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COUNSEL FOR RESPONDENT

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. OP 21-0558

TYREE KILO SELAGE,

Petitioner,

v.

TOM GREEN, Warden,
Dawson County Correctional Facility,
Glendive,

Respondent.

**ATTORNEY GENERAL'S RESPONSE TO PETITION FOR
WRIT OF HABEAS CORPUS**

In compliance with this Court's November 10, 2021, Order to determine whether petitioner is due credit for time served, the Attorney General's Office responds to Tyree Kilo Selage's (Selage's) Petition for a Writ of Habeas Corpus (Petition). Selage challenges the Third Judicial District Court's Judgment and

Order as facially invalid. However, the district court did not credit Selage for his presentence incarceration time because Selage was subject to “incarceration as a result of his conviction in Missoula, Cause Number DC 14-22.” (App. 9.)

The State requests that this Court take judicial notice of the documents in the Appendix and the facts presented pursuant to Mont. R. Evid. 202(b)(6) (Court may take judicial notice of records from any Montana court) and Mont. R. Evid. 201(b)(2) (Court may take judicial notice of facts “not subject to reasonable dispute,” as they are “capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.”).

Selage argues that he was due credit for 210 days served at the Anaconda-Deer Lodge County Detention Center pursuant to Mont. Code Ann. § 46-18-403 and *State v. Hornstein*, 2010 MT 75, 356 Mont. 14, 229 P.3d 1206. (Petition at 2.) The State concedes that Selage is entitled to an additional 16 days of credit for time served (February 28, 2016-March 14, 2016¹). But the rationale of *Hornstein* is not applicable to the balance of his time in custody (3/15/2016 - 9/27/2016). On March 15, 2016, Montana Probation and Parole revoked Selage’s conditional release for his sentence out of the Fourth Judicial District Court, Cause Number

¹ It was a Leap Year in 2016, so this calculation includes February 29, 2016.

DC-14-22, and placed him on a no-bond hold at the Anaconda-Deer Lodge County Detention Center while he awaited disposition of his new felony DUI case.

STATEMENT OF THE CASE

I. Facts of the instant case, DC-16-19, for which Selage requests credit for time served.

On February 28, 2016, Selage was arrested on charges of felony DUI and other traffic offenses. (App. 1 at 3-4.) On February 29, 2016, Selage initially appeared in the Anaconda-Deer Lodge Justice Court. (App. 2.) The justice court set Selage's bail at \$10,000. (App. 3.) The State filed a "Motion for Leave to File an Information and Affidavit in Support" on March 9, 2016. (App. 4) On March 11, 2016, the State filed an Information charging Selage with felony DUI. (App. 5) On March 16, 2016, the district court held Selage's initial appearance and continued the justice court's bail of \$10,000. (App. 6.) Selage did not post bail and remained incarcerated.

Pursuant to a plea agreement with the State, Selage pled guilty to felony DUI. (Apps. 7-9.) On September 27, 2016, the district court committed Selage to the Department of Corrections (DOC) for five years, to run consecutively with his sentence in DC-14-22. (App. 9.) The court did not grant Selage any credit for time served. (*Id.* at 5.) Upon subsequent motions by Selage asking for credit for time

served, the court again declined to award credit, reasoning that “credit for time served does not include time served for an unrelated conviction in Missoula County.” (App. 9 at 5; App. 10.) The court did not analyze or consider when the DOC revoked Selage’s conditional release on his previous sentence in assessing the claim. (*Id.*)

II. Facts involving the sentence Selage was serving, DC-14-22, when he was arrested for the felony DUI in DC-16-19.

At the time of Selage’s arrest for DUI, he was on conditional release for a felony DUI sentence out of the Fourth Judicial District Court, Cause No. DC-14-22. (Apps. 11, 12, 13, 15-19; 20 at 3.) The same day Selage initially appeared in justice court on his new felony DUI charge (DC-16-19), Probation and Parole Officer Roland Smathers issued a “Warrant to Arrest Conditional Release Offender,” which authorized any law enforcement officer to arrest Selage. (App. 13.) Just above the officer’s signature, the warrant advised in bold letters **OFFENDER IS NOT ENTITLED TO BOND.** (*Id.*)

On March 10, 2016, DOC Hearings Officer Stephanie Motil (Officer Motil) emailed Probation and Parole Officer MaryLynne Antonich (Officer Antonich) to schedule Selage’s conditional release revocation hearing for March 15, 2016, at the Anaconda-Deer Lodge County Detention Center. (App. 14.) On March 14, 2016,

Officer Antonich and Selage signed a DOC “Statement of Charges/Notice of Disciplinary Hearing/Rights” and a “Request for Waiver of Witnesses.”

(Apps. 15-16.) The DOC alleged Selage had violated his conditional release by committing a new felony DUI, driving while his license was suspended, and using alcohol. (App. 15.)

On March 15, 2016, the DOC held a disciplinary hearing that resulted in the DOC revoking Selage’s conditional release. (*See* Apps. 12-19.) The DOC sanctioned Selage:

Revoke CR [conditional release] and place at START to be screened for appropriate future placement. Must have current legal issue adjudicated in court and follow any court ordered conditions.

(Apps. 17, 19.) Selage declined to appeal Officer Motil’s decision. (App. 18.)

On March 23, 2016, the DOC issued a “Notification and Placement Warrant” authorizing the Anaconda-Deer Lodge County Detention Center to transport Selage to the START facility at the earliest possible date. (App. 19.) The DOC updated Selage’s status with DOC from “conditional release” to “alt-secure” to “secure” to correspond to Selage’s arrest and conditional release revocation. (*See* App. 20 at 3.) The DOC explained that the reasons for Selage’s placement at the Anaconda-Deer Lodge Detention Center were that Selage’s conditional release was revoked, and his sanction was to be placed at Sanction Treatment Assessment Revocation

and Transition (START) to be screened for appropriate future placement. (App. 19.) The DOC noted that, before he was sent to START, Selage needed to have his current legal issue (felony DUI) adjudicated. (*Id.*) The DOC transported Selage to the Montana State Prison on October 27, 2016. (App. 12 at 2.)

On November 10, 2021, Selage filed a state habeas petition with this Court, asserting “I am entitled to more credit for jail time served than I received.” (*See* Petition at 1.) Selage argued that the district court should have given him credit for the time period February 2, 2016, to September 27, 2016, for days served in Cause Number DC-16-19. (Petition at 2.) Selage claimed the court erred by declining to credit him for 210 days he served in Anaconda-Deer Lodge County Detention Center. (*Id.* at 2-3.)

STANDARD OF REVIEW AND APPLICABLE LAW

Montana Code Annotated § 46-22-101(1) allows a person who is incarcerated or restrained of liberty to apply for a “writ of habeas corpus to inquire into the cause of imprisonment or restraint and, if illegal, to be delivered from the imprisonment or restraint.” The fundamental purpose of habeas corpus is to remedy “illegal” restraints or imprisonments (*e.g.*, a sentence that exceeds statutory or constitutional limits). *See Lott v. State*, 2006 MT 279, ¶ 22, 334 Mont. 270, 150 P.3d 337.

This Court has concluded that confinement beyond the expiration of a sentence is an unlawful restraint of liberty and, thus, this Court will entertain habeas petitions challenging the proper amount of credit for time served.

Johnston v. Kirkegard, 369 Mont. 540, 310 P.3d 1098 (2013) (citing *Sebastian v. Mahoney*, 2001 MT 88, ¶ 8, 305 Mont. 158, 25 P.3d 163). Moreover, even if it has not been objected to below, this Court has concluded that it may review the issue of credit for time served. *See Campbell-Kelsey v. Mahoney*, 2006 Mont. LEXIS 776, ¶ 3. Selage bears the burden of demonstrating sufficient legal cause to persuade the Court to grant the writ of habeas corpus. *Miller v. Eleventh Judicial Dist. Court*, 2007 MT 58, ¶ 14, 336 Mont. 207, 154 P.3d 1186.

This Court reviews a criminal sentence for legality *de novo* to determine whether the sentence is within statutory parameters. *State v. Seals*, 2007 MT 71, ¶ 7, 336 Mont. 416, 156 P.3d 15.

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ARGUMENT

- I. Selage is not entitled to credit for time served from his arrest for DUI to sentencing (210 days), but is entitled to credit from his arrest for DUI until the DOC formally revoked his conditional release (16 days).**

Montana Code Annotated § 46-18-403(1)², provides:

A person incarcerated on a bailable offense against whom a judgment of imprisonment is rendered must be allowed credit for each day of incarceration prior to or after conviction, except that the time allowed as a credit may not exceed the term of the prison sentence rendered.

As this Court has stated,

the general purpose of § 46-18-403(1), MCA, is to eliminate the disparity of treatment between indigent and nonindigent defendants. In other words, credit for time served is given so as not to penalize indigent defendants who are unable to post bail and must remain in custody until they are sentenced when nonindigent defendants may secure their release and remain free during that time period.

State v. Kime, 2002 MT 38, ¶ 15, 308 Mont. 341, 43 P.3d 290 (*overruled on other grounds by State v. Herman*, 2008 MT 187, 343 Mont. 494, 188 P.3d 978).

However, this Court further explained:

[t]hat purpose is not served by crediting a defendant's sentence for time served where the defendant would not have been released from

² Montana Code Annotated § 46-18-201(9) does not apply to this case because Selage committed his offense on February 28, 2016. The bill enacting § 46-18-201(9) expressly applied only to "offenses committed after June 30, 2017." 2017 Mont. Laws, ch. 321, §§ 24, 44 (H.B. 133, applicability).

custody had he or she been able to post bail in any event as a result of being held on a sentence related to an earlier offense.

Kime, ¶ 15.

In *Kime*, the defendant was serving a sentence for felony assault but had been released from prison to participate in a supervised release program. *Kime*, ¶ 3. Kime was later arrested on new DUI and theft charges. *Id.* Kime pled guilty and was sentenced on the new charges. *Kime*, ¶ 5. Although the district court gave Kime 20 days of credit for time served from his arrest to his transfer to the state prison, it did not give Kime any credit from his transfer to state prison to sentencing. *Id.* This Court affirmed, reasoning that Kime was not entitled to credit from when he was transferred to the state prison to serve his sentence on his prior assault offense until sentencing because that time was “related to his prior felony conviction and not the charges of which he was convicted in the [new] case.”

Kime, ¶ 16.

Unlike *Kime*, here the district court did not grant Selage credit for time served from his arrest to the revocation of his previous sentence. This Court has explained that where a defendant has an existing sentence but has been released to community supervision on that sentence, his pre-trial custody on new charges remains directly related to the new charges until and unless his community

supervision on the prior sentence is formally revoked. *Hornstein*, ¶¶ 16-18.

Whereas in *Hornstein* the DOC only filed a probation violation report while the defendant awaited resolution of his new charges, *Hornstein*, ¶ 17, the DOC formally revoked Selage's conditional release while he was in jail. (*See App. 17.*)

In *Brasda v. Kaululaau*, 398 Mont. 447, 454 P.3d 630 (2019), this Court agreed with the State that the defendant (Brasda) "should receive credit for time served from his arrest until the DOC's revocation of his conditional release."

The facts in *Brasda* are substantially similar to those of the instant matter:

Brasda was arrested for felony driving under the influence of alcohol or drugs (DUI) (4th offense) and other traffic offenses on April 17, 2018. Brasda appeared the next day in the Cascade County District Court, and the District Court set his bond at \$50,000. Brasda did not post bail. When Brasda was arrested, he was on conditional release from an assault with a weapon sentence. Brasda had a disciplinary hearing on May 4, 2018, at the CCDC, concerning Brasda's violations of his conditional release . . . Upon his parole officer's request for secure placement, Brasda was transferred from the CCDC to the Montana State Prison (MSP) on May 7, 2018. Consequently, his conditional release was terminated.

Brasda ultimately pled guilty to the felony DUI and was committed to the DOC "for a three-year term to run concurrently with any other sentences." *Id.*

The district court "did not grant Brasda any credit for time served . . . [and] denied Brasda's post-judgment motions for such credit." *Id.*

On appeal, Brasda requested credit for time served from April 17, 2018, through December 18, 2018, asserting that “he was held on a bailable offense where bail was set at \$50,000.” *Id.* The State countered that Brasda was only entitled to “credit for time served from his arrest until the DOC’s revocation of his conditional release.” *Id.* The State relied on Mont. Code Ann. § 46-18-403(1) and *Kime*, ¶ 15, to explain that Brasda was “not entitled to the other 226 days of credit applying to his DUI offense and sentence because it [was] not directly related.” *Id.*

This Court agreed that Brasda was not entitled to credit for time served after his conditional release was revoked because he would not have been released from custody had he posted bail on the new charges. *Id.* This Court remanded the case to the district court “for the limited purpose of issuing an amended judgment to award Brasda credit of twenty days (from April 17, 2018 to May 7, 2018) for time served.” *Id.*

Like the defendants in *Kime* and *Brasda*, Selage was serving a sentence for a prior conviction when he was arrested for new charges. While Selage was serving that sentence, the DOC formally revoked his custodial release, and he was returned to custodial status with the DOC. (See App. 20 at 3.) This is distinguishable from the defendant in *Hornstein* whose release the DOC did not formally revoke until after he resolved his new charges. Giving Selage credit for his incarcerated time

after his conditional release revocation does not serve the purpose of Mont. Code Ann. § 46-18-403(1) because Selage “would not have been released from custody” had he “been able to post bail in any event as a result of being held on a sentence related to an earlier offense.” *Kime*, ¶ 15. Once his conditional release was revoked, DOC was again the “supervising facility” and had Selage in DOC custody. (App. 20 at 3.) Accordingly, Selage is entitled to 16 days of credit for time served from the date of his arrest for DUI (February 28, 2016) to the date that the DOC formally revoked his conditional release from his previous sentence of felony DUI (March 15, 2016).

CONCLUSION

The State respectfully requests that this Court deny Selage’s request for 210 days credit for time served and instead grant Selage 16 days of credit for time served.

Respectfully submitted this 27th day of December, 2021.

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By: /s/ Bree Gee
BREE GEE
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14 of the Montana Rules of Appellate Procedure, I certify that this response to writ is printed with a proportionately spaced Times New Roman 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 2,498 words, excluding certificate of service, certificate of compliance, and appendices.

/s/ Bree Gee

BREE GEE

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. OP 21-0558

TYREE KILO SELAGE,

Petitioner,

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Dawson County Correctional Facility,
Glendive,

Respondent.

APPENDICES

Notice to Appear and Complaint; 3 citations

February 29, 2016, numbered 16-33658 (A), (B) and (C)App. 1

Initial Appearance: Felony

February 29, 2016; Justice Court.....App. 2

Release Order and Conditions of Bail

February 29, 2016; Justice Court.....App. 3

Doc. 1, State's Motion for Leave to File an Information

March 9, 2016; Anaconda-Deer Lodge County, DC-16-19App. 4

Doc. 3, Information

March 11, 2016; Anaconda-Deer Lodge County, DC-16-19App. 5

Doc. 8, Release Order and Conditions of Release

March 17, 2016; Anaconda-Deer Lodge County, DC-16-19App. 6

Doc. 20, Plea Agreement and Acknowledgment of Waiver of Rights by Plea of Nolo Contendere June 8, 2016; Anaconda-Deer Lodge County, DC-16-19	App. 7
Doc 24, Pre-Sentence Investigation September 16, 2016; Anaconda-Deer Lodge County, DC-16-19	App. 8
Doc. 26, Judgment October 3, 2016; Anaconda-Deer Lodge County, DC-16-19.....	App. 9
Doc. 29 Order and Defendant’s Motion for <i>Amended Judgement</i> August 4, 2021; Anaconda-Deer Lodge County, DC-16-19	App. 10
Doc. 83, Judgment December 24, 2014; Missoula County DC-32-2014-0000022-IN	App. 11
CMIS; Location Terms December 14, 2021	App. 12
Warrant to Arrest Conditional Release Offender February 29, 20216	App. 13
E-mail between Motil-Boysen and Antonich March 10, 2016	App. 14
Statement of Charges/Notice of Disciplinary Hearing/Rights March 14, 2016	App. 15
Request for or Waiver of Witnesses March 14, 2016	App. 16
Summary of Disciplinary Hearing March 23, 2016	App. 17
Disciplinary Hearing Appeal March 15, 2016	App. 18

Notification and Placement Warrant	
March 23, 2016	App. 19
Montana CJIN Criminal History Report	
Current as of December 21, 2021	App. 20

CERTIFICATE OF SERVICE

I, Bree Williamson Gee, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Petition for Writ to the following on 12-27-2021:

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Electronically signed by Wendi Waterman on behalf of Bree Williamson Gee
Dated: 12-27-2021