DA 18-0072

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 266

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BER LEE YANG,

Defendant and Appellant.

APPEAL FROM: District Court of the Seventh Judicial District,
In and For the County of Dawson, Cause No. DC-16-128
Honorable David Cybulski, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Penelope S. Strong, Attorney at Law, Billings, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Katie F. Schulz, Assistant Attorney General, Helena, Montana

Brett Irigoin, Dawson County Attorney, Glendive, Montana

Submitted on Briefs: May 15, 2019

Decided: November 12, 2019

Filed:

Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Ber Lee Yang (Yang) appeals from a criminal sentence imposed by the Montana Seventh Judicial District Court, Dawson County. Yang pleaded guilty to possessing 144 pounds of marijuana, and the District Court fined her $75,600—35% of the drugs' market value—pursuant to § 45-9-130(1), MCA. Yang appeals. We address the following restated and dispositive issue:

> *Is § 45-9-130(1), MCA, which requires a district court to impose a mandatory 35%-market-value fine in drug possession convictions, facially unconstitutional?*

We conclude § 45-9-130(1), MCA, is facially unconstitutional because it mandates imposition of a 35%-market-value fine and does not allow a court to consider—before imposing the fine—the nature of the crime committed, the offender's financial resources, or the nature of the burden the mandatory fine would impose on the offender. We remand this case to the District Court for recalculation of Yang's fine consistent with this Opinion.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In December 2016, a Montana Highway Patrol Trooper stopped a speeding vehicle in which Yang was a passenger. Yang's ex-husband, Cher Thai Yang, was the driver of the vehicle, which was a rental car. Based on his interactions with the Yangs, the Trooper deployed a drug-sniffing dog and the dog made multiple alerts. Law enforcement eventually recovered over 144 pounds of marijuana from the vehicle's rear cargo area and backseat. Yang and her ex-husband were arrested and charged with felony drug offenses.

¶3 Yang was charged with one count of felony criminal possession of dangerous drugs with intent to distribute and one count of misdemeanor criminal possession of drug

paraphernalia. The Information notified Yang that a person convicted of felony criminal possession of dangerous drugs could be imprisoned for not more than twenty years and fined an amount not to exceed $50,000. The Information also cited § 45-9-130, MCA, and stated, "In addition, the Defendant will be required to pay an assessment in the amount of 35% of the market value of the drugs . . . ." The District Court appointed a public defender to represent Yang, as she qualified for public defense assistance as an indigent defendant.

¶4 A jury trial commenced on October 24, 2017, but Yang entered into a plea agreement on October 30, 2017. In the plea agreement, the State and Yang agreed to jointly recommend a five-year sentence with all time suspended. Regarding Yang's fines, the State and Yang agreed to "leave the assessment for 35% of the market value of the drugs seized in this matter" to the District Court's discretion. Yang also agreed to pay all court costs, including the interpreter's fees and other costs.

¶5 As the underlying proceedings were resolved by plea agreement and the District Court made no inquiry of Yang's ability to pay fines and costs, our understanding of the facts relevant to disposition of the restated issue come from averments in Yang's pleadings on appeal and our review of the Presentence Investigative (PSI) report. Yang represents that she is disabled and her only source of income are monthly payments of $721 in Social Security Income and $172 in food stamps. Yang has no formal education, does not speak English, and required a Hmong interpreter throughout these proceedings. Yang represented that she arrived in Sacramento and took a ride with her ex-husband back to

Minnesota. Yang indicated that she did not discover the marijuana in the vehicle until she had already accepted the ride and was in the vehicle.

¶6 The District Court sentenced Yang a few months later. At Yang's sentencing hearing, the court noted that Yang was a non-violent, first-time offender who had a minimal risk of re-offending. The court therefore accepted the parties' suggestion and sentenced Yang to the Montana Department of Corrections for five years, with all time suspended. Regarding Yang's fines, the State represented its position that the drugs' fair market value equaled $250 per ounce, for a total of $576,000. The District Court inquired of Yang's counsel: "I'm going to guess you estimate lower than that?" To which counsel replied, "Yes, Your Honor. . . . Although we are asking the Court to consider not imposing the fee in this case, the value per pound of marijuana at the distribution level ranges between $1,000 to $2,000. Same as everything; if you buy in bulk, it gets less expensive." The District Court noted it was "required" to impose the 35%-market-value fine and determined the drugs' fair market value was $216,000—a value in between the State's and Yang's estimations. Therefore, the court ordered Yang to pay 35% of $216,000, or $75,600. The District Court also ordered Yang to pay various other court costs and $3,830 for interpreter fees.

¶7 We take judicial notice of the Judgment and Order Suspending Sentence in *State v. Cher Thai Yang*, Montana Seventh Judicial District Court, Dawson County, Cause No. DC-16-126. *See* M. R. Evid. 202. Yang's ex-husband, the driver of the rental car, received a $4,000 fine.

STANDARD OF REVIEW

¶8 We review criminal sentences for legality. *State v. Coleman*, 2018 MT 290, ¶ 4, 393 Mont. 375, 431 P.3d 26. We review a claim that a sentence violates a constitutional provision de novo. *State v. Tam Thanh Le*, 2017 MT 82, ¶ 7, 387 Mont. 224, 392 P.3d 607.

