

No. DA 20-0577

Case Number: DA 20-0577

STATE OF MONTANA,

Plaintiff and Appellee,

v.

RUSSELL KORTAN,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Seventh Judicial District Court,
Dawson County, the Honorable Katherine M. Bidegaray, Presiding

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TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES.....II

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

STANDARD OF REVIEW..... 7

SUMMARY OF THE ARGUMENT..... 8

ARGUMENT 9

**THE DISTRICT COURT SHOULD HAVE AWARDED RUSSEL
ADDITIONAL CREDIT IN THE AMOUNT OF 565 DAYS FOR
TIME SERVED ON HIS SEPARATE, CONCURRENT
SENTENCES..... 9**

CONCLUSION 20

CERTIFICATE OF COMPLIANCE 21

APPENDIX 22

TABLE OF AUTHORITIES

Cases

City of Kalispell v. Salsgiver, 2019 MT 126, 396 Mont. 57, 443 P.3d 504	7, 8
Derrick v. Fletcher, 380 Mont. 543, 403 P.3d (2017)	15, 23
Finerfrock v. Green, 379 Mont. 536, 353 P.3d 506 (2015)	15
Johnston v. Kirkegard, 369 Mont. 540, 310 P.3d 1098 (2013).....	10
Ronemus v. State, 2001 MT 203N	15, 16, 23
State v. Byrd, 2015 MT 20, 378 Mont. 94, 342 P.3d 9.....	17
State v. Himes, 2015 MT 91, 378 Mont. 419, 345 P.3d 297.....	8
State v. Mendoza, 2021 MT 197, 405 Mont. 154, 492 P.3d 509	13, 14, 23
State v. Tracy, 2005 MT 128, 327 Mont. 220, 113 P.3d 297 (superseded by statute).....	11, 12, 13, 14, 15, 19, 20, 21, 23, 24
State v. Youpee, 2018 MT 102, 391 Mont. 246, 4176 P.3d 1050	14, 23

Statutes

Mont. Code Ann. § 45–6–316	2
Mont. Code Ann. § 46–18–203(7)(b)	9
Mont. Code Ann. § 46–18–401(1)(a)	15, 21
Mont. Code Ann. § 46–18–403(1).....	16

Other Authorities

2017 Mt. ALS 391, 2017 MT. Laws 391, 2017 Mt. Ch. 391,
2017 Mt. SB 63 22

2021 Mt. ALS 283, 2021 Mt. Laws 283, 2021 Mt. Ch. 283,
2021 Mt. HB 451 16

STATEMENT OF THE ISSUES

1. Did the District Court issue an illegal sentence in its failure to give Appellant, Russell Kortan, credit for time that he served on sentences that were ordered to run concurrent to his revocation sentence?

STATEMENT OF THE CASE

Russell Kortan was sentenced on April 8, 2008, in Dawson County, Cause No. DC-07-047, to a deferred, five-year, imposition of sentence to the Department of Corrections. On December 19, 2008, Russell had another sentencing hearing for two separate matters, wherein Russell was sentenced to the DOC for a period of five years on each case. The District Court ordered those sentences to run concurrent with each other and concurrent with the deferred imposition of sentence in this case just a few months prior.

On February 28, 2013, the District Court revoked Russell's sentence in this case, and sentenced him to the DOC for a period of eight years, with three suspended. This sentence was ordered to run concurrently with his sentences previously imposed on December 19, 2008, for his two other cases. On September 28, 2020, the District Court

again revoked Russell's sentence in this case and sentenced him to the DOC for a period of three years, none suspended. The District Court did not grant Russell credit towards his DC-07-047 sentence for time that he served on his two separate sentences which ran concurrent to this sentence for the period of December 19, 2008 through July 7, 2010.

The questions presented for this appeal are: (1) whether Russell's three sentences merged for the purposes of calculating time served at the sentencing hearing; and (2) whether Russell was then entitled to receive credit on this sentence for the time that he was incarcerated on his other sentences during the period they ran concurrent to each other.

