial in all criminal prosecutions. Mont. Const. art. II, § 24; Mont. Const. art. II, § 26. The right to a jury trial attaches to a defendant when a criminal case commences. *See* Mont. Const. art. II, § 24 ("In all criminal prosecutions the accused shall have the right to…a speedy public trial by an impartial jury…"). A jury trial may be waived only by nonappearance or consent of the parties. Mont. Const. art. II, § 26.

This Court held that a law that limited a criminal defendant to only one jury trial in either justice court or district court infringed upon the defendant's right to a jury trial. *Woirhaye v. Montana Fourth Jud. Dist. Ct.*, 1998 MT 320, 292 Mont. 185, 972 P.2d 800. After appealing a justice court jury trial verdict to the district court for a trial *de novo*, Woirhaye moved the court to declare the statute was unconstitutional. The Court agreed. The statute acted as a "forced waiver of the right to a jury trial," which violated the "absolute right to a trial by jury" guaranteed by the Montana Constitution. *Woirhaye*, ¶¶ 22, 16.

In the same way, the Yellowstone County Justice Court imposed a forced waiver of Clayton's right to a jury trial. In 2007, the justice court used a stock form to set conditions of release and the omnibus and trial dates. (State's Ex. 3 at 4.) The language on the preprinted form automatically set the case for a bench trial—not a jury trial—at the defendant's initial appearance. Although the form provided that Clayton could "demand" a jury trial, it explicitly required him to take an affirmative step to secure the right guaranteed to him by the federal and state constitutions.

Clayton's right to a jury trial attached to him when he first appeared and heard the charges against him. Unlike a civil case, Montana's constitution guarantees him the right to a jury trial—it is not a right he has to affirmatively assert. *See* Mont. Const. art. II, § 24. That is, a defendant must take an intentional and voluntary action to waive his constitutional right to a jury trial. But here, the justice court's preprinted form presumed Clayton waived his right to a jury trial not through an intentional waiver or forfeiture, but through inaction, and required him to take an affirmative step to secure the right guaranteed to all criminal defendants by the constitution. Neither a nonappearance nor consent of the parties—the only two ways a jury trial can be waived—triggered the waiver. The constitutional right to a jury trial cannot be presumptively waived by the court in this manner. As such, the justice court violated Clayton's constitutional right to a jury trial.

### B. The court violated Clayton's constitutional right to be present at trial when it proceeded with a trial in absentia.

A defendant has a fundamental constitutional right to be present at all stages of a criminal proceeding. *Weaver*, ¶ 16. The Montana Constitution guarantees that "[i]n all criminal prosecutions the accused

shall have the right to appear and defend in person and by counsel…" Mont. Const. art. II, § 24. "Since the right to appear and defend in person is found within Montana's Declaration of Rights, it is a fundamental right." *State v. McCarthy*, 2004 MT 312, ¶ 30, 324 Mont. 1, 10, 101 P.3d 288, 295.

A defendant waives their constitutional right to be present in limited circumstances. "Waiver is defined as the voluntary abandonment of a *known* right." *State v. Tapson*, 2001 MT 292, ¶ 25, 307 Mont. 428, 435, 41 P.3d 305, 310. "This Court will not engage in presumptions of waiver; any waiver of one's constitutional rights must be made specifically, voluntarily, and knowingly." *Tapson*, ¶ 25.

### 1. Montana Code Annotated § 46-16-122 does not adequately safeguard a defendant's right to be present at trial and is unconstitutional as applied to stacking misdemeanors that could result in a felony conviction.

Montana law creates a sliding scale where the seriousness of a crime determines if and when a defendant can waive their presence at trial. *See* Mont. Code Ann. §46-16-122. For example, a felony trial cannot commence without the defendant. Mont. Code Ann. §46-16-122(3). If not a capital offense, a court may proceed after the

commencement of the trial if the defendant was removed for disruptive behavior or became voluntarily absent. Mont. Code Ann. §46-16-122(3)(a).

On the other hand, for a misdemeanor, if the defendant fails to appear in person, the court proceeds with the trial if the defendant's counsel is authorized to act on the defendant's behalf, unless good cause exists for a continuance. Mont. Code Ann. § 46-16-122(1). If the attorney is not authorized by the client to proceed on their behalf, the court may, in its discretion, proceed with the trial after finding that the defendant had knowledge of the trial date and is voluntarily absent. Mont. Code Ann. § 46-16-122(2)(d).

Trials conducted in absentia present ethical issues for defense counsel—especially for attorneys who have not met with their clients. The Montana Rules of Professional Conduct stress the importance of informed consent and the need for communication between attorney and client regarding certain courses of action and the consequences thereof. M.R. Pro. C. 1.4. When a defendant is entirely absent from trial, the attorney cannot follow this rule. For an attorney who has sat

through a docket of trials in absentia, the attorney's testimony from *State v. Hass* is familiar:

> "[B]ecause if you've ever sat through the trial in absentia, the State puts the cop on and he testifies. It's uncontroverted testimony. So the facts are taken. There's nobody—I mean, what's the defense? The guy gets up and says, I pulled him over and I did the test, I did this, I did that. And he didn't have a driver's license, and you sit there and go, Okay. I mean, I've sat through trials in absentia."

