IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0474

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BENJAMIN PITKANEN III,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, The Honorable John W. Parker, Presiding

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Whether the district court imposed a facially legal PFO sentence and granted Pitkanen the concededly correct 223 days of credit in accordance with affirmative statutory mandates.

STATEMENT OF THE CASE

Benjamin Pitkanen, III, was charged with assault with a weapon for stabbing Karson Bird twice in the back. (Docs. 1-2.) When law enforcement first spoke to Karson at the hospital, he was not truthful about the incident because he did not want Pitkanen to get into trouble. (1/23/20 Tr. (Tr-1) at 218-19, 230, 263-64, 268.) However, Karson later told the officers that Pitkanen had assaulted him. (*Id*.; 1/24/20 Tr. (Tr-2) at 26-30, 37, 41-42, 192-94.) Karson's statements were recorded, and the district court overruled Pitkanen's hearsay objections to the State playing excerpts from two of the recordings and also overruled Pitkanen's objection to the detective describing Pitkanen's jail phone call to his girlfriend. (Tr-2 at 44-49, 140-45; Exs. 16-18.)

The jury convicted Pitkanen of assault with a weapon. (Tr-2 at 255.) The district court sentenced Pitkanen as a persistent felony offender (PFO) to Montana

State Prison (MSP) for 40 years, with 20 suspended. (7/30/20 (Hr'g) at 27-30; Doc. 99.) The court ordered that Pitkanen's sentence "shall run concurrent to any other sentence he may be serving" and gave him credit for 223 days. (*Id*.)

STATEMENT OF THE FACTS

On March 24, 2019, Karson and Justin Newbreast were at Erin McCoun-Larocque's home on 13th Street in Great Falls. (Tr-1 at 220-73; Tr-1 at 290-303.) All three were drinking. (*Id*.) Justin and Erin were sitting on couches and Karson was sitting in a recliner calmly drawing/writing. (*Id*.) When Pitkanen arrived about ten minutes after Karson, he appeared intoxicated, paced and fidgeted around the room, and was noticeably upset. (*Id*.)

Pitkanen told Karson to "[g]et the fuck up. This is my chair. This is my spot." (Tr-1 at 221.) Karson refused and Pitkanen threw his shoe at Karson. (*Id*. at 220-72.) Karson got up and pushed Pitkanen back, but Pitkanen came back at him and hit him in the face. (*Id*. at 292-303.) Pitkanen then reached around Karson and Justin saw him stab Karson two times between his shoulder blades. (*Id*.) Erin did not see a knife, but saw Pitkanen restraining Karson and wrapping his arms around him. (*Id*. at 294-95.)

Erin yelled at them to stop and Justin moved in to stop the altercation. (Tr-1 at 222-73.) Erin explained that Karson appeared to be in shock and she followed

Pitkanen to the bathroom because he had cut his hand. (*Id*.) Erin did not see how Pitkanen cut his hand, but agreed it could have been from a glass table in the living room as Karson had recalled. (*Id*.) As Pitkanen walked out of the room, he told Karson he was going to hurt him when he saw him again. (*Id*.) Karson speculated that Pitkanen came after him because Karson had given some money to Pitkanen's girlfriend, who hugged him in return. (*Id*. at 227.)

Karson and Justin walked to a friend's house, who helped dress the stab wounds on Karson's back. (Tr-1 at 224-73.) Karson did not want to go to the hospital, but later relented when his friends insisted he get checked out. (*Id*.) Karson's lung had been nicked during the assault and he had to stay in the hospital for four days while his stab wounds healed. (*Id*. at 245.) Photographs of Karson's back and the t-shirts he was wearing showed the two stab wounds and the significant amount of blood he lost. (Tr-2 at 52-62; Exs. 1-8.)

Great Falls Police Department (GFPD) Officers Kristi Kinsey and Anthony Formell responded to the emergency room and spoke to Karson and Justin. (Tr-2 at 34-116, 119-21.) Officer Kinsey was the Field Training Officer supervising Officer Formell at the time. (*Id*.) Karson did not want Pitkanen to get into trouble, so he initially told the hospital staff and Officer Formell that an unknown male stabbed him when he refused to give him his backpack. (Tr-1 at

218-19, 230, 263-64, 268; Ex. No 16.) Justin also told Officer Formell that an unknown male had stabbed Karson. (*Id*. at 256.)

After learning that Karson had not been honest with the officer, Karson's mother, Teri Gray, spoke to Karson and Justin and told them they needed to tell the truth. (Tr-1 at 229-70; Tr-2 at 26-30, 37, 41-42, 192-95.) Both Justin and Karson then told the officers that Pitkanen had assaulted Karson. (*Id*., Exs. 17-18.) Justin told the officer that he saw Pitkanen stab Karson with a knife. (*Id*.) Karson did not see a knife, but believed he had been stabbed. (*Id*.) Karson later repeated this true version of events to the officers. (*Id*.) All of Karson's statements were recorded.

GFPD Officer Lance Souza interviewed Erin at her residence and she provided a substantially similar account of the incident. (Tr-1 at 290-303; Tr-2 at 119-20, 153-56.) Erin did not see a knife or the stab wounds in Karson's back, but described seeing Pitkanen wrap his arms around Karson during the fight. (*Id*.) GFPD discovered blood on the recliner and in the bathroom where Pitkanen washed his hands. (Tr-2 at 62-116, 120-30, 140-55, 198-200; Exs. 9-10.) When GFPD officers arrested Pitkanen days later, they did not locate a knife, but noted a laceration on his left palm that was bandaged. (Tr-2 at 67-73, 122-28, 201-02.)

GFPD Detective Derek Mahlum made attempts to locate and speak to Karson and the witnesses. (Tr-2 at 130-65.) He was not able to locate Newbreast, but he did find Jenee Klein (Pitkanen's girlfriend), who heard about the incident

from others. (*Id*.) Later, Detective Mahlum listened to Pitkanen's phone calls from jail and recognized Klein's voice on a call Pitkanen made right after he was arrested. (*Id*. at 139-45.) During the call, when Klein stated it was her fault that he had stabbed Karson, Pitkanen reassured her it was not her fault. (*Id*.)

Karson did not want to testify against Pitkanen because he considered him to be like family. The State arranged for him to be deposed in case he did not appear for the trial. (Docs. 37.1-43, 47-48, 53-55, 57-58, 67; Tr-1 at 215-17.) However, Karson did appear for trial, so his deposition was not played at trial. (Tr-1.)

Karson repeatedly told the jury he did not want to be there and reiterated he did not want Pitkanen to get into trouble. (Tr-1 at 213-19, 230, 233, 263-64.) Karson had difficulty recalling the various statements he gave including those at the hospital and when he was deposed. (*Id*. at 215-19, 222-30, 268, 270-73.) Defense counsel impeached Karson with his prior statements several times. (*Id*. at 258-68.) During redirect, Karson explained he remembered different aspects of the assault at different times and testified that the only time he purposely lied about the event was his first statement to the police about an unknown male stabbing him. (*Id*. at 271-73.)

Later, during Officer Kinsey's testimony, the State introduced, without objection, part of Karson's first recorded statement at the hospital when he blamed an unknown male for stabbing him. (Tr-2 at 38-49; Ex. 16.) Next, the State

sought to introduce Karson's excerpts of subsequent recorded statements in which he identified Pitkanen as the person who stabbed him. (Tr-2 at 44-49.) Pitkanen objected and argued those statements constituted improper "bolstering" because they would simply repeat what Karson had testified to at trial. The State asserted the statements were admissible under prior inconsistent statements based on his inability to recall the events at different times. (*Id*.) The court overruled Pitkanen's objection and allowed the recordings to be admitted "as a prior inconsistent statement up to a point" and allowed Pitkanen to renew arguments concerning cumulative evidence. (*Id*.) Both recorded excerpts were then played for the jury. (*Id*.)

Pitkanen also objected to Detective Mahlum testifying about Pitkanen's jail phone call to Klein. (Tr-2 at 140-45.) The court allowed the State to inquire about the call and, upon hearing the detective's description, concluded that sufficient evidence supported that Pitkanen's comment was an admission of party opponent and rejected Pitkanen's objection to admissibility. (*Id*.) However, the court reminded the parties that the effect of Pitkanen's statement was subject to argument and that the jury would ultimately determine its weight. (*Id*.)

When the court considered Pitkanen's motion to dismiss for insufficient evidence, it referenced Detective Mahlum's description of Pitkanen's call with Klein, noting that the word stabbed was used and reiterated that the jury will

determine if Pitkanen's comment—that it "was not her fault"—was an admission of guilt. (Tr-2 at 173-76.) The court also noted that an "admission" jury instruction should be given. (Tr-2 at 179; Doc. 75, JI No. 11.)

During closing remarks, Pitkanen pointed to procedural problems with the investigation, including the first officers' failure to keep Karson and Newbreast separated after they gave their initial statements and the detective's failure to send blood samples taken from the crime scene into the lab for testing. (Tr-2 at 230-37.) Pitkanen focused on the fact that Newbreast was the only one who allegedly saw Pitkanen with a knife, but Newbreast did not testify. (*Id*.) Thus, while Pitkanen conceded that Pitkanen and Karson had a physical altercation, he argued there was an absence of any evidence or testimony that Pitkanen had a knife at the time. (*Id*.) Pitkanen further argued that Newbreast may have been the person who stabbed Karson. (*Id*.)

STANDARD OF REVIEW

Evidentiary rulings are reviewed for abuse of discretion, which occurs when a court "acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice." *State v. Oliver*,

2022 MT 104, ¶ 18, 408 Mont. 519, __ P.3d ___ (citing *State v. Smith*, 2021 MT 148, ¶ 14, 404 Mont. 245, 488 P.3d 531). "A district court's evidentiary rulings must be supported by the 'rules and principles of law;' therefore, 'to the extent that a discretionary ruling is based on a conclusion of law [this Court] must determine whether the court correctly interpreted the law." *Smith*, ¶ 14.

Criminal sentences of a least one year are reviewed only for legality, which is a question of law that this Court reviews *de novo*. *State v. Parks*, 2019 MT 252, ¶ 7, 397 Mont. 408, 450 P.3d 889. A criminal sentence is legal if it falls within the parameters set by applicable sentencing statutes and if the sentencing court adheres to the affirmative mandates of the applicable sentencing statutes. *Parks*, ¶ 7. When a sentence of imprisonment is imposed, the district court must adhere to the affirmative statutory mandate requiring the award of "credit for time served." *Parks*, ¶ 9. Citation to sentencing statutes herein will be to the 2017 version of the Montana Code Annotated which was applicable at the time Pitkanen committed the 2019 assault with a weapon. *See State v. Tirey*, 2010 MT 283, ¶ 26, 358 Mont. 510, 247 P.3d 701("[t]he law in effect at the time an offense is committed controls as to the possible sentence").

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion or commit reversible error when it overruled Pitkanen's hearsay objections to playing excerpts of his statements at the hospital for the jury. Pitkanan's statements were admissible pursuant to Mont. R. Evid. 801(d)(1)(A) and did not constitute improper "bolstering." Throughout Karson's testimony, he stated he did not recall events or statements he made to the officers or during the deposition. Since his testimony contained intertwined consistent and inconsistent statements, the district court did not abuse its discretion when it allowed the State to play excerpts of Karson's statements to the officers at the hospital. Nonetheless, if this Court determines the court erred by admitting Exhibits 17 and 18, that error was harmless since the pertinent information in those statements—identity of the assailant and where the assault took place—were established through other testimony and evidence.

The district court did not abuse its discretion or commit reversible error when it permitted Detective Mahlum to describe the conversation between Pitkanen and Klein. Pitkanen's comment absolving Klein as the reason he stabbed Karson was a statement against interest and admissible under Mont. R. Evid. 801(d)(2)(A). Klein's question to Pitkanen was not offered for the truth of the matter, so it was not hearsay, and it was necessary to place Pitkanen's response in context. Even if it was error to allow the detective to describe their conversation,

that error was harmless given the other compelling evidence that Pitkanen had been stabbed (*e.g.*, Karson's belief he had been stabbed and obvious stab wounds on his back; Erin's observations that Pitkanen put his arms around Karson; officer's testimony that Justin saw Pitkanen stab Karson) and the fact the jury was instructed that a conviction cannot be based on an admission alone and that an unrecorded oral admission should be viewed with caution.

The district court granted Pitkanen the correct amount of credit for time served. According to a plain and reasonable interpretation of the two applicable credit for time served statutes in this case—§§ 46-18-201(9) and -403(1), MCA—and the unquestioned precedent establishing the legislative purposes for granting credit for time served, Pitkanen was not legally entitled to any credit for the time he served incarcerated as a DOC inmate (for another crime, conviction, and sentence) while his trial and sentencing in this case were pending. Having been granted the concededly correct 223 days of credit, Pitkanen has no claim for any more credit. The Court should affirm Pitkanen's facially legal sentence which is within statutory parameters—and then some—and which was credited with all the jail time he requested and was due. The Court should also overrule its recent decisions in *Killam* and *Mendoza*, for the reasons stated herein.