STATEMENT OF FACTS

Defendant and Appellant Russell Kortan ("Russell") was charged in November of 2007 for the crime of Issuing Bad Checks, a Common Scheme, a felony, in violation of Montana Code Ann. § 45-6-316 in Dawson County, Cause No. DC-07-047. (D.C. Doc. 3). This was a bailable offense, as bail was originally set for \$10,000, but was reduced to \$2,000 upon a motion by the Defendant. (D.C. Doc. 11). At the sentencing hearing held on April 8, 2008, the District Court imposed a

deferred sentence for a period of five years upon the Defendant's compliance with certain terms and conditions. (D.C. Doc. 18).

On December 19, 2008, Russell had another sentencing hearing for two separate matters: Dawson County Cause No. DC-08-027 and Prairie County Cause No. DC-08-04. (D.C. Doc. 50).¹ In each of those matters, the District Court committed Russell to the Department of Corrections (DOC) for a period of five years, with two years suspended. (D.C. Doc. 50). The District Court ordered those sentences to run concurrent with each other and concurrent with the sentence imposed in this case, DC-07-047. (D.C. Doc. 50).

A few years later in 2013, Russell admitted to violating certain conditions of his parole for the DC-07-047 case. (D.C. Doc. 50). The District Court revoked Russell's deferred sentence on February 28, 2013, and sentenced Russell to the DOC for a period of eight years, with three suspended. (D.C. Doc. 40). The District Court ordered this sentence to run concurrently with his sentences in DC-08-027 and DC-

¹ To clarify, these cases are not mentioned to request credit for time served for those cases. Rather, they are to illustrate Russell's incarceration history for purposes of asking for credit for time served in DC-07-047, because he is arguing that all of his sentences merged.

08-04. (D.C. Doc. 40). The District Court did not give Russell credit for any good time served while on probation for his partially suspended sentences in the two other cases toward his sentence imposed in this case. (D.C. Doc. 40).

Russell filed a Motion for Credit for Time Served on February 10, 2017, asking the District Court to award him credit towards his DC-07-047 sentence for time he served at the DOC on his other sentences from December 19, 2008 through July 31, 2011. (D.C. Doc. 45). Russell's commitment to the DOC in the assigned programs and facilities for the time period in question is as follows:

Dec. 19, 2008—Glendive Probation and Parole
Jan. 23, 2009—Dawson County Jail
May 6, 2009—MASC Assessment Program
Sept. 2, 2009—Treasure State Correctional Training Center
Oct. 14, 2009—Great Falls Transition Center
Oct. 22, 2009—Cascade County Jail
Dec. 18, 2009—START Revocation
Jul. 7, 2010—Billings Pre-Release Center
Aug. 25, 2010—Billings Probation and Parole

(D.C. Doc. 46); *See also* (Hr'g. Tr. 12:1–24, Sept. 28, 2020).

In its Order denying Russell's Motion for Credit for Time Served, the District Court reasoned that, because Russell's original sentence was deferred for a period of five years, Russell's sentence did not begin

until February 28, 2013, after the dispositional hearing for his violations was held and that sentence was revoked. (D.C. Doc. 57).

Thus, the District Court explained, the “approximately one year and eight months referred to by the defendant in DC-08-027 and DC-08-04 [did not overlap and] cannot serve as good time and affect the February 28, 2013 sentence in this matter.” (D.C. Doc. 57).

Later, Probation and Parole Officer Melanie Etchemendy filed numerous additional reports of violation of the DC-07-047 sentence on June 2, 2019, August 26, 2019, September 12, 2019, and April 8, 2020, which resulted in a revocation of Russel’s sentence. (D.C. Docs. 52, 70, 75, 98, & 118).

It was undisputed at the September 28, 2020, Sentencing Hearing that Russell “remained in some form of incarceration [from December 19, 2007] through July 7, 2010” for a total of 565 days (Hr’g Tr. 12:1–24; 16:18–25; 17:1–14, Sept. 28, 2020). The State also referred to those days as incarceration days, and did not object either to Russell’s counsel’s assertion or the witness’s assertion that Russell was considered incarcerated:

Regarding the previous [sic] prison days—or incarceration days that, [sic], Mr. Lundvall had mentioned, the Defendant filed a

motion to get credit for those days back in [sic] February 2017. . . . Thus, during the period in question by the defendant, December 19, 2009–July 31, 2011, the defendant had not been sentenced in DC-07-047. And that’s this matter, your Honor. “Since he had not been sentenced in this matter, the . . .” appropriate time that he was asking for cannot be served, or cannot be credited, in this sentence, but was credited to him in DC-08-027 as well as the DC-08-004, which ran concurrently with this matter, your Honor. So, [sic], the jail days, or the incarceration days from that previous time has already been addressed by Judge Simonton, and the Defendant was not given credit for that.”