*Hass*, ¶ 11.

Presumably, the justification for allowing trial absentia for misdemeanor offenses on less than proof of a knowing, voluntary and intelligent waiver of the right to be present when such proof is required for felony offenses is the less serious consequences associated with misdemeanor convictions. However, this justification fails for a misdemeanor that can stack to support a felony conviction.

The elements of a felony and misdemeanor DUI are the same. Mont. Code Ann. §61-8-401. The number of prior convictions determines if a DUI is a misdemeanor or a felony. Mont. Code Ann. §61-8-722 and §61-8-731. Because the number of priors are a sentencing enhancement and are not an element of the offense, the priors do not have to be proven at trial. *Weldele*, ¶ 37. As such, a case can be charged as a felony

and later sentenced as a misdemeanor. *See State v. Gardipee,* 2004 MT 250, 323 Mont. 59, 98 P.3d 305 (Court found that amendment of information from a misdemeanor to felony PFMA on the morning of trial was an amendment of form that did not violate defendant's substantive rights because the elements of the crime were the same).

Because the elements of a misdemeanor and felony DUI are identical and the classification as a misdemeanor or felony can be determined after trial, a DUI should be treated as a felony offense under §46-16-122, MCA. The Court should not allow this conveyor belt of convictions in absentia to continue for misdemeanors that can later be used to support a felony sentencing enhancement. The statute violates a defendant's right to be present for serious misdemeanors.

### 2. Clayton did not have adequate notice of his trial date.

Even if the Court rejects the above argument, the justice court still lacked the authority to proceed in Clayton's absence under Mont. Code Ann. § 46-16-122, which states that if defendant's attorney is not authorized to act on the defendant's behalf, the court must find that the

defendant had knowledge of the trial date and is voluntarily absent before proceeding with trial.

First, Clayton's attorney did not have the authority to proceed in his absence. Clayton never spoke with his court-appointed attorney in 2007 and therefore could never have authorized him to proceed at trial.

Next, Clayton did not have sufficient knowledge of his trial date. He does not remember being told his trial date when he appeared by video from jail and was intoxicated. He left the jail without any papers. Even if the jail had given Clayton a copy of his signed release conditions, the handwritten bench trial date was unclear. The handwriting could have said the 12th, 17th, or 19th. As it turns out, the bench trial was calendared for the 12th—but each of the other two options occurred after that date. Clayton's address was updated with the justice court, but he never received any further paperwork. While a defendant should keep in touch with their attorney and follow-up on court dates, a defendant's failure to do so is not the standard on which a court can procced to trial without the defendant.

At the bench trial, the justice of the peace checked a box that Clayton knew his trial date and was voluntarily absent, but that was

the only option on the form for the court to check if the defendant failed to appear. And a different justice of the peace presided over the trial than the one at Clayton's first appearance. That justice of the peace would not know if Clayton had been verbally informed or which date he was verbally informed of. Without proper notice, the justice court should not have proceeded without Clayton.

The district court here properly presumed the validity of the 2007 conviction and acknowledged that Clayton provided direct evidence of irregularity through his testimony and the court documents regarding the conviction. The burden shifted to the State to prove that the conviction was valid and did not violate Clayton's rights. The State failed to provide evidence to prove the conviction was validly obtained. The State failed to call any witnesses or submit any affidavits from the parties who were present. The only testimony came from Clayton. In all, the State failed to meet its burden and the district court erred in determining the conviction was valid.

Whether this Court finds that the conviction violated Clayton's right to be present or right to a jury trial or both, the conviction is

constitutionally infirm, and the Court should reverse and remand for resentencing as a misdemeanor.

## CONCLUSION

Clayton's conviction must be reversed because Clayton's right to equal protection of the laws was violated when the court allowed the State to strike the only minority member of the jury panel based on his race. Alternatively, the State's improper comments substantially prejudiced Clayton's right to a fair trial and have undermined confidence in the jury's verdict. As a result, his conviction must be reversed. Even if this Court affirms Clayton's conviction, this case must be remanded for resentencing because one of the requisite predicate offenses for felony sentencing was obtained in violation of his constitutional rights to a jury and to be present at trial.

Respectfully submitted this 8th day of November, 2021.

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By: /s/ Jeavon C. Lang
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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 9,931, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

s/ Jeavon C. Lang
JEAVON C. LANG

# APPENDIX

## CERTIFICATE OF SERVICE

I, Jeavon C. Lang, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 11-08-2021:

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