ARGUMENT

I. The district court did not abuse its discretion when it overruled Pitkanen's hearsay objections.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," and generally inadmissible at trial. Mont. R. Evid. 801(c), 802. However, Mont. R. Evid. 801(d) specifically excludes some out-of-court statements from the hearsay rule. Two of those rules are relevant here.

Montana Rule of Evidence 801(d)(1)(A) provides that an out-of-court statement is not hearsay when the declarant testifies at trial and is subject to cross-examination concerning the statement when the out-of-court statement is "inconsistent with the declarant's testimony." Montana Rule of Evidence 801(d)(2)(A) provides that an out-of-court statement is not hearsay when the party's own statement is offered against that party.

A. Karson's recorded interviews at the hospital

Rule 801(d)(1)(A) applied because Karson gave inconsistent statements and had difficulty recalling the events and the various statements he made. Claimed lapses of memory represents an inconsistency under Rule 801(d)(1)(A). *Smith*, ¶ 22; *State v. Mederos*, 2013 MT 318, ¶ 17, 372 Mont. 325, 312 P.3d 438. Additionally, when the nature of the declarant's trial testimony makes it difficult for the court to parse out the consistent from the inconsistent portions of the prior

statement, a court may admit consistent statements in conjunction with inconsistent statements. *Mederos*, ¶ 18.

During both direct examination and cross-examination, Karson often responded that he could not recall details from both the assault and the different statements he made to the officers and during his deposition. For instance, when asked if he recalled what he initially told the officers, Karson replied, "Kind of. I mean, not really. I remember some stuff, but then the others I can't remember—recall" and later reiterated that "I don't remember that." (Tr-1 at 218.) Karson could not recall if the officers were with him when he spoke to his mother and was not clear on the details that he told the officers after that conversation. (*Id*. at 220, 228-29.)

During cross-examination, Pitkanen impeached Karson with his deposition which differed from his statements at the hospital and his trial testimony (*e.g*., number of people at the house; who/when people visited him at the hospital; when Pitkanen fell on glass table; not wanting to testify to protect Pitkanen and himself). (Tr-1 at 259-68.) On redirect, Karson explained that when he gave statements to the police and at his deposition he "tried to remember as much as I could, but then I forget what I said about like three weeks ago when we had that deposition." (*Id*. at 271.)

Karson's pretrial statements (recorded statements at the hospital and deposition) were inconsistent. Karson's testimony was also inconsistent with those statements and riddled with memory lapses. Pitkanen's defense theory was that Karson was not a reliable witness and used his varying statements to undermine his credibility. Ultimately, however, whether those inconsistencies were relevant was up to the jury to decide. (*See* Doc. 75, JI Nos. 1, 8.)

The district court was correct when it overruled Pitkanen's objection to Exhibits 17 and 18. *See, e.g.*, *State v. Devlin*, 251 Mont. 278, 825 P.2d 185 (1991) (held, witness' prior recorded statement about defendant's comments about victim and seeing defendant assault victim were admissible under Rule 801(d)(1)(A) when witness testified she could not remember what defendant said to her and denied seeing the assault); *State v. Charlo*, 226 Mont. 213, 735 P.2d 278 (1987) (held, inconsistency within the meaning of Rule 801(d)(1)(A) includes both positive contradictions and claimed lapses of memory; no error to admit prior statement that declarant knew who stabbed him but testified that he never thought about who stabbed him and no error to admit other witness' prior statement that he knew defendant stabbed him, but testified at trial he could not remember accusing defendant).

The circumstances presented here are unlike the victim in *Smith* where this Court held that a victim testifying that she did not remember not saying something

during her forensic interview was not an inconsistent statement. *Smith*, ¶ 27. Pitkanen's reference to the "material variance" standard from an Oregon case is misplaced as this Court has not adopted such a test. (Opening Brief (Br.) at 23.)

It would have been confusing to the jury and witnesses to parse out consistent statements from the inconsistent statements because Karson's memory lapses occurred throughout his testimony. Therefore, the district court did not abuse its discretion when it allowed the jury to listen to excerpts of Karson's statements to the officers. *Mederos*, ¶ 18. Pitkanen's claim that the State presented the recorded statements only to "bolster" Karson's testimony is unsupported. (Br. at 30.) "Bolstering" is not the standard for determining whether a statement is hearsay or not. Moreover, the recordings were simply cumulative of other witnesses' testimony. The statements had little impact on the trial as they "did no more than repeat admissible in-court testimony." *State v. McOmber*, 2007 MT 340, ¶ 35, 340 Mont. 262, 173 P.3d 690.

Even if this Court determines the district court erred by overruling Pitkanen's hearsay objections, "[n]ot every error committed by a District Court is reversible." *Smith*, ¶ 34 (citation omitted); *Oliver*, ¶ 28; *see also* § 46-20-701(1), MCA ("A cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial."); *State v. Van Kirk*, 2001 MT 184, ¶ 29, 306 Mont. 215, 32 P.3d 735.

Admission of erroneous evidence is harmless if other admissible evidence established the same fact and there was no "reasonable possibility that its admission might have contributed to the defendant's conviction." *McOmber*, ¶ 26; *Smith*, ¶ 34.

To establish that an evidentiary error was harmless, the State must demonstrate that there is no reasonable possibility that the inadmissible evidence might have contributed to the verdict. *Van Kirk*, ¶ 47. Thus, if the State can point to admissible evidence that proved the same facts as the tainted evidence, it can establish there was no reasonable possibility that the tainted evidence might have contributed to the defendant's conviction. *Van Kirk*, ¶ 44; *Oliver*, ¶ 28.

The pertinent pieces of information that were included in Karson's second set of statements at the hospital were the identity of the assailant and where the assault occurred. Both those facts were established by other evidence: Karson's testimony; Erin's testimony; and Officer Formell's testimony about what Justin stated, to which Pitkanen did not object. Moreover, Pitkanen agreed that he fought with Karson at Erin's which was the only different information contained in Karson's second set of statements (identity of assailant and where assault occurred).

A "defendant is not prejudiced by hearsay testimony when the statements that form the subject of the inadmissible hearsay are admitted elsewhere through

the direct testimony of the 'out-of-court' declarant or by some other direct evidence." *State v. Veis*, 1998 MT 162, ¶ 26, 289 Mont. 450, 962 P.2d 1153; *State v. Mensing*, 1999 MT 303, ¶ 18, 297 Mont. 172, 991 P.2d 950 ("[W]here the declarant testifies at trial and the defendant is given the opportunity to cross-examine regarding the statements at issue, the improper admission of the declarant's out-of-court statements is considered harmless."); *Mederos*, ¶ 24.