DISCUSSION

¶9 Yang appeals the District Court's sentence, arguing that the mandatory requirement that a 35%-market-value fine be imposed in every drug possession conviction—without consideration of an offender's financial resources, the nature of the crime committed, and the nature of the burden the required fine would have on the offender—violates her constitutional right against excessive fines protected by U.S. Const. amend. VIII and Mont. Const. art. II, § 22. Yang did not object to the fine before the District Court. On appeal, her constitutional challenge is both facial and as-applied.

¶10 We differentiate between the types of constitutional challenges that we will address for the first time on appeal. *State v. Parkhill*, 2018 MT 69, ¶ 16, 391 Mont. 114, 414 P.3d 1244 (citing *State v. Robertson*, 2015 MT 266, ¶ 12, 381 Mont. 75, 364 P.3d 580). "[A] claim that a statute authorizing a sentence is unconstitutional on its face may be raised for the first time on appeal, but the exception does not apply to as-applied constitutional challenges." *Parkhill*, ¶ 16.

¶11 A defendant's facial constitutional challenge is based on the defendant's allegation that the *statute* upon which the district court based her sentence is unconstitutional. A defendant's sentence is illegal if she is sentenced pursuant to an unconstitutional statute.

Accordingly, we will address a defendant's facial constitutional challenge to a sentencing statute even if it is raised for the first time on appeal. *Coleman*, ¶ 9 (citing *State v. Strong*, 2009 MT 65, ¶ 12, 349 Mont. 417, 203 P.3d 848; *State v. Ellis*, 2007 MT 210, ¶ 7, 339 Mont. 14, 167 P.3d 896). A defendant's as-applied constitutional challenge is based on the defendant's allegation that her *sentence* is unconstitutional, although imposed pursuant to a constitutional sentencing statute. As long as within statutory parameters of a constitutional sentencing statute, the as-applied challenge is considered objectionable and therefore waived if not first presented to the sentencing court. We, accordingly, will not address a defendant's as-applied constitutional challenge to her sentence for the first time on appeal. *Coleman*, ¶ 9 (citing *Strong*, ¶¶ 13, 15; *State v. Mainwaring*, 2007 MT 14, ¶ 20, 335 Mont. 322, 151 P.3d 53; *State v. Heddings*, 2008 MT 402, ¶ 20, 347 Mont. 169, 198 P.3d 242); *see also Parkhill*, ¶¶ 15-16. For example, in *Ellis*, ¶¶ 7, 10, we addressed a defendant's facial constitutional challenge to a sentencing statute for the first time on appeal, while in *Mainwaring*, ¶ 20, we declined to address a defendant's argument that his sentence itself was unconstitutional for the first time on appeal.

¶12 Yang asserts both as-applied and facial constitutional challenges on appeal. First, she argues an as-applied constitutional challenge—that is, she argues the $75,600 mandatory 35%-market-value fine imposed by the District Court pursuant to § 45-9-130(1), MCA, is an unconstitutionally excessive fine given Yang's financial circumstances (she reports that she only receives $721 a month in social security disability income and $172 a month in food stamps). We conclude Yang waived her as-applied

constitutional challenge to her fine by not raising it before the District Court. *See Coleman*, ¶ 11.

¶13 Next, Yang asserts a facial constitutional challenge, in which she recognizes that the 35%-market-value fine in § 45-9-130(1), MCA, is mandatory—that is, the District Court did not have the opportunity or avenue to consider the nature of the crime Yang committed, Yang's financial resources, or the nature of the burden the imposed fine had on Yang. She therefore concludes that § 45-9-130(1), MCA, unconstitutionally mandated the District Court to impose an excessive fine upon her without considering her ability to pay the fine. As a facial constitutional challenge to a sentencing statute, we may review Yang's challenge to the mandatory 35%-market-value fine contained in § 45-9-130(1), MCA, even though Yang did not raise it before the District Court.

¶14 The party challenging the constitutionality of a statute has the burden of proving beyond a reasonable doubt that it is unconstitutional. *State v. Trull*, 2006 MT 119, ¶ 30, 332 Mont. 233, 136 P.3d 551 (citing *State v. Stanko*, 1998 MT 321, ¶ 16, 292 Mont. 192, 974 P.2d 1132). To meet their burden, the party challenging the statute must show either that "no set of circumstances exists under which the statute would be valid or that the statute lacks a 'plainly legitimate sweep.'" *In re S.M.*, 2017 MT 244, ¶ 10, 389 Mont. 28, 403 P.3d 324 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 1190 (2008)) (internal citations omitted).