(Hr’g. Tr. 16:18–25; 17:1–14, Sept. 28, 2020) (emphasis added). Counsel for Russell responded:

The Court was not required to give him credit, but I think it’s important for the Court to have an overall broad view of this case. This is a bad check case, and we’re on year 13 of what should be, and should’ve been, a maximum of a 10-year sentence. Again, it’s a bad check case that originated in 2004. [Sic] And again, by my calculation, he has been incarcerated for over 2,436 days on a bad check case from 2004. [Sic] We need to put this to bed. [Sic] I frankly think that the cleanest way to resolve this would be to simply give him credit for time served and close this docket so he can start anew on his new cases. I just think that there’s been enough done here on this docket and it should be done. So, we’re asking for credit for time served and closing the docket.

(Hr’g Tr. 17:26–25, 18:1–23, Sept. 28, 2020).

At the September 28, 2020 sentencing hearing, the District Court revoked the three-year suspended portion of Russell’s sentence to the DOC imposed at his previous revocation hearing, and sentenced Russell to the DOC for a term of three years. (D.C. Doc. 118). The District

Court credited Russell with 105 days of street time/good time credit and 181 days served in jail prior to sentencing for this case. (D.C. Doc. 118). The District Court denied Russell's request to receive credit for time served on his other, concurrent, cases between December 19, 2008 through July 7, 2010. (D.C. Doc. 118). The District Court did not indicate in her October 6, 2020, Order Revoking Suspended Sentence and Imposing Sentence why she did not award Russell credit for time previously served from December 19, 2008 through July 31, 2010.

Russell filed his Notice of Appeal to this Court on December 2, 2020. (D.C. Doc. 121).

STANDARD OF REVIEW

This Court reviews criminal sentences greater than one year of incarceration for both legality and an abuse of discretion. *City of Kalispell v. Salsgiver*, 2019 MT 126, ¶ 12, 396 Mont. 57, 64, 443 P.3d 504, 509–10. The review for legality “is confined to determining whether ‘the sentencing court had statutory authority to impose the sentence, whether the sentence falls within the parameters set by the applicable sentencing statutes, and whether the court adhered to the affirmative mandates of the applicable sentencing statutes.’” *Salsgiver*, ¶ 12

(quoting *State v. Himes*, 2015 MT 91, ¶ 22, 378 Mont. 419, 345 P.3d 297). A district court abuses its discretion in sentencing a defendant when it acts “arbitrarily without employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice.” *Salsgiver*, ¶ 12 (citing *Himes*, ¶ 22).

SUMMARY OF THE ARGUMENT

Russell is entitled to credit against his sentence imposed in DC-07-047 for incarceration time that he served on his other two cases. To further clarify, because the district court ordered that Russell’s other two sentences ran concurrently with his previous sentence imposed in this case, and again ordered that his first revocation sentence in this case was ordered to run concurrently with his other two cases, all of his sentences merged for the purposes of calculating credit for time served. Because these sentences merged, the district court should have awarded Russell credit towards his DC-07-047 sentence at the second revocation sentencing hearing for time that he was incarcerated on his other two sentences.

As such, Russell requests this Court vacate his sentence and remand the case back to the district court to honor Mont. Code Ann. § 46–18–203(7)(b), and correctly calculate the credit for time served.

ARGUMENT

THE DISTRICT COURT SHOULD HAVE AWARDED RUSSEL ADDITIONAL CREDIT IN THE AMOUNT OF 565 DAYS FOR TIME SERVED ON HIS SEPARATE, CONCURRENT SENTENCES.

The Montana Legislature has provided specific direction to district court judges regarding the consideration of credit for time served on a deferred or suspended sentence. Section 46–18–203(7)(b) of the Montana Code Annotated provides:

If a suspended or deferred sentence is revoked, the judge shall consider any elapsed time, consult the records and recollection of the probation and parole office, and all of the elapsed time served without any record or recollection of violations as a credit against the sentence. If the judge determines that elapsed time should not be credited, the judge shall state the reasons for the determination in the order. Credit must be allowed for time served in a detention center or for home arrest time already served.

In addition to the direction provided in § 46–18–203(7)(b), MCA, this Court’s precedent guides a District Court to consider that concurrent sentences merge for the purposes of time served. *See*

Johnston v. Kirkegard, 369 Mont. 540, 310 P.3d 1098 (2013). It follows that a district court must apply § 46–18–203(7)(b), MCA, and award credit for time that was served—or state the reasons for determining otherwise—on sentences running concurrently to the current revocation sentence being evaluated. *Johnston*, at *7 (Johnston was allowed credit in the revocation sentence for the time he previously served against his two other unexpired sentences imposed separately and concurrently).

This Court has written exclusively on this precise issue in *State v. Tracy*, 2005 MT 128, ¶¶ 28–30, 327 Mont. 220, 226–27, 113 P.3d 297, 301 (superseded by statute), when it remanded the case back to the district court to recalculate and grant time for credit for time served on a sentence that ran concurrently to the revocation sentence at issue. In *Tracy*, the defendant was serving a total of three sentences. The appealed sentence was a Cascade County case and the other two were Yellowstone County cases, which were issued prior to the Cascade County sentence. *Tracy*, ¶ 5. The Cascade County sentence was ordered to run concurrently to the Yellowstone County sentences, and the Yellowstone County sentences were originally ordered to run concurrently with each other. *Id.* After a petition to revoke the Cascade

County sentence was adjudicated, the district court denied Tracy credit on his Cascade County sentence for all time he served in jail or on home arrest on his concurrent Yellowstone County commitments which occurred subsequently to the imposition of the Cascade County sentence. *Tracy*, ¶ 24. To illustrate:

After the commitment in this Cascade County case was imposed and specifically made to run concurrent, it merged with and ran at the same time as those in Yellowstone County. Tracy was in detention on these sentences during a portion of the time after May 24, 2000, and before he discharged the prison time of the Yellowstone County sentences. Thus, by the plain words of the statutes, he is entitled to credit against each of the concurrent commitments for the time he was in detention. Were we to hold otherwise, by the simple device of seeking revocation for some, but not all, of several concurrent sentences, the State in this case would have been able to, in effect, convert a concurrent sentence to a consecutive sentence contrary to law.

Tracy, ¶ 28. The Court noted specifically that when “sentences for unrelated offenses are to run concurrently, not consecutively, and the person committed is already serving a sentence, the two terms are merged.” *Tracy*, ¶ 27.

This Court has relied on *Tracy* in other cases which question the district court’s denial of credit for time served on separate, concurrent sentences. In *State v. Mendoza*, 2021 MT 197, ¶ 12, 405 Mont. 154, 158–

59, 492 P.3d 509, 512, the defendant had a DUI case first in Gallatin County and then in Missoula County. The defendant served time in the Gallatin County Detention center after his arrest on December 3, 2017 until he was sentenced to “a two-year commitment to the DOC, followed by a suspended five-year term, with credit for 290 days presentence-incarceration on September 18, 2018.” *Mendoza*, ¶4 n.1. While he was serving his Gallatin County sentence with the DOC, Mendoza was adjudged guilty of the Missoula County DUI and sentenced to 24 months to the DOC, which was ordered to run concurrently with the Gallatin County sentence. *Id.* This Court noted specifically that “any credit Mendoza would receive under the Gallatin County sentence would merge with his sentence from Missoula County.” *Id.*

Often, the State has recognized where credit was due and credited time to the defense. In *State v. Youpee*, 2018 MT 102, ¶ 8, 391 Mont. 246, 248–49, 4176 P.3d 1050, 1052, the State conceded that the defendant was entitled to credit for the time he served in federal custody for a sentence running concurrently with his original state sentence after he was discharged onto probation. In its decision, the Court cited *Tracy*, stating that “unrelated sentences merge when [the]

court orders that one runs concurrently with the other.” *Youpee*, ¶ 8 (citing *Tracy* ¶ 27). The State again in *Derrick v. Fletcher*, 380 Mont. 543, 403 P.3d (2017), conceded that the defendant was entitled to additional credit on a Richland County case for time served on a concurrent sentence in North Dakota because the Richland County District Court ordered his sentences to run concurrently with the North Dakota sentences. *See also Finerfrock v. Green*, 379 Mont. 536, *3, 353 P.3d 506 (2015) [quoting *Tracy*, ¶ 28 (Concluding “§ 46–18–203(7)(b), MCA, in conjunction with § 46–18–401(1)(a), MCA, requires that credit be given for time spent on all sentences that are being served concurrently.”)].

Finally, while listed as a non-citable opinion, *Ronemus v. State*, 2001 MT 203N, ¶ 23, is persuasive because it demonstrates this Court’s precedent and willingness to award a defendant credit for time served on sentences which were running concurrently to the revocation sentence at issue. This Court concluded that:

Section 46–18–203(7)(b), MCA, does not permit a district court to withhold credit for time already served towards one sentence because credit was given on other sentences which run concurrently. Consequently, if it is determined Ronemus was being held in the Cascade County Jail on his Missoula probation violation in addition to his Cascade County offenses, the Missoula

District Court must give Romenus credit for time served in the Cascade County Jail even though his Missoula sentence runs concurrently with the Cascade County sentences which have been credited with time already served in Cascade County.

Ronemus, ¶ 23.

Montana legislature and Supreme Court precedent expanding what is considered incarceration supports the trend to give defendants credit for time served. The 2021 amendments added in sections 46–18–403(1)(a)&(b), MCA (2021), suggest a shift in public policy to allow credit for time served when the defendant serves all or part of that sentence in a treatment facility or detention center. 2021 Mt. ALS 283, 2021 Mt. Laws 283, 2021 Mt. Ch. 283, 2021 Mt. HB 451.

That section 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.

For purposes of subsection (1)(a), incarceration includes time spent in a residential treatment facility under the order of the court.

§§ 46–18–403(1)(a)&(b), MCA. Compare to *State v. Byrd*, 2015 MT 20, ¶ 19, 378 Mont. 94, 99, 342 P.3d 9, 12 (“[w]e conclude that because the Montana legislature has limited incarceration to a location at a county

detention center or state prison, a district court has no statutory authority to decide that placement at a treatment center constitutes incarceration.”).

In this case, the record shows that trial counsel effectively asserted his position Russell should receive an additional 565 days of credit for time served during his sentences for DC-08-027 and DC-08-04 which ran concurrently with DC-07-047. Russell first clarified that the request for credit “December 19, 2008, to July 7, 2010, is 565 days,” and he was considered incarcerated at that time. Hr’g Tr. 12:16–21, Sept. 28, 2020. Russell further noted his objection in asking for credit for time served later in the hearing:

The Court was not required to give him credit, but I think it’s important for the Court to have an overall broad view of this case. This is a bad check case, and we’re on year 13 of what should be, and should’ve been, a maximum of a 10-year sentence. Again, it’s a bad check case that originated in 2004. [Sic] And again, by my calculation, he has been incarcerated for over 2,436 days on a bad check case from 2004. [Sic] We need to put this to bed. [Sic] I frankly think that the cleanest way to resolve this would be to simply give him credit for time served and close this docket so he can start anew on his new cases. I just think that there’s been enough done here on this docket and it should be done. So, we’re asking for credit for time served and closing the docket.

Hr’g Tr. 17:26–25, 18:1–23, Sept. 28, 2020; *See also* D.C. Doc. 45.

In this case, Russell should have been credit for the 565 days that he was incarcerated on his other sentences (DC-08-027 and DC-08-004) between December 19, 2008 and July 7, 2011. On December 19, 2008 at the sentencing hearing for DC-08-027 and DC-08-004, Russell was sentenced to five years to the Department of Corrections with two years suspended in each case. These sentences were ordered to run concurrently with each other and with the deferred imposition of the sentence in this matter, DC-07-042. *See* Hearing Transcript 9-28-20 pp. 11-13; *see also* D.C. Docs. 46 & 50. From the period of December 19, 2008 to July 7, 2010, Russell remained in one form of incarceration or another. *Id.* Russell spent time in the Glendive Probation and Parole, Dawson County Jail, MARC, Treasure State Correctional Training, Great Falls Transition Center, Cascade County Jail, START, Billings Pre-Release Center, and Billings Probation and Parole. *Id.*

Montana Supreme Court precedent and the Montana legislature lends itself to an award of credit for time served between December 19, 2008 and July 7, 2010 on his other sentences running concurrently to this sentence. Section 46–18–203, MCA, provides that “credit *must* be allowed for time served in a detention center or for home arrest time

already served.” In addition, the rule first set forth in *Tracy* requires that a district court consider that concurrent sentences merge for the purposes of time served. *See also Johnston*, * 74.

Like the defendant in *Tracy*, Russell’s sentences in all three cases ran concurrently to each other, because his 2008 cases were ordered to run concurrently with each other and with the DC-07-047 case at hand on December 19, 2008. *Tracy*, ¶ 28. Russell was similarly in detention on his 2008 cases during the time he was also serving his deferred sentence in this case, just as Tracy was “in detention on these sentences during a portion of the time after May 24, 2000, and before he discharged the prison time of the Yellowstone County sentences.” *Id.* As such, Russell should be entitled to credit towards his DC-07-047 sentence for the time he was incarcerated on his other concurrent commitments.

A further comparison can be made to the facts in *Johnston*, where this Court, with the State’s agreement, ruled that Johnston was entitled to credit for time he served against his other concurrent sentences that had not yet expired. Johnston was a defendant in four different cases, the first of which expired prior to it being relevant to the

Johnston being awarded credit for time served. *Johnston*, **1–2.

Johnston's sentences were ordered to run concurrently on January 10, 2006, during his sentencing for the last of the cases. *Johnston*, *3. This completed a merger of his sentences for purposes of calculating time served pursuant to § 46–18–401(1)(a), MCA and *Tracy*. *Id.* This Court held that Johnston was entitled to credit for the time he previously served against the revocation sentence for which he was presently confined, and for a similar credit against each of the other two concurrent, unexpired, sentences. Like Johnston, Russell's sentences merged for purposes of calculating time served on December 19, 2008, when the district court ordered that Russell's new sentences in DC-08-027 and DC-08-04 ran concurrently with each other and with the present case, DC-07-047. Thus, as in *Johnston*, Russell is entitled to credit for the time he spent in a detention center or in incarceration on the DC-08-027 and DC-08-04 cases from December 19, 2008 to July 7, 2010.

It is worth noting that § 46–18–203, MCA, was amended on May 19, 2017, two months after District Court Judge Richard Simonton issued an order denying Russell's motion for credit for time served

during the time frame at issue in this appeal. 2017 Mt. ALS 391, 2017 MT. Laws 391, 2017 Mt. Ch. 391, 2017 Mt. SB 63. Prior to the 2017 amendment, the statute did not direct a judge to consider “and allow all of the elapsed time served without any record or recollection of violations as a credit against the sentence.” *Id.* Rather, the statute allowed a district court to “allow all *or part* of the elapsed time as a credit against the sentence.” *Id.* However, District Court Judge Katherine Bidegaray’s Order was issued well within the purview of the 2017 amendment, so she had both the authority and the duty to award Russell credit where credit was due.

In addition to *Johnston* and *Tracy*, the Court’s decisions in *Mendoza*, *Youpee*, *Derrick*, *Finerfrock*, and *Ronemus* all indicate this Court’s readiness to ensure that defendants are given credit for time served on merged, concurrent sentences. To hold that Russell is not entitled to credit for time served on his concurrent sentences would, “by the simple device of seeking revocation of some, but not all, of several concurrent sentences, [. . .] convert a concurrent sentence to a consecutive sentence contrary to law.” *Tracy*, ¶ 30.

CONCLUSION

For the foregoing reasons, Appellant Russell Kortan respectfully requests this Court to: (1) hold that Russell was entitled to receive an additional 565 days credit towards his DC-07-047 sentence for time served on his other, concurrent sentences; and (2) remand the case back to the District Court so that Russell's sentence can be credited with an additional 565 days of credit for time served.

Respectfully submitted this 22nd day of February, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal 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 4,247 excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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APPENDIX

Hr’g Tr., Sept. 28, 2020App. A

Oct. 6, 2020 Order Revoking Suspended SentenceApp. B

CERTIFICATE OF SERVICE

I, Rachel Glenn Inabnit, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-22-2022:

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