When the record is considered as a whole, there is no reasonable possibility that excerpts of Karson's statements at the hospital where he identified Pitkanen as the assailant and that he was stabbed at Erin's house contributed to Pitkanen's convictions since those facts were established by other evidence at trial. *Van Kirk*, ¶ 44; *Smith*, ¶¶ 34-35; *Oliver*, ¶¶ 28-29.

B. Pitkanen's party opponent admission

Detective Mahlum testified that right after Pitkanen was arrested, he called Klein from the jail. (Tr-2 at 139-45.) When asked if Pitkanen made any statements that the detective took as an admission, Detective Mahlum explained that during one call, Klein said

> something to the effect of: "It's my fault that you stabbed"—I don't recall if it was Karson or – but, "It was my fault that you stabbed him," something to that effect. Mr. Pitkanen then responds, "No baby. Don't worry about it. It wasn't your fault," something to that effect. I don't recall the exact verbatim of the statement.

(*Id*. 142.) Pitkanen objected and moved to strike, arguing that "[n]one of that is a party admission. They haven't identified the subject that they were talking about. This is all speculation on the part of the prosecutor." (*Id*.)

The court overruled the objection, but required the State to establish additional foundation/context for when the conversation took place which was right after Pitkanen was booked for stabbing Karson. (Tr-2 at 143-44.) Pitkanen reiterated his argument that neither statement was an admission. (*Id*. at 145.) The court maintained its ruling that Pitkanen's statement was admissible as an admission of a party opponent, but further noted that ultimately the jury, as the finder of fact, would determine its weight. (*Id*.)

An "admission by party-opponent," under Mont. R. Evid. 801(d)(2)(A) is a statement that is "the party's own statement" offered against the party. *State v. Smith*, 276 Mont. 434, 441, 916 P.2d 773, 777 (1996); *State v. Wienke*, 2022 MT 116, ___ Mont. ___, ___ P.3d ___ (defendant's text messages to coconspirators following homicide and destruction of evidence were non-hearsay admissions of party opponent); *United States v. Sanjar*, 876 F.3d 725 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 1577 (2018) (when offered by government, defendant's out-of-court statements are those of party opponent and thus not hearsay under Fed. R. Evid. 801(d)(2)).

Pitkanen asserts that without Klein's question to him, his statement was not an admission to anything. (Br. at 33-34.) However, neither the district court, nor this Court, is required to consider Pitkanen's statement in isolation. *See United States v. Hicks*, 635 F.3d 1063 (7th Cir. 2011) (recordings of defendant and informant did not contain inadmissible hearsay: defendant's statements were admissible as statements of party opponent, which did not constitute hearsay under Fed. R. Evid. 801(d)(2); and informant's statements were admissible to contextualize defendant's statements).

Pitkanen is incorrect that the "only way" the State could admit his statement was through Mont. R. Evid. 801(d)(2)(B) and by classifying Klien's statement as an admission that Pitkanen adopted. (Br. at 35-41.) The State did not articulate that theory of admissibility and, it was not necessary to do so; Klein's statement was admissible because it was not hearsay. Mont. R. Evid. 801(c) (Hearsay is an out of court statement "offered in evidence to prove the truth of the matter asserted.").

The State did not offer Klein's statement for the truth of the matter; rather, it was necessary to establish context for Pitkanen's reply. The district court did not abuse its discretion when it overruled Pitkanen's objection and permitted the detective to describe that one exchange between Klein and Pitkanen. And, as the

district court explained, while Pitkanen's statement was admissible, the jury would determine its weight and whether it should be considered an "admission of guilt."

Even if this Court determines that the court erred in allowing the detective to describe what he heard Pitkanen say to Klein, it was harmless because the only facts/elements the jail call may have established were the identity of the assailant and that Karson had been stabbed. *See Van Kirk*, ¶ 44; *McOmber*, ¶ 26 (other admissible evidence established same fact as tainted evidence); *Oliver*, ¶¶ 28-29.

First, Pitkanen was identified as the person who assaulted Karson through Karson's and Erin's testimony and Officer Formell's testimony about what Justin told him. Second, the fact that Karson was stabbed was also established by photographs of Karson's wounds and Karson's testimony (*e.g*., he was at the hospital because he was stabbed twice in the back; he sustained injuries to his back during the assault at Erin's; he had to stay in hospital four days because his lung was nicked. (*Id*. at 230-33, 245-46.) Officer Formell's testimony that Justin reported to him that Pitkanen stabbed Karson also established the mechanism of Karson's injury.

Moreover, the State did not mention Pitkanen's call to Klein in its initial closing remarks, and only referenced it in its rebuttal closing because Pitkanen argued the jury should consider that information with caution since it was unrecorded and they only heard about one part of the conversation in insolation.

(Tr-2 at 238, 250.) The jury was instructed that it could view an unrecorded oral admission with caution and that Pitkanen's conviction could not be based on the admission alone. (Doc. 75, JI No. 11.)

The record supports that there was no "reasonable possibility" that the allegedly inadmissible hearsay challenged by Pitkanen "might have contributed to [his] conviction." *McOmber*, ¶ 26; *Van Kirk*, ¶ 47. Therefore, if admitting that evidence was in error, it was harmless.

II. The district court imposed a facially legal PFO sentence and granted Pitkanen the concededly correct 223 days of credit in accordance with affirmative statutory mandates.

A. Relevant facts

When Pitkanen was arrested on March 27, 2019, his bail was set at $100,000, and he did not post bail. (Docs. 1-3; 5; 11; 84 at 1, 7.) The State gave notice that it would seek treatment of Pitkanen as a PFO which carried a maximum penalty of up to 100 years in prison and a fine of up to $50,000. (Docs. 16-18.) Notably, this was not Pitkanen's only pending criminal matter: "Mr. Pitkanen has some moving parts with his legal matters here. In addition to this trial, assault with a weapon, he's also pending a revocation with Judge Pinski for not completing treatment court." (7/17/19 Tr. at 4.)

In October 2019, Pitkanen moved for reduction of bail and a hearing was set for November 13, 2019. (Docs. 34, 37.) That hearing was vacated on the State's motion, without objection and on good cause appearing, for the reason that "**bail is moot** for this defendant at this time due to [him] **having been sentenced on November 4, 2019 to four years to the Department of Corrections** in DDC-16-552(A)." (Docs. 45 (emphasis added), 46.) Also, because Pitkanen was "currently serving" that four-year DOC sentence, the State moved for Pitkanen to be transferred to MSP or another facility designated by DOC. (Doc. 49.)

Upon Pitkanen's conviction, the district court ordered a presentence investigation report (PSI) and inquired about Pitkanen's inmate status. (Tr-2 at 257-58.) Defense counsel confirmed that Pitkanen was an inmate, having been revoked and given "a four-year DOC imposition, so he's sitting that sentence out," and the State reiterated that "ultimately, release is a non-issue as he's a DOC inmate." (*Id*. at 258.) Counsel further explained that Pitkanen had a third criminal case in district court (drug possession) and "in terms of bond, **that's the bond that's holding him**." (*Id*. at 259 (emphasis added).)

Pitkanen's PSI stated the following in relation to jail time credit:

> *The Defendant was held on bond from March 27, 2019 until November 4, 2019. On November 4, 2019 he was sentenced to a four (4) year commitment to the Department of Corrections in cause*

> *number DDC-16-552. Therefore, he was not eligible for jail credit after being sentenced to a DOC commitment.*

(Doc. 84 at 7 (italics in original).)

In support of the recommended PFO sentence (40 years with 20 years suspended), the State described Pitkanen's very lengthy criminal history, numerous revocations, and his pending criminal possession of dangerous drugs case. (Hr'g at 9.) When discussing credit for time served, the State correctly noted that "anything past November 4, 2019, he's been an inmate, so he's not entitled to that credit." (Hr'g at 14.)

Defense counsel represented that Pitkanen had been "incarcerated for a significant period of time," approaching "470-some days, well over a year."[1] (Hr'g at 17.) However, Pitkanen agreed that he was only entitled to 223 days of credit, stating that, "[u]nder the law . . . once he is a DOC inmate—which that operative date is November 4th of 2019—he's not entitled to credit for time served." (*Id*.)

Defense counsel recommended a sentence of 20 years MSP, with 15 suspended, concurrent with the sentence that he was already serving, with credit for 223 days. (Hr'g at 18.) Counsel reasoned, "That will result in a significant period of incarceration and a long period of monitoring in the community." (*Id*.)

[1]The actual number of days of incarceration between Pitkanen's arrest on March 27, 2019, and his sentencing on July 30, 2020, was 492, as claimed for the first time on appeal. (Br. at 1, 3-4, 18-19, 47-48.)

The district court sentenced Pitkanen as a PFO for 40 years with 20 suspended and credited his sentence with the 223 days of incarceration from March 27, 2019, to November 4, 2019. (Docs. 97 at 2, 99 at 2-3; Hr'g at 14, 17-18, 28.) The court also ordered Pitkanen's sentence to "run concurrent to any other sentence the Defendant may be serving." (*Id*.) The district court explained its reasoning for imposing the 40-year/20-year suspended sentence:

> I've tried to consider this case from a number of points of view under what the statutory penalty would be for the base offense that would have a maximum of 20 years. As a persistent felony offender, it would be up to . . . 100 years. Based upon the repeat violent record, I find that the State's recommendation is very appropriate and balanced. And by no means do I automatically default to the State's recommendation or the Defense recommendation. **I think you can make a good argument that even more time could be warranted here**[.]

(Hr'g at 27-28 (emphasis added).) The district court rejected the State's recommendation, based on the statutory requirement, that the PFO sentence run consecutively: "I'm going to order that this sentence will run concurrently to anything else you're currently serving. I think the time horizon is long enough." (Hr'g at 28-29.) Regarding the 223 days of credit for time served, the court explained: "That's some liberty that you've lost already, Mr. Pitkanen. I think statutorily and under the law I don't have to do that, but I'm going to do that because it seems fair, even though your crime was severe." (*Id*.)

B. Sections 46-18-201(9) and -403, MCA, must be applied in harmony and in accordance controlling precedent.

1. Statutory construction

Two statutes, each requiring sentences of imprisonment to be credited with pretrial incarceration, are applicable to Pitkanen's case. One provision, codified in Montana's general sentencing statute,[2] was enacted in 2017 and it provides:

> When imposing a sentence under this section that includes incarceration in a detention facility or the state prison, as defined in 53-30-101, the court shall provide credit for time served by the offender before trial or sentencing.

§ 46-18-201(9), MCA (hereinafter, § 201(9)).

The other, more specific statute, § 46-18-403 MCA ("credit for incarceration prior to conviction"), was enacted in 1967 and is now codified in Title 46, Chapter 18, Part 4, among other specified "factors that reduce sentence," including discretionary concurrent sentences and mandatory credit against a subsequent sentence for "time served" on a sentence declared to be invalid. *See* §§ 46-18-401 MCA. ("consecutive sentences"), -402 ("credit for time served"). This statute provides:

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[2]This Court recognizes § 46-18-201, MCA as the "general sentencing statute." *See, e.g.*, *State v. Tam Thanh Le,* 2017 MT 82, ¶ 12, 387 Mont. 224, 392 P.3d 607*; accord State v. Thibeault*, 2021 MT 162, ¶ 27, 404 Mont. 476, 490 P.3d 105 (Gustafson, J., dissenting) ("Section 46-18-201, MCA, provides courts with general sentencing authority.").

> 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.

§ 46-18-403(1), MCA (hereinafter, § 403(1)).

When several statutory provisions are at issue, this Court must interpret the provisions to "give effect to all," without "insert[ing] what has been omitted or . . . omit[ting] what has been inserted." § 1-2-101, MCA. "This Court operates under the presumption that the Legislature does not pass meaningless legislation, and we will harmonize statutes relating to the same subject in order to give effect to each statute." *State v. Brendal*, 2009 MT 236, ¶ 18, 351 Mont. 395, 213 P.3d 448. In situations where general and specific statutes exist and the two cannot be harmonized to give effect to both, the specific statute controls. *State v. Oie*, 2007 MT 328, ¶ 17, 340 Mont. 205, 174 P.3d 937; *see* § 1-2-102, MCA.

"When interpreting a statute, [this Court's] objective is to implement the objectives the legislature sought to achieve." *Mont. Vending, Inc. v. Coca-Cola Bottling Co.*, 2003 MT 282, ¶ 21, 318 Mont. 1, 78 P.3d 499. This Court will also read and construe the statutes as a whole to avoid an absurd result and to give effect to a statute's purposes. *Brendal*, ¶ 18 (quotes and citations omitted). This Court presumes that the Legislature acted with deliberation and full knowledge of all existing laws on a subject. *Id.*

The two statutes at issue here, "[b]y virtue of [their] plain language and [their] location[s] in the criminal code," *see Brendal*, ¶ 19, each require the same thing at sentencing, albeit with somewhat different phrasing and specificity. *Compare* § 201(9) ("court shall provide credit for time served by the offender before trial or sentencing") *with* § 403(1) ("[a] person incarcerated on a bailable offense . . . must be allowed credit for each day of incarceration prior to or after conviction"). Whereas § 201(9), located in the general sentencing statute, merely requires credit for "time served"—without any more definition or specificity—§ 403(1), located among the more specific statutorily mandated "factors that reduce sentence" statutes, explicitly requires credit for incarceration "on a bailable offense."

This slight difference in specificity does not make these statutes conflicting; rather, the two can, and must, be harmonized to give effect to both provisions and to avoid an absurd result. *See Montana Contractors Ass'n v. Dep't of Highways*, 220 Mont. 392, 395, 715 P.2d 1056, 1058 (1986) ("[T]he Court must harmonize statutes relating to the same subject, giving effect to each."). Thus harmonized, the two statutes read together simply require that a sentencing court provide or allow credit for time served incarcerated on a bailable offense before trial, conviction, and sentencing.

To the extent there is a difference between these statutes, it does not concern the requirement THAT credit is required. Rather, any variance between the two

concerns WHAT time must be credited: § 403(1) specifies time must be credited for incarceration on a bailable offense, while § 201(9) simply refers generally to "time served." Legislative history on the bill enacting § 201(9) suggests nothing more. A Commission on Sentencing subcommittee recommended revising § 46-18-201, MCA, simply to "[p]rovide credit for jail time served before entry to a facility." *See* Commission on Sentencing, 64th Montana Legislature, Statute Review Subcommittee, Minutes of August 29, 2016 at 2, 4, 15-16 (attached hereto as App. 1); Statute Review Subcommittee Recommendations to the Commission on Sentencing, adopted August 29, 2016, at 1 (attached hereto as App. 2).

2. Legislative purposes and objectives served by granting credit

The Legislature is presumed to have had full knowledge of § 403(1) when it enacted § 201(9). Because it did not repeal or amend § 403(1), and the plain language of § 201(9) does not conflict with § 403(1), the obvious intent for the new statute was to further the legislative objectives and statutory purposes for granting credit for "time served" prior to the imposition of criminal sentences as such purposes and objectives already existed under § 403(1) for the previous 50 years.

The purpose of granting credit for pretrial incarceration has long been recognized in Montana—even before the enactment of § 403(1)'s predecessor statute in 1967: "[T]he primary reason for the allowance of credit for pretrial

confinement is to preclude placing a person with insufficient financial resources at a disadvantage vis-à-vis one who can raise bail." Agata, *Time Served Under A Reversed Sentence of Conviction—A Proposal and A Basis For Decision*, 25 Mont. L. Rev. 1, at 30 n.94 (1963) (citing *In re Needel*, 182 N.E.2d 125 (Mass. 1962)). As stated in *Needel*: "The statutory purpose was not to allow deductions for time served under sentence for another crime, but was to afford relief to those not convicted and not serving any sentence but who because of inability to obtain bail, for example, were held in custody awaiting trial." *Needel*, 182 N.E.2d at 127. Four years after this law review article, the predecessor statutes to both § 402 ("credit for time served") and § 403 ("credit for incarceration prior to conviction") were enacted. *See* Sec. 1, Chp. 196, L. 1967 (enacting, as part of the newly created Montana Code of Criminal Procedure, §§ 95-2214 ("credit for time served"), 95-2215 ("credit for incarceration prior to conviction"), R.C.M. 1947.)

The same rationale and purpose were carried forward upon enactment of the original version of § 403(1), as this Court has repeatedly stated. First:

> It is not within the contemplation of the statutes which provide credit for incarceration prior to conviction that a defendant should receive credit for incarceration time served by the defendant on the conviction of another offense. Otherwise, a second offender would be entitled to receive credit on a basis not available to a first offender.

In re Davis, 1979 Mont. LEXIS 800, at *1, *4-5 (No. 14240, Apr. 23, 1979) (opinion and order on original proceeding/amended petition for postconviction relief). This Court has also declared that:

> [T]he 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. That purpose is not served by crediting a defendant's sentence for time served where the defendant would not have been released from 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.

State v. Kime, 2002 MT 38, ¶ 15, 308 Mont. 341, 43 P.3d 290, *overruled in part on other grounds by State v. Herman*, 2008 MT 187, ¶ 12, 343 Mont. 494, 188 P.3d 978; *Parks*, ¶ 10; *State v. Hornstein*, 2010 MT 75, ¶ 13, 356 Mont. 14, 229 P.3d 1206. Similarly:

> Statutes giving credit for presentence confinement were designed to ensure equal treatment of all defendants whether or not they are incarcerated prior to conviction. Granting presentence credit, therefore, seeks to place an in-custody criminal defendant who cannot afford to post bail in the same position as his counterpart with bail money.

State v. Price, 2002 MT 150, ¶ 27, 310 Mont. 320, 50 P.3d 530 (quoting *State v. Tauiliili*, 29 P.3d 914, 918 (Haw. 2001)); *State v. Pavey*, 2010 MT 104, ¶ 16, 356 Mont. 248, 231 P.3d 1104 (quoting *Tauiliili*, 29 P.3d at 918).

Accordingly, this Court has consistently read the plain language of § 403(1) to mean that each day of incarceration must be credited to a defendant's sentence, but "only if that incarceration was directly related to the offense for which the sentence [was] imposed." *Kime*, ¶ 16 (the time Kime was incarcerated at MSP prior to the date of his sentencing was related to his prior felony conviction and not the charges of which he was convicted in the present case). Conversely, "[a] defendant is not entitled to receive credit for pre-conviction time served on an offense if he is not incarcerated for that particular offense." *State v. Henderson*, 2008 MT 230, ¶ 9, 344 Mont. 371, 188 P.3d 1011 (citing *State v. Erickson*, 2005 MT 276, ¶ 25, 329 Mont. 192, 124 P.3d 119 (no credit where defendant "not incarcerated on that charge")). As this Court has held:

> Pavey's continued incarceration was due at least in part, if not entirely, to his prior convictions. In other words, it appears that during the time period in question, **he would have been incarcerated based on those convictions, regardless of the filing of the new charges and regardless of his ability to post bail on the new charges**. For these reasons, the general purpose of § 46-18-403(1), MCA, to eliminate the disparity of treatment between indigent and nonindigent defendants, *Kime*, ¶ 15, is not implicated here and would not be served by crediting Pavey's new sentences for time served prior to sentencing.

Pavey, ¶ 22 (emphasis added).

This Court's historical plain reading of § 403(1) makes sense; there would be no logical or correctional basis to grant credit for time serving a prison sentence on a prior conviction which has nothing to do with the offense at issue. Put

another way, this Court has said that "[t]he sentencing court must determine **for what charge the defendant was being detained** and **if the charge is bailable**." *Parks*, ¶ 13 (emphasis added) (citing *Hornstein*, ¶ 17; *Kime*, ¶¶ 13, 16); *see* § 46-9-102(1), MCA; *State v. Race*, 285 Mont. 177, 181-82, 946 P.2d 641, 643-44 (1997) (a "bailable offense" is any non-death-penalty offense). If an offender's incarceration is directly related to the pending bailable offense, because they are not serving a sentence or commitment on another conviction, then credit is due. But, if the offender is serving a sentence or commitment[3] on a prior conviction, they are "incarcerated based on those convictions, regardless of the filing of the new charges and regardless of [their] ability to post bail on the new charges," *Pavey*, ¶ 22, and no credit for that time is due under the credit statutes.

3. Recent decisions of this Court are in derogation of the letter and the purpose of the applicable sentencing credit statutes and should be overruled.

This Court recently interpreted § 201(9) in *Killam v. Salmonsen*, 2021 MT 196, 405 Mont. 143, 492 P.3d 512, and applied that holding in *State v. Mendoza*, 2021 MT 197, ¶ 11, 405 Mont. 154, 492 P.3d 509 ("Our holding in *Killam* is

[3]A "person is committed when he is actually sentenced to confinement by the court." *Rossbach*, ¶ 28 (citing *State v. Smith*, 232 Mont. 156, 161, 755 P.2d 569, 572 (1988) (citing Black's Law Dictionary, 248 (5th ed. 1979)). For example, as happened in this case, "after revocation of a suspended sentence the defendant is ordered 'committed.'" *Smith*, 232 Mont. at 161, 755 P.2d at 572 (citing § 46-18-203, MCA)).

controlling and discusses application of § 46-18-201(9), MCA, in determining what credit must be given for pre-sentence incarceration. *Killam*, ¶¶ 16-17.").[4]

Notably, neither *Killam* nor *Mendoza* overruled any of this Court's jurisprudence interpreting § 403. Thus, the State agrees with the ultimate holding and conclusion in *Killam* because it is consistent with this Court's precedent and did not require application of a new rule under § 201(9): statutory sentencing credit was required for Killam's pretrial incarceration when he was also "on parole status" for a prior conviction. *Killam*, ¶¶ 3, 5, 19; *accord Parks*, ¶ 9 (district court may not decide to withhold credit in anticipation that credit may be given in another sentence); *Hornstein*, ¶ 16 (court may not withhold credit for time served where such time may be credited to defendant's parole by the Board of Pardons and Parole). In effect, because Killam was on parole, he was not "incarcerated" on his prior conviction and sentence, even though he could possibly receive credit for serving that sentence at the time. Because Killam's incarceration was related

[4]In addition to the argument below, the State asserts that *Mendoza* was wrongly decided and should be overruled because the sentence imposed there was for a 2015 offense, to which § 46-18-201(9), MCA (2017) manifestly did not apply. *See Mendoza*, ¶ 4 ("Mendoza was charged by citation in Lake County, Montana, for felony Driving Under the Influence of Alcohol or Drugs (DUI) on September 3, 2015."). This Court is "obligated to overrule precedent where it appears the construction manifestly is wrong." *City of Kalispell v. Salsgiver*, 2019 MT 126, ¶ 45, 396 Mont. 57, 443 P.3d 504 (citation and quotations omitted). The application of a statute to a case in which it expressly does not apply, as § 201(9) was in *Mendoza*, is "manifestly wrong."

solely and directly to his pending charges and not his prior sentence—for which he was on parole—he was entitled to credit for that period of time.

While the State agrees with the ultimate outcome in *Killam*, it takes issue with this Court's interpretation of § 201(9) as stated in *Killam* in three respects and asks the Court to overrule *Killam*, in part, and *Mendoza* in its entirety, for those reasons.

First, *Killam* failed to read both applicable credit statutes together, as it is required to do, and instead applied § 201(9) to the exclusion and derogation of § 403(1). Section 201(9) does not apply in a vacuum or stand alone as the sole authority for granting credit for time served—§ 403(1) must also be given effect and read in harmony with § 201(9). Although this Court may or may not agree entirely with the State's statutory interpretation above, *Killam*'s analysis of the applicable sentencing credit statutes only paints half the picture—at best.

Killam concluded that "confusion" engendered by § 403(1) and the Court's decisions interpreting it was "resolved by the Legislature with the enactment of § 46-18-201(9), MCA, by eliminating sentencing courts' need to determine whether a defendant is incarcerated on a 'bailable offense.'" *Killam*, ¶ 16. This declaration is misleading, because the 2017 Legislature did not repeal or amend § 403(1). Yet, in *Killam*, this Court effectively determined that the Legislature repealed § 403(1) by implication—a conclusion without support of any analysis

and contrary to the "cardinal rule . . . that repeals by implication are not favored." *Morton v. Mancari*, 417 U.S. 535, 549-51 (1974) (citations omitted).

The Supreme Court has said that "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. . . . Clearly, this is not the case here." *Mancari*, 417 U.S. at 550. Nor, as argued above, is it the case here. The two applicable credit statutes are plainly consistent with each other and perfectly capable of being harmonized to effect the simple mandate that credit be granted for time served prior to sentencing. As the Supreme Court said, "[a]ny perceived conflict is thus more apparent than real." *Id*.

Moreover, "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Mancari*, 417 U.S. at 550-51. Here, § 403(1) is a more specific provision applying to the specified type of "incarceration" that is to be counted for credit—incarceration "on" a bailable offense—whereas § 201(9) is more general and references the general term "time served." *See Oie*, ¶ 17; § 1-2-102, MCA.

Finally, on this point:

> The courts are not at liberty to pick and choose among [legislative] enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed [legislative] intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible . . . .

> The intention of the legislature to repeal 'must be clear and manifest.'"

Mancari, 417 U.S. at 551 (citation omitted). In *Killam*, this Court applied only § 201(9) and thereby improperly determined that § 403(1) was effectively repealed by the enactment of § 201(9) and of no effect. In doing so, this Court failed, without any explanation or apparent basis to do so, to "harmonize statutes relating to the same subject in order to give effect to each." *Brendal*, ¶ 18; § 1-2-101, MCA.

Second, the State disagrees that a plain reading of § 201(9) actually says what *Killam* says it does in at least four ways. For instance, § 201(9) does not say that the statutory time served/credit "determination is based solely on the record of the offense for which the defendant is being sentenced and does not require determination by the court as to whether defendant is also being held on another matter and, if so, which hold is primary." *Killam*, ¶ 17. Such a reading violates the rule of construction that courts will not "insert what has been omitted or . . . omit what has been inserted." § 1-2-101, MCA.

Similarly, the plain language of § 201(9) does not provide that it "does not require the court to rely on its understanding of other proceedings to determine if the defendant would have otherwise been released from custody on a pre-trial basis had the defendant been able to post bond." *Killam*, ¶ 17. Section 201(9) says nothing about what information the sentencing court may or may not rely upon to

make its time served/credit determination—it says only that "the court shall provide credit for time served." § 201(9). *Killam*'s reading, moreover, would infringe upon the longstanding discretion and authority of courts to "consider any relevant evidence" having probative force at sentencing. *See, e.g.,* S*tate v. Collier,* 277 Mont. 46, 63, 919 P.2d 376, 387 (1996) (rules of evidence do not apply at sentencing).

Next, the statute certainly does not say, by any stretch of its plain language, "that upon sentencing, the court *shall* provide credit for time served by the defendant before trial or sentencing *even if* the defendant would not have been released from custody pre-trial/sentencing had s/he been able to post bond." *Killam*, ¶ 17 (emphasis in original). Finally, the statute does not say that "the court must determine the amount of time to credit based on the record relating to the offense for which the defendant is being sentenced on without considering other criminal proceedings or DOC incarcerations or holds." *Killam,* ¶ 17.

These four examples constitute improper additions to the plain language of the statute by inserting qualifiers and explanation of WHAT time must be credited. The role of this Court is to read and apply the words of the statute as written and intended by the Legislature, not as inserted by the Court. This Court is "obligated to overrule precedent where it appears the construction manifestly is wrong." *Salsgiver*, ¶ 45. Thus, in addition to failing to harmonize and apply all relevant

statutes, *Killam*'s reading of the "plain language" of § 201(9), and *Mendoza's* application thereof, constitute manifestly wrong applications of the rules of statutory construction.

Third, *Killam*'s interpretation of § 201(9), to the exclusion of § 403(1), is in direct conflict with this Court's unquestioned precedent interpreting § 403(1)—which this Court did not overrule—and the legislative purposes and objectives for granting credit in the first place. *Killam*'s ultimate holding did not result in error because it was correct under prior law and the novel interpretation and application of § 201(9) alone was unnecessary.

But application of the *Killam* rule going forward, in cases like this—as Pitkanen has cited and relied upon to the exclusion of everything else—results in a misreading of the applicable statutes in harmony to effect their stated purposes as expounded by this Court. *See, e.g.*, *Davis, supra*; *Kime*, ¶ 15; *Price*, ¶ 27; *Parks*, ¶ 10; *Hornstein*, ¶ 13; *Pavey*, ¶ 16. In cases like this one, application of *Killam* would turn credit for time served into an unwarranted windfall for the multiple, repeat offender. Instead of equalizing the potential disparity between indigent and nonindigent offenders facing prison time, *Killam* exacerbates that unfairness. All other things being equal, an offender in Pitkanen's position, but who was able to make bail, would not get credit for the time he was a DOC inmate after the November 4 revocation and sentence. But Pitkanen, who could not make bail,

would get that credit under *Killam*. That is not the "equal treatment of all defendants" espoused by this Court. *See, e.g.*, *Price*, ¶ 27 (quoting *Tauiliili*, 29 P.3d at 918).

Such a result does not serve the legislative purposes and objectives that this Court has long recognized and adopted. It is this Court's obligation to apply and give effect to both the letter and the spirit of all relevant enacted legislation. This Court did not do so in *Killam*—though it reached the right result—and it should correct its course now.

C. Pitkanen's PFO sentence was not illegal because it was within statutory parameters and the district court complied with the statutory mandate to allow credit for "time served."

A district court's authority to impose a sentence is defined and constrained by statute, and the court cannot impose a sentence in the absence of specific statutory authority. *DeShields v. State*, 2006 MT 58, ¶ 7, 331 Mont. 329, 132 P.3d 540; *State v. Thibeault*, 2021 MT 162, ¶ 10, 404 Mont. 476, 490 P.3d 105 (sentence not authorized by statute or beyond statutorily authorized range/limit is a facially illegal sentence). A sentence in excess of one prescribed by law is not void because of the excess, but is good insofar as the power of the court extends and is invalid only as to the excess—only the portion of the sentence beyond the district court's statutory authority is illegal. *DeShields*, ¶ 11.

If an offender qualifies as a PFO, a district court must sentence the offender under § 46-18-502, MCA. *State v. Rossbach*, 2022 MT 2, ¶ 26, 407 Mont. 55, 501 P.3d 914; *Vaska v. McTighe*, 394 Mont. 390, 432 P.3d 704 (2018) (PFO sentence valid where defendant could have received the maximum of 100 years instead of the 15 years with 10 suspended actually imposed). Pitkanen was properly deemed a PFO and the court unquestionably possessed the statutory authority to impose a sentence as long as 100 years in prison. §§ 46-13-108, 46-18-502, MCA. Thus, the court imposed a legal sentence when it sentenced Pitkanen as a PFO to 40 years in prison (20 suspended), and further reduced the sentence by running it concurrent to his prior sentences. The sentence imposed does not "exceed[] the statutorily authorized range or limit for that type of sentence" and is, therefore, a facially legal sentence. *Thibeault*, ¶ 10. There is no "portion of the sentence beyond the district court's statutory authority." *DeShields*, ¶ 11.

The district court also adhered to the affirmative mandates of § 201(9) and § 403(1) when it granted credit for the 223 days that Pitkanen's incarceration was directly related to his assault with a weapon charge—and not the time after November 4, 2019, when he was committed to the DOC on a prior conviction. Credit is clearly mandated for the time he was incarcerated on the "bailable offense" of felony assault with a weapon after he was arrested on March 27, 2019. However, pursuant to the above statutory analysis, Pitkanen was not legally

entitled to any credit after November 4, 2019, when the undisputed record establishes that he was sentenced to a four-year DOC commitment pursuant to revocation on a prior conviction, he became a DOC inmate, "bail was moot," and release was a "non-issue." (Docs. 45, 49, 84 at 7; Tr-2 at 257-59; Hr'g at 14, 17-18.) *See Pavey*, ¶ 22.

Pitkanen relies solely upon the flawed analysis of *Killam* and *Mendoza* to claim 269 days of additional credit after he was sentenced and committed to DOC. This Court should overrule *Killam* and *Mendoza* as argued above, reject Pitkanen's claim, and affirm the correct grant of 223 days of credit in this case.

CONCLUSION

Pitkanen's judgment of conviction and sentence should be affirmed.

Respectfully submitted this 30th day of June, 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 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 9,635 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0474

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BENJAMIN PITKANEN III,

Defendant and Appellant.

APPENDICES

CERTIFICATE OF SERVICE

I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 06-30-2022:

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