¶15 The United States Constitution and the Montana Constitution both protect a defendant's right to be free from excessive fines. U.S. Const. amend. VIII ("Excessive bail

shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); Mont. Const. art. II, § 22 ("Excessive bail shall not be required, or excessive fines imposed, or cruel and unusual punishments inflicted."). The United States Supreme Court recently held that the federal Excessive Fines Clause is applicable against the states through the Fourteenth Amendment's Substantive Due Process Clause. *Timbs v. Indiana*, ___ U.S. ___, 139 S. Ct. 682, 687 (2019); *contra State v. Johnson*, 2018 MT 277, ¶ 25, 393 Mont. 320, 430 P.3d 494. In *Timbs*, the Court held that "the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority," and as such, "[t]his safeguard . . . is 'fundamental to our scheme of ordered liberty,' with 'deep roots in our history and tradition.'" *Timbs*, 139 S. Ct. at 686-87 (quoting *McDonald v. Chicago*, 561 U.S. 742, 767, 130 S. Ct. 3020, 3026 (2010)).

¶16 Federal precedent interpreting the Eighth Amendment establishes that "[t]he touchstone of the constitutional inquiry is the principle of proportionality: The amount of the [fine] must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 334, 118 S. Ct. 2028, 2036 (1998). In applying this standard, "the district courts in the first instance, and the courts of appeals, reviewing the proportionality determination de novo, must compare the amount of the [fine] to the gravity of the offense." *Bajakajian*, 524 U.S. at 336-37, 118 S. Ct. at 2037-38. In assessing proportionality, courts must consider that judgments about appropriate punishment for an offense belong in the first instance to the legislature. *Solem v. Helm*, 463 U.S. 277, 290, 103 S. Ct. 3001, 3009 (1983). Additionally, "any determination

regarding the gravity of a particular criminal offense will be inherently imprecise." *Bajakajian*, 524 U.S. at 336, 118 S. Ct. at 2037.

¶17 In Montana, the Montana legislature has determined the inquiry to be made which guarantees that a fine is not imposed in violation of the Eighth Amendment and Mont. Const. art. II, § 22, both provisions protecting against excessive fines. The 1972 Montana Constitutional Convention delegates adopted the language in Mont. Const. art. II, § 22, verbatim from the 1889 Montana Constitution stating: "It is thought that the section provides the Judiciary and the Legislative [sic] adequate flexibility to apply the principle that there shall not be excessive bail, excessive fines, or cruel and unusual punishments." Montana Constitutional Convention Verbatim Transcript, March 9, 1972, p. 1771. Section 46-18-231(3), MCA, protects against excessive fines by specifying the manner in which fines in felony and misdemeanor cases may be imposed:

> The sentencing judge may not sentence an offender to pay a fine unless the offender is or will be able to pay the fine. In determining the amount and method of payment, the sentencing judge shall take into account the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine will impose.

¶18 In stark contrast, § 45-9-130(1), MCA, sets forth a mandatory 35%-market-value fine in all dangerous drug convictions: "[T]he court shall fine each person found to have possessed or stored dangerous drugs 35% of the market value of the drugs as determined by the court." The statute's "shall" language makes the fine non-discretionary—a court *must* impose the fine upon a person found to have possessed or stored dangerous drugs. Section 45-9-130(1), MCA, removes any ability of the trial court, through its mandatory

nature, of protecting against an excessive fine. Accordingly, it is inconsequential that in *some* situations—following consideration of the nature of the crime committed, the financial resources of the offender, and the nature of the burden of payment of the fine—imposition of the 35%-market-value fine is not excessive. What is consequential, however, and which occurs in *every* case as a result of the mandatory nature of the fine, is the inability of the trial court to even consider whether the fine is excessive. Here, the important distinction is that in *all* situations a trial court is precluded from considering the factors the Montana legislature has expressly mandated be considered when it enacted § 46-18-231(3), MCA, to ensure that fines are not excessive as guaranteed in both the United States Constitution and Montana's Constitution.

¶19 Section 46-18-231(3), MCA, protects an offender's constitutional right to be free from excessive fines by requiring the sentencing judge to consider the circumstances of the particular case before imposing a fine: "In determining the amount and method of payment, the sentencing judge shall take into account the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine will impose." Section 46-18-231(3), MCA. By requiring a sentencing judge to consider the nature of the crime committed, the offender's financial resources, and the nature of the burden that payment of the fine will impose on the offender, § 46-18-231(3), MCA, ensures a fine is not grossly disproportionate to the gravity of the offense and thus protects an offender's right to be free from excessive fines.

¶20 The nexus between constitutional protections under Mont. Const. art. II, § 22 and the sentencing considerations in § 46-18-231(3), MCA, is evidenced by the legislative history of the statutes referencing § 46-18-231, MCA. For example, § 46-18-201, MCA, is entitled "Sentences that may be imposed." The original version of the statute permitted a court's imposition of "a fine as provided by law for the offense" where an offender was found guilty or entered a guilty plea. Section 46-18-201(1)(c), MCA (1978). However, § 46-18-201, MCA, was later amended by the same bill—Senate Bill 14 (SB 14)—which created § 46-18-231, MCA. S. 14, 47th Leg., Reg. Sess. (Mont. 1981). Sections 46-18-201(1)(a) and (1)(b) were amended to include "payment of a fine as provided in [§] 46-18-231" as a reasonable restriction or condition on a deferred or suspended sentence. Section 46-18-201, MCA (1981). The present version of the statute reflects these changes. *See* Section 46-18-201(4), MCA. The language permitting imposition of "a fine as provided by law for the offense" where "a person has been found guilty of an offense upon a verdict of guilty or a plea of guilty or nolo contendere" remains in the statute at § 46-18-201(3)(a)(i), MCA, but assumes new meaning in light of the promulgation of § 46-18-231, MCA. In fact, the language of §§ 46-18-231(1)(a), and (2), MCA, directly mirrors the language of § 46-18-201(3)(a), MCA, with the additional requirement that all fines must be imposed in light of a determination of the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine will impose.

¶21 A reading of § 46-18-201(3)(a), MCA, together with § 46-18-231, MCA, requires the sentencing judge to consider the factors in § 46-18-231(3), MCA, when imposing any fine upon the finding of an offender's guilt. It is evident that the legislature intended the considerations in § 46-18-231(3), MCA, as an express premise for a sentencing judge contemplating imposition of a fine. Any contrary interpretation would render the provision ineffectual or pointless. Through this statutory framework the legislature addressed Montana's constitutional excessive fines clause and directed how fines were to be imposed consistent with this constitutional provision. Section 46-18-231(3), MCA, is a direct product of the legislature employing its "flexibility" in "apply[ing] the principle that there shall not be excessive bail, excessive fines, or cruel and unusual punishments." Montana Constitutional Convention Verbatim Transcript, March 9, 1972, p. 1771. Any assertion that § 46-18-231(3), MCA, entitled "Fines in felony and misdemeanor cases," has little to do with a proper excessive fines inquiry under Mont. Const. art. II, § 22, when § 46-18-231(3), MCA, dictates the manner in which sentencing judges assess fines, ignores the plain language of § 46-18-231(3), MCA, and the obvious nexus the statute has to Mont. Const. art. II, § 22.

¶22 In *State v. Good*, 2004 MT 296, ¶ 25, 323 Mont. 378, 100 P.3d 644 (*overruled on other grounds by Johnson*, ¶ 34), this Court recognized other considerations applied to a constitutional excessive fines inquiry, in addition to considering the relationship between the amount of the fine and the magnitude of the offense. In *Good*, we determined our

application of the test from *Bajakajian* to assess the excessiveness of a punitive fine,[1] "involves different considerations than those on display in *Bajakajian*." *Good*, ¶ 24. While the Court in *Good* examined a restitution award, which has since been categorized as outside the purview of the Excessive Fines Clause, rather than a forfeiture fine as in *Bajakajian*, the Court's excessiveness analysis remains good law.[2] The Court noted that the defendant was "judged financially capable of paying the amount" ordered in the restitution award, so "[t]here [was] nothing 'grossly disproportional' about th[e] obligation." *Good*, ¶ 25. However, the Court stated, "[i]f for some reason . . . [the defendant] was indigent, then [he] might possibly satisfy the *Bajakajian* test."[3] *Good*, ¶ 25.

[1] *Good* was subsequently overruled in *Johnson*, ¶ 34, on the grounds that the Court in *Good* "improperly deduced that because forfeiture constituted a fine in *Bajakajian*, restitution also constituted a fine." *Johnson*, ¶ 31. That was in error, we said in *Johnson*, because "forfeiture and restitution do not share the same inherent purpose." *Johnson*, ¶ 31.

[2] "We now overrule *Good*, as well as cases that rely on *Good* for the principle that restitution in Montana is punitive and a fine per the Excessive Fines Clause." *Johnson*, ¶ 34.

[3] Since *Bajakajian*, lower courts have largely applied the disproportionality analysis which focuses on the relationship of the fine to the magnitude of the offense. However, some federal courts adhere to a disproportionality analysis that incorporates an inquiry regarding a defendant's ability to pay. *See United States v. Jose*, 499 F.3d 105 (1st Cir. 2007); *United States v. Levesque*, 546 F.3d 78 (1st Cir. 2008). Indeed, the Supreme Court in *Bajakajian* did not reach this issue and Justice Thomas's opinion expressly reserved judgment on issues relating to the interface between the Excessive Fines Clause and considerations of livelihood, stating that "respondent does not argue that his wealth or income are relevant to the proportionality determination or that full forfeiture would deprive him of his livelihood . . . and the District Court made no factual findings in this respect." *Bajakajian*, 524 U.S. at 340, n.15. *See generally* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS L.Q. 833-54 (2013) (highlighting the emergence of a circuit split regarding the Eighth Amendment's Excessive Fines Clause in the years since *Bajakajian*).

¶23 Comparatively, § 45-9-130(1), MCA, mandates a sentencing judge to fine an offender 35% of the drugs' fair market value, thus not permitting the judge to take any additional circumstances into account when sentencing an offender. Unlike other mandatory fines which are "provided by [the] law for the offense," § 46-18-201(3)(a), MCA, such as the minimum fine of $5,000 and the maximum fine of $10,000 for driving under the influence of alcohol or drugs, § 61-8-731(1)(a)(iii), (b)(ii), MCA, there is no limit on the mandatory 35%-market-value fine. Although it could be disproportionately high in certain situations, there exists no way for a sentencing judge to consider those situations and decrease the amount. Depending on the nature of the crime committed, the offender's financial resources, and the nature of the burden that the fine will impose, a fine of 35% of the drugs' fair market value may very well be excessive under both the Eighth Amendment to the United States Constitution and Article II, Section 22 of the Montana Constitution. Therefore, § 45-9-130(1), MCA, is facially unconstitutional to the extent it requires a sentencing judge to impose a mandatory fine without ever permitting the judge to consider whether the fine is excessive. No set of circumstances exist under which § 45-9-130(1), MCA, is valid—the statute is unconstitutional in all of its applications because it completely prohibits a district court from considering whether the 35%-market-value fine is grossly disproportionate to the offense committed.

¶24 In *Tam Thanh Le*, ¶ 15, this Court held that the Legislature incorporated the concept of proportionality into § 45-9-130(1), MCA, by requiring that the amount of the fine be based on the market value of the dangerous drugs that the offender illegally possessed. We

noted that, the greater the value of the illegally possessed drugs—i.e. the greater the gravity of the offense—the greater the fine under § 45-9-130(1), MCA. *Tam Thanh Le*, ¶ 15. That still rings true. However, in *Tam Thanh Le*, the fine imposed—$15,000—was well below the maximum $50,000 fine authorized "by law for the offense." *See* §§ 45-9-103(3) and 46-18-201(3)(a), MCA. We now recognize that the mandatory 35%-market-value fine does not allow for the sentencing judge to consider other proportionality factors that are important to a constitutional inquiry under the Eighth Amendment and Montana's Constitution, such as the financial resources of the offender and the nature of the burden that payment of the fine will impose. *See* § 46-18-231(3), MCA. Therefore, we clarify that Article II, Section 22, of the Montana Constitution requires that the sentencing judge be able to consider "the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine will impose" before ordering the offender to pay the 35%-market-value fine contained in § 45-9-130(1), MCA. *See* § 46-18-231(3), MCA.

¶25 In this case, the District Court imposed the mandatory 35%-market-value fine under § 45-9-130(1), MCA. The court did not consider the nature of the crime Yang committed, Yang's financial resources, or the nature of the burden the imposed fine would have on Yang. Thus, we remand this case to the District Court for recalculation of Yang's fine consistent with this Opinion.

¶26 Yang further asserts on appeal that the District Court committed reversible error when it ordered Yang to pay the interpreter's fees and other court costs without considering

her ability to pay those costs. Yang agreed to pay those costs in her plea agreement. At her sentencing hearing, Yang argued that the District Court should impose a $500 fine instead of the "substantial court costs" because of her "limited income." She did not otherwise object. Recognizing that she agreed to pay those costs in the plea agreement and then did not object to the costs at her sentencing hearing, Yang urges us to exercise plain error review to reverse the District Court's order requiring her to pay.

¶27 Section 46-18-232(1), MCA, provides that a court may require a convicted defendant to pay various costs. The court may not, however, require an offender to pay costs unless the defendant is or will be able to pay them. Section 46-18-232(2), MCA. "In determining the amount and method of payment of costs, the court shall take into account the financial resources of the defendant, the future ability of the defendant to pay costs, and the nature of the burden that payment of costs will impose." Section 46-18-232(2), MCA. Because we already decided to remand this case back to the District Court for recalculation of Yang's fine consistent with this Opinion, we do not find it necessary to address this issue. On remand, the District Court can consider Yang's ability to pay the fines and costs and issue an amended judgment stating its decisions.

CONCLUSION

¶28 Section 45-9-130(1), MCA, is facially unconstitutional to the extent it does not allow the sentencing judge to consider whether the 35%-market-value fine is grossly disproportional to the gravity of the offense. A sentencing judge may not impose the 35%-market-value fine contained in § 45-9-130(1), MCA, without considering the factors

in § 46-18-231(3), MCA, thereby ensuring that the offender's fine is not grossly disproportional to the offense committed and protecting an offender's federal and state constitutional rights to be free from excessive fines. Because the District Court imposed the mandatory 35%-market-value fine under § 45-9-130(1), MCA, without considering the nature of the crime Yang committed, Yang's financial resources, or the nature of the burden the imposed fine would have on Yang, we remand this case to the District Court for recalculation of Yang's fine consistent with this Opinion.

/S/ LAURIE McKINNON

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON

Justice Beth Baker, concurring in part, dissenting in part.

¶29 Like Justice Rice, I would not permit Yang to pursue a facial constitutional challenge on remand because our decision in *Le* resolved that question and demonstrates that § 45-9-130(1), MCA, is not unconstitutional in all of its applications or that it lacks a plainly legitimate sweep. I would invoke plain error review, however, and remand for the District Court to consider Yang's as-applied constitutional challenge.

¶30 The Court observes that a defendant may raise a facial challenge to claim that the statute under which she was sentenced is unconstitutional; she may, in the alternative,

challenge a sentencing statute to claim that it is unconstitutional as applied to her own sentence. Yang claims that the fine imposed against her pursuant to § 45-9-130(1), MCA, constitutes unconstitutionally excessive punishment because it is disproportionate to her offense and far exceeds her ability to pay. She thus argues that application of the statute to her case violates the Excessive Fines Clause. Yang has raised an as-applied challenge. "[W]hether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case[.]" *Bajakajian*, 524 U.S. at 336 n.10, 118 S. Ct. at 2037 n.10.

¶31 Yang acknowledges that she did not raise her excessive fine argument before the sentencing court, and the Court concludes properly that our well-established *Lenihan* exception cannot be used to review the claim for the first time on appeal. Opinion, ¶ 12. But, like other unpreserved claims that we generally will not consider for the first time on appeal, Yang's argument that she was denied a fundamental constitutional right may, in the Court's discretion, be reviewed for plain error.

¶32 "Unpreserved issues alleging violation of a fundamental constitutional right are reviewable under the common law plain error doctrine." *State v. Barrows*, 2018 MT 204, ¶ 8, 392 Mont. 358, 424 P.3d 612 (citing *State v. White*, 2014 MT 335, ¶ 14, 377 Mont. 332, 339 P.3d 1243). "The purpose of the plain error doctrine is to correct an error not objected to at trial that affects the 'fairness, integrity, and public reputation of judicial proceedings.'" *State v. Lawrence*, 2016 MT 346, ¶ 9, 386 Mont. 86, 385 P.3d 968 (quoting *State v. Finley*, 276 Mont. 126, 134, 915 P.2d 208, 213 (1996), *overruled on other grounds*

by State v. Gallagher, 2001 MT 39, ¶ 21, 304 Mont. 215, 19 P.3d 817). When an argument is made for the first time on appeal, "we first determine whether the defendant's fundamental constitutional rights have been implicated." *Lawrence*, ¶ 9. We then consider "whether a failure to review the alleged error might 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." *Lawrence*, ¶ 10 (internal quotations and citations omitted).

¶33 We thus may review the merits of an unpreserved claim for plain error when "the issue is directly constitutional." *Barrows*, ¶ 11 (determining to review the defendant's unpreserved claim that double jeopardy barred his retrial on a dismissed drug charge); *see also Lawrence*, ¶ 12 (proceeding to consider the merits of an unpreserved claim that the prosecutor's argument violated the defendant's fundamental right to the presumption of innocence). "Once the doctrine is invoked, this Court's review is grounded in our 'inherent duty to interpret the constitution and to protect individual rights set forth in the constitution.'" *Lawrence*, ¶ 6 (quoting *Finley*, 276 Mont. at 134, 915 P.2d at 213).

¶34 We did not exercise plain error review in *Coleman* to consider the defendant's unpreserved First Amendment challenge to a probation condition that prohibited him from having a cell phone. We concluded that reviewing the claim in that case would undercut our precedent refusing to consider "a defendant's as-applied constitutional challenge to his sentencing conditions for the first time on appeal." *Coleman*, ¶ 12. In *Strong*, we declined to review for the first time on appeal the defendant's as-applied equal protection challenge

to a sentencing statute. We concluded by observing, "Nothing in [the challenged statute] leaves the [C]ourt with the impression that Strong has received an illegal sentence." *Strong*, ¶ 27. And in *Mainwaring*, refusing to consider a challenge the defendant had failed to raise "at the earliest opportunity," we "decline[d] to invoke the doctrine of plain error to review this issue." *Mainwaring*, ¶ 20. Finally, in *Robertson*, observing that the defendant failed to preserve an as-applied constitutional challenge to a condition of his sentence, we declined to invoke plain-error review because, "[u]nder the facts of this case, Robertson has not established a manifest miscarriage of justice." *Robertson*, ¶ 14. As these cases indicate, *Lenihan*'s limited exception does not foreclose plain-error review of an allegedly unconstitutional sentence in an appropriate case. The plain-error doctrine exists for the very purpose of safeguarding individual rights guaranteed by the constitution when the error affects the fairness and integrity to which a defendant is entitled in the judicial process. *Lawrence*, ¶ 6; *Finley*, 276 Mont. at 134, 915 P.2d at 213.

¶35 The protection against excessive fines, which "guards against abuses of government's punitive or criminal-law-enforcement authority . . . , is 'fundamental to our scheme of ordered liberty,' with 'dee[p] root[s] in [our] history and tradition.'" *Timbs*, 139 S. Ct. at 686-87 (quoting *McDonald v. Chicago*, 561 U.S. 742, 767, 130 S. Ct. 3020, 3036 (2010) (bracketed material in original)). "Exorbitant tolls undermine other constitutional liberties[, and] fines may be employed 'in a measure out of accord with the penal goals of retribution and deterrence,' for 'fines are a source of revenue,' while other forms of punishment 'cost a State money.'" *Timbs*, 139 S. Ct. at 689 (quoting *Harmelin*

v. Michigan, 501 U.S. 957, 979 n.9, 111 S. Ct. 2680, 2693 n.9 (opinion of Scalia, J.)). Yang's appeal plainly raises a claim that implicates her fundamental constitutional rights.

¶36 Without recounting the facts underlying Yang's conviction and sentence (Opinion, ¶¶ 2-7), I have little trouble concluding that, under these unique circumstances, failure to review her constitutional claim "might 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." *Lawrence*, ¶ 10 (internal quotations and citations omitted). I would not undertake an as-applied analysis on Yang's appeal, however, because application of the law regarding excessive fines depends on factual determinations. "[T]he district court[] in the first instance . . . must compare the amount of the [fine] to the gravity of the offense[,]" *Bajakajian*, 524 U.S. at 336-37, 118 S. Ct. at 2037-38.

¶37 In sum, I agree with the Court that Yang is entitled to review of her constitutional claims. But I would limit that review to her as-applied challenge. I would remand for a new sentencing hearing at which the District Court may take evidence and consider whether § 45-9-130(1), MCA, would impose an excessive fine if applied in Yang's circumstances.

/S/ BETH BAKER

Justice Dirk M. Sandefur joins in the concurring and dissenting Opinion of Justice Baker.

/S/ DIRK M. SANDEFUR

Justice Jim Rice, dissenting.

¶38 The Court issues a sweeping declaration that § 45-9-130(1), MCA, "is facially unconstitutional in all of its applications," and strikes down the Legislature's percentage-based fine. Opinion, ¶ 23. Not only does the Court's decision lack foundation in constitutional authority, it is contrary to controlling constitutional authority.

¶39 First, our law's clear governing principle, for facial constitutional challenges under both state and federal constitutions, is that a plaintiff can succeed only by "'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 1190 (2008) (citation omitted); *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131. In *State v. Tam Thanh Le*, 2017 MT 82, ¶ 15, 387 Mont. 224, 392 P.3d 607, we rejected the Defendant's proportionality challenge to § 45-9-130(1), MCA and upheld the statute's constitutionality under the circumstances in which it was there applied. Consequently, it is simply not possible for Yang to establish that there is "no set of circumstances" the statute would be valid, or that it is "unconstitutional in all of its applications." *Montana Cannabis*, ¶ 14. Under our precedent, the inquiry should end there.

¶40 To overcome the obstacle to its decision presented by our holding in *Le*, the Court adopts a sweeping and absolute principle, unsupported by authority, that a sentencing statute that does not "permit[] the judge to consider whether the fine is excessive," Opinion, ¶ 23, is *always* unconstitutional. *See* Opinion, ¶ 23 (§ 45-9-130(1), MCA, "is

unconstitutional in all of its applications because it completely prohibits a district court from considering" proportionality) (emphasis added). Consequently, without saying so, the Court effectively overturns our recent holding in *Le* because its new absolute rule cannot be reconciled with our determination in *Le* that § 45-9-130(1), MCA, was constitutionally applied under the circumstances there. *See* Opinion, ¶ 24 ("We now recognize," after *Le*, that § 45-9-130(1), MCA, does not permit consideration of other proportionality factors).

¶41 Unable to cite any constitutional precedent for an absolute rule, the Court bases its decision on an unavailing, and quizzical, statutory comparison. The Court first holds, incorrectly as discussed below, that a different statute, § 46-18-231(3), MCA, provides for an inquiry that "*guarantees* that a fine is not imposed in violation of the Eighth Amendment and Mont. Const. art. II, § 22." Opinion, ¶ 17 (emphasis added). Despite the fact this statute's validity is not before the Court, there has been no briefing on the question, and the statute was not applied in this case, the Court *sua sponte* declares, not merely that § 46-18-231(3), MCA, is constitutional under the Eighth Amendment, but that it *embodies* the Eighth Amendment such that other statutes must conform to it to also be constitutional. *See* Opinion, ¶¶ 17-19 ("Section 46-18-231(3), MCA, protects an offender's constitutional right to be free from excessive fines. . . ." "In stark contrast, Section 45-9-130(1), MCA, sets forth a mandatory 35%-market-value fine."). The Court celebrates the Legislature's design of § 46-18-231(3), MCA, as "expressly mandating" consideration of proportionality, but condemns the Legislature's design of § 45-9-130(1), MCA, for being

unlike § 46-18-231(3), MCA, without considering that the Legislature likewise "expressly mandated" the different approach under § 45-9-130(1), MCA, to serve a different purpose in certain cases. Opinion, ¶¶ 18-19. This is not appropriate constitutional analysis. These sentencing statutes reflect variant legislative purposes, and the fact they are inconsistent in their individual approaches does not alone provide a legal basis to endorse one and condemn the other.

¶42 Substantively, § 46-18-231(3), MCA, does not embody a guarantee of Eighth Amendment protections. "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some *relationship to the gravity of the offense* that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 334, 118 S. Ct. 2028, 2036 (1998) (emphasis added). A fine violates the Excessive Fines Clause only if "it is *grossly disproportional* to the gravity of a defendant's offense." *Bajakajian*, 524 U.S. at 334, 118 S. Ct. at 2036 (emphasis added). Critically for this case, ". . . Eighth Amendment gross disproportionality analysis *does not require an inquiry into the hardship the sanction may work on the offender*." *United States v. Dubose*, 146 F.3d 1141, 1146 (9th Cir. 1998) (emphasis added). The proportionality test concerns the punishment's relation to the gravity of the offense, not the situation or resources of the offender. Thus, the Court's focus on Yang's situation and resources ("Yang represents that she is disabled and her only source of income are monthly payments of $721 in Social Security Income and $172 in food stamps. Yang has no formal education,

does not speak English, and required a Hmong interpreter throughout these proceedings") is misplaced. Opinion, ¶ 5.

¶43 This is further reflected in the disproportionality test that has evolved since *Bajakajian*. Although the Supreme Court does not require consideration of particular factors, the following have been utilized, which focus on the magnitude of the crime and the fine received, not the defendant's personal situation: "(1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused." *United States v. 100,348.00 in United States Currency*, 354 F.3d 1110, 1122 (9th Cir. 2004) (citing *Bajakajian*, 524 U.S. at 337-40, 118 S. Ct. at 2038-39).[1]

¶44 Further, the Legislature is granted substantial deference to determine the appropriate punishment for an offense, because proportionality of sentence for a particular crime is "inherently imprecise," and the Excessive Fines Clause does not "require strict proportionality." *Bajakajian*, 524 U.S. at 336, 118 S. Ct. at 2037; *Ewing v. California*, 538 U.S. 11, 23, 123 S. Ct. 1179, 1186-87 (2003). The gross disproportionality principle is

[1] The Court adds constitutional history citations to its analysis to demonstrate a "nexus" between constitutional protections and § 46-18-231(3), MCA, but misses the point. Opinion, ¶ 20. Of course, § 46-18-231(3), MCA, and the state and federal constitutions, all address sentencing, and thus clearly share a nexus regarding that area of law. Nonetheless, the statute does not, by itself, embody the constitutional guarantee such that the constitutionality of other statutes can be determined by comparison. That this is not the appropriate constitutional analysis is clear from the authorities cited herein. As explained in the McLean article cited by the Court in Footnote 3, "One area of near-consensus among the lower federal courts has, however, emerged: the large majority of lower courts have appeared to read *Bajakajian* as foreclosing an inquiry into the personal financial or economic characteristics of a defendant for the purposes of an Excessive Fines Clause analysis." Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 846.

intended for the "exceedingly rare" and "extreme" case. *Lockyer v. Andrade*, 538 U.S. 63, 73, 123 S. Ct. 1166, 1173 (2003) (citing *Solem v. Helm*, 463 U.S. 277, 290, 103 S. Ct. 3001, 3009 (1983)).

¶45 Thus, the ability-to-pay inquiry set forth in § 46-18-231(3), MCA, does not itself embody a proper Eighth Amendment inquiry, and "guarantees" nothing in that regard. The Court's declaration that § 45-9-130(1), MCA, is facially invalid—that is, "unconstitutional in all of its applications"—premised upon the statute's inconsistency with the ability-to-pay inquiry provided in § 46-18-231(3), MCA, is without merit. Section 45-9-130(1), MCA, has been enacted for different purposes, and its constitutionality is not dependent upon incorporation of an ability-to-pay inquiry.

¶46 Yang has also made an as-applied constitutional challenge to § 45-9-130(1), MCA. I concur with the Court that this challenge cannot be addressed on appeal. However, if it was to be addressed in future proceedings, Yang would need to demonstrate under the factors, discussed above, that the statute was unconstitutionally applied in her case, resulting in a "grossly disproportionate" sentence. Here, those factors include the following considerations into Yang's crime and possible penalties. Had Yang's crime gone undetected, she would have played a role in the transport and, ultimately, the distribution of 144 pounds of illegal drugs, which would have, in the normal course, affected numerous citizens and caused significant consequences for emergency, public safety, health, and law enforcement agencies. Under Montana's sentencing statutes, Yang's other possible penalties were a maximum sentence of 20 years, including prison, and a fine of up to

$50,000. Section 45-9-103(3), MCA. However, despite the large amount of drugs she was convicted of transporting, she avoided prison time and received a deferred sentence. Then, because of the proportional fine under § 45-9-130(1), MCA, the District Court imposed no other fines on Yang, going lighter than even her counsel's argument for "a fine of only $500." The amount of the proportional fine imposed here was linked to the large value of the drugs seized, and is thus inherently proportional to the gravity of the offense, as we recognized in *Le*. *Le*, ¶ 15. It is worth noting that the mandatory assessment the Supreme Court struck down as unconstitutional in *Bajakajian* totaled $347,144, compared to a $5,000 maximum fine applicable under general sentencing statutes. *Bajakajian*, 524 U.S. at 339-40, 118 S. Ct. at 2038-39. Consequently, Yang would have to establish under these factors that her sentence is the "exceedingly rare," "extreme" case falling outside the Legislature's substantial deference, and prove gross disproportionality.

¶47 "A statute is presumptively constitutional and the party challenging it bears the burden of proving it is unconstitutional beyond a reasonable doubt. . . . The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action." *Duane C. Kohoutek, Inc. v. State*, 2018 MT 123, ¶ 14, 391 Mont. 345, 417 P.3d 1105 (internal citations omitted). For the reasons discussed herein, Yang has not met her burden under the correct standards to demonstrate § 45-9-130(1), MCA, is facially unconstitutional beyond a reasonable doubt.

¶48 I would affirm the sentence without prejudice to Yang seeking postconviction relief.

/S/ JIM RICE

Justice Dirk M. Sandefur joins in the dissenting Opinion of Justice Rice.

/S/ DIRK M. SANDEFUR