IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0660

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOSHUA DUANE WOLFBLACK,

Defendant and Appellant.

OPENING BRIEF OF APPELLANT

On Appeal from Montana's Eleventh Judicial District Court,
Flathead County, the Honorable Robert B. Allison, Presiding

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2. In the alternative, is § 46-18-116(3), MCA, facially unconstitutional to the extent it prohibits courts from correcting illegal sentences after the time for filing an appeal or post-conviction petition has expired?

3. If necessary should the court invoke plain error review to rectify the illegal portion of Mr. Wolfblack's 2010 Theft Revocation Sentence?

4. At a minimum is Mr. Wolfblack entitled to an additional 102-days of credit?

STATEMENT OF THE CASE & FACTS

Timeline[1]

7/21/2003: Mr. Wolfblack takes an acquaintance's 1991 Pontiac without her permission; he is arrested later that same day. (D.C. Doc. 1, at 2-3.)

7/22/2003: Mr. Wolfblack is charged by the Flathead County Attorney's Office with **Count I:** Felony burglary under § 45-6-204(1), MCA; and **Count II**: Felony theft under § 45-6-301(1)(a), MCA (hereinafter "Theft Case"). (D.C. Docs. 1-2.)

9/25/2003: The State dismisses **Count I:** Felony burglary under 45-6-204(1) and Mr. Wolfblack pleads guilty to **Count II:** Felony theft under 45-6-301(1)(a). (D.C. Doc. 18.)

12/4/2003: The district court sentences Mr. Wolfblack to the Montana Department of Corrections for 10-years with 5-years suspended (hereinafter "2003 Theft Sentence"). (D.C. Doc. 25; see also D.C. Doc. 61, at 1-2.) The court awards Mr. Wolfblack 137-days credit for pretrial incarceration. (D.C. Doc. 22, at 6 (¶12); see also D.C. Doc.

[1] Given the legal issues in this matter a timeline format presents the factual and procedural history in the most cogent and easily digestible fashion.

39, at 3 n.1.)

7/18/2008: Mr. Wolfblack is released to community supervision to begin serving the 5-year suspended portion of his 2003 Theft Sentence. (D.C. Doc. 61, at 2.)

5/14/2010: Mr. Wolfblack is charged in Lewis & Clark County with Felony Sexual Intercourse Without Consent (hereinafter "2010 SIWOC Case"). (D.C. Doc. 29, at 2.)

6/29/2010: The Flathead County Attorney's Office files a petition to revoke the 5-year suspended portion of Mr. Wolfblack's 2003 Theft Sentence. (D.C. Doc. 30.)

10/13/2010: Mr. Wolfblack pleads guilty in the 2010 SIWOC Case and is sentenced to 10-years with 5-years suspended (hereinafter "2010 SIWOC Sentence"). (D.C. Doc. 29, at 2; D.C. Doc. 39, at 2; and D.C. Doc. 40, at 2.)

11/10/2010: Mr. Wolfblack admits to the allegation(s) in the State's petition to revoke. (D.C. Doc. 39, at 1-2.) The district court proceeds to disposition the same day. (D.C. Doc. 39, at 2.) The court revokes and re-imposes the 5-year suspended portion of Mr. Wolfblack's 2003 Theft Sentence, and further orders that the revocation sentence

run *consecutive* to his 2010 SIWOC Sentence (hereinafter "2010 Theft Revocation Sentence").[2] (D.C. Doc. 39, at 2; see also D.C. Doc. 40, at 2.)

6/26/2021: Mr. Wolfblack's 10-year SIWOC Sentence expires and, according to the State, Mr. Wolfblack begins serving his 2010 Theft Revocation Sentence.[3] (D.C. Doc. 41, at 3; see also 9/22/22 Tr., at 4-5.)

12/3/2021: Mr. Wolfblack's probation officer, Tanya Kenworthy ("Officer Kenworthy"), files a report alleging numerous violations including absconding on November 10, 2021. (D.C. Doc. 41, at 3; see also 9/22/22 Tr., at 9.)

3/3/2022: The Flathead County Attorney's Office files a petition to revoke Mr. Wolfblack's 2010 Theft Revocation Sentence. (D.C. Doc. 42.) The district court issues a warrant for Mr. Wolfblack's arrest the same day (hereinafter "1st Revocation Warrant"). (D.C. Doc. 43.)

3/13/2022: Mr. Wolfblack is arrested on the 1st Revocation Warrant. (D.C. Doc. 61, at 3.)

3/17/2022: Mr. Wolfblack is released on his own recognizance.

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[2] There is nothing in the record indicating that Mr. Wolfblack appealed his 2010 Theft Revocation Sentence.

[3] As will be addressed in detail below, Mr. Wolfblack contends he began serving his 2010 Theft Revocation Sentence the day it was imposed—November 10, 2010—not June 21, 2021 as alleged by the State.

(D.C. Doc. 61, at 3.)

3/31/2022: Mr. Wolfblack enters general denials to the allegations in the State's petition to revoke. (3/31/22 Tr., at 6.)

5/19/2022: Mr. Wolfblack files a motion to dismiss arguing the State's petition to revoke was untimely. (D.C. Doc. 55, at 1-2.)

6/1/2022: The Flathead County Attorney's Office files a response opposing Mr. Wolfblack's motion to dismiss. (D.C. Doc. 58.)

6/3/2022: Probation Officer Kenworthy files an Addendum Report of [Probation] Violation. (D.C. Doc. 61.) The Addendum contains additional allegations including that Mr. Wolfblack used drugs on two separate occasions and absconded for a second time on May 26, 2022. (D.C. Doc. 61, at 3; see also 8/11/22, Tr., at 10.)

6/7/2022: The Flathead County Attorney's Office files a second petition to revoke Mr. Wolfblack's 2010 Theft Revocation Sentence. (D.C. Doc. 62.)

6/24/2022: The court issues a warrant for Mr. Wolfblack's arrest (hereinafter "Second Revocation Warrant"). (D.C. Doc. 68.)

7/9/2022: Mr. Wolfblack is arrested on the Second Revocation Warrant. (8/11/22 Tr., at 10.)

8/11/2022: An adjudication hearing is held on the State's petition to revoke. (8/11/22 Tr., at 1-27.) The district court orally denies Mr. Wolfblack's motion to dismiss based on a "presumption" that his 2010 Theft Revocation Sentence ran consecutive to his 2010 SIWOC Sentence. (8/11/22 Tr., at 24.)

Probation Officer Kenworthy provides testimony concerning Mr. Wolfblack's probation violations. (8/11/22 Tr., at 5-14.) Officer Kenworthy testifies that among other transgressions Mr. Wolfblack absconded on November 10 (2021) and again on May 26 (2022). (8/11/22 Tr., at 6-8.) Based on Officer Kenworthy's testimony the district court concludes Mr. Wolfblack violated his probation and orally revokes his 2010 Theft Revocation Sentence. (8/11/22 Tr., at 25.)

9/22/2022: A disposition hearing is held during which the district court re-imposed the 5-year suspended portion of Mr. Wolfblack's 2003 Theft Sentence with no time suspended. (D.C. Doc. 79, at 1.) The court awarded Mr. Wolfblack 73-days of incarceration credit and 44-days of street credit. (D.C. Doc. 79, at 1-2; see also 9/22/22 Tr., at 25.)

Concerning street credit, Officer Kenworthy testified that Mr. Wolfblack had no violations from June 26 – 30, nor any violations from

October 1 – November 9 (2021). (9/22/22 Tr., at 5-7.) For this period the court awarded Mr. Wolfblack 44-days of street credit. (9/22/22 Tr., at 8-9, 16-17, & 25.)

The court did not award Mr. Wolfblack any street credit for the months of July, August, or September (2021). Concerning the month of July (2021), Officer Kenworthy testified that Mr. Wolfblack violated his probation by moving into an unauthorized residence and losing his job. (9/22/22 Tr., at 5-6 & 9-11.) For the month of August (2021), Officer Kenworthy initially testified that Mr. Wolfblack lost his job "by the beginning of [August 2021]", although she never clarified when he regained employment. (See 9/22/22 Tr., at 5.) Officer Kenworthy later clarified on cross examination that Mr. Wolfblack's only violation during the month of August (2021) was using meth on the 25th. (9/22/22 Tr., at 11.) For the month of September (2021), Officer Kenworthy testified that Mr. Wolfblack violated his probation by using drugs, not reporting his residence, and "employment again." (9/22/22 Tr., at 6.)

11/21/2022: Mr. Wolfblack files a timely notice of appeal with the Montana Supreme Court. (D.C. Doc. 81.)

STANDARDS OF REVIEW

Whether a criminal sentence is within statutory parameters is a legal question reviewed de novo. *State v. Adams*, 2013 MT 189, ¶ 11, 371 Mont. 28, 305 P.3d 808. Whether the court properly applied a sentencing provision receives de novo review as well. *State v. Gable*, 2015 MT 200, ¶ 6, 380 Mont. 101, 354 P.3d 56.

Whether the court followed the statutory requirements applicable to revocation proceedings also receives de novo review. *State v. Nelson*, 1998 MT 227, ¶ 16, 291 Mont. 15, 966 P.2d 133. Similarly, whether the district court had the legal authority to revoke a probationer's suspended sentence is reviewed de novo. *State v. Graves*, 2015 MT 262, ¶ 12, 381 Mont. 37, 355 P.3d 769.

Whether a right is fundamental, whether a statute interferes with a fundamental right, and whether the government has demonstrated a compelling interest to intrude upon that right are also legal questions reviewed de novo. *Wadsworth v. State*, 911 P.2d 1165, 15, 275 Mont. 287 (1996). Calculating credit for time served is reviewed de novo as well. *State v. Gudmundsen*, 2022 MT 178, ¶ 8, 410 Mont. 67, 517 P.3d 146.

Lastly, the Court may exercise plain error review when failure to do so would result in a manifest miscarriage of justice, leave unsettled the fundamental fairness of the proceeding, or comprise the integrity of the judiciary. *State v. Akers*, 2017 MT 311, ¶¶13-17, 389 Mont. 531, 408 P.3d 142.

SUMMARY OF THE ARGUMENT

On November 10, 2010, the district court lawfully revoked and re-imposed the 5-year suspended portion of Mr. Wolfblack's 2003 Theft Sentence. However, the court violated § 46-18-203(7)(a)(iii), MCA, when it ordered Mr. Wolfblack's revocation sentence to run *consecutive* to his recently imposed 2010 SIWOC sentence. As a result, the "consecutive" portion of Mr. Wolfblack's 2010 Theft Revocation Sentence was facially invalid pursuant to *State v. Southwick*, 2007 MT 257, ¶ 26, 339 Mont. 281, 169 P.3d 698 (Any portion of a sentence that exceeds the district court's statutory authority is "illegal and facially invalid.") (Internal citations and quotations omitted.)

This means Mr. Wolfblack began serving his 5-year revocation sentence the day it was imposed—November 10, 2010—which in turn means his revocation sentence expired on November 10, 2015. Accordingly, the State's 2022 petition to revoke was untimely under § 46-18-203(2), MCA, which mandates that a revocation petition be filed "during the period of suspension… but not after the period has expired."

Importantly, Mr. Wolfblack's failure to appeal his 2010 Theft Revocation Sentence does not bar his claim. It is true § 46-18-116(3),

MCA, prohibits courts from correcting illegal sentences after the time to file an appeal has lapsed. But Mr. Wolfblack is not seeking to correct an unlawful sentence. Rather, Mr. Wolfblack is simply pointing out that because the "consecutive" portion of his 2010 Theft Revocation Sentence was facially invalid, it was void from the outset pursuant to the holding in *Southwick*.

Should this Court conclude Mr. Wolfblack is seeking to correct the unlawful portion of his 2010 Theft Revocation Sentence and/or required to do so to obtain relief, then Mr. Wolfblack asserts 46-18-116(3) is facially unconstitutional when applied to illegal sentences. Or if necessary, this Court should invoke plain error review given that the "incarceration of an individual pursuant to a facially invalid sentence represents a grievous wrong[] and a miscarriage of justice…" *Southwick*, ¶ 18 (internal citations and quotations omitted).

ARGUMENT

I. The district court should have granted Mr. Wolfblack's motion to dismiss.

A. Revocation proceedings are governed by 46-18-401—not 46-18-203.

On May 19, 2022, Mr. Wolfblack moved to dismiss as untimely the State's petition to revoke his 2010 Theft Revocation Sentence. (D.C. Doc. 55, at 1-2.) The district court denied the motion based on a "presumption" that Mr. Wolfblack's 2010 Theft Revocation Sentence ran consecutive to his 2010 SIWOC Sentence. (8/11/22, Tr., at 24.) While not saying so explicitly, the district court must have relied on § 46-18-401(4), MCA, which advises that "[s]eparate sentences for two or more offenses must run consecutively unless the court otherwise orders."

The district court erred in relying on 46-18-401 as revocation proceedings are governed by 46-18-203—not 46-18-401. *State v. Seals*, 2007 MT 71, ¶ 15, 336 Mont. 416, 156 P.3d 15 (Section "46-18-401, MCA, is not applicable to the revocation matter before us because sentencing upon the revocation of a suspended… sentence is… expressly governed by § 46-18-203, MCA… not § 46-18-401, MCA…"); *see also Boggs v. McTighe*, 2019 Mont. LEXIS 278, 2-3, 397 Mont. 552,

449 P.3d 787 *citing State v. White*, 2016 Mont. LEXIS 542, No. DA 15-0475, Order, at 1 (Mont. Aug. 2, 2016) ("[A] district court does not possess authority to run a sentence upon revocation consecutively with another existing sentence under 46-18-401, MCA.") Thus, in denying Mr. Wolfblack's motion to dismiss it appears the district court applied the wrong statute i.e., 46-18-401 instead of 46-18-203.

B. During Mr. Wolfblack's initial sentencing in 2003 the court could not have imposed a consecutive sentence; accordingly, the revoking court was statutorily prohibited from doing so in 2010.

Section 46-18-203(7)(a)(iii) provides in pertinent part that when an offender violates the terms of his suspended sentence the court may revoke the suspended sentence and require the offender to serve "any sentence that could have been imposed" so long as the revocation sentence "does not include a longer… commitment term than the original sentence[.]"

In other words, 46-18-203(7)(a)(iii) cautions that the parameters of Mr. Wolfblack's 2010 Theft Revocation Sentence were statutorily limited by his *initial* 2003 Theft Sentence. This is common sense given that a revocation "subjects the defendant to execution of the original sentence as though he had never been given a suspension of sentence."

State v. Cook, 2012 MT 34, ¶ 16, 364 Mont. 161, 272 P.3d 50 *citing State v. Haagenson*, 2010 MT 95, ¶ 16, 356 Mont. 177, 232 P.3d 367; *see also State v. Souther*, 2022 MT 203, ¶ 9, 410 Mont. 330, 519 P.3d 1 ("[A] revocation hearing is simply an exercise of the trial court's supervision over a defendant during probation and the consequence of revocation is execution of a penalty previously imposed[]"); and *State v. Frazier*, 2001 MT 210, ¶ 15, 306 Mont. 358, 34 P.3d 96 (During revocation proceedings "the court's authority encompasses the power to reimpose the *original sentence*… totaling no greater than the length of the original sentence.") (Emphasis added.)

To illustrate, at Mr. Wolfblack's initial 2003 Theft Sentencing the court imposed a DOC commitment of 10-years with 5-years suspended. (D.C. Doc. 25.) The court did not order Mr. Wolfblack's 2003 Theft Sentence to run consecutive to any other sentence, nor is there evidence the court could have imposed a consecutive sentence in 2003. (See D.C. Doc. 25.)

Accordingly, in 2010 the revocation court was statutorily prohibited from revoking and running the suspended portion of Mr. Wolfblack's 2003 Theft Sentence *consecutive* to his 2010 SIWOC

Sentence. This is self-evident given that Mr. Wolfblack's 2010 SIWOC Sentence did not exist in 2003, meaning a consecutive sentence "could [not] have been imposed" at his initial 2003 Theft Sentencing as required under 46-18-203(7)(a)(iii).

Additionally, running Mr. Wolfblack's 2010 Theft Revocation Sentence consecutive to his 2010 SIWOC Sentence resulted in a revocation sentence with a "longer… commitment term than the original sentence" also in violation of 46-18-203(7)(a)(iii). As the district court explained in its 2010 Revocation Order, the "net effect" of running Mr. Wolfblack's 2010 Theft Revocation Sentence consecutive to his 2010 SIWOC Sentence was a commitment of "fifteen (15) years with ten (10) years suspended." (D.C. Doc. 39, at 2.) And 15-years with 10-years suspended is a "longer… commitment term" than 10-years with 5-years suspended. (*Compare* D.C. Doc. 25 *with* Doc. 39, at 2.)

In sum, during the 2010 revocation disposition the district court was prohibited under 46-18-203(7)(a)(iii) from running Mr. Wolfblack's revocation sentence *consecutive* to his 2010 SIWOC Sentence.

C. The "consecutive" portion of Mr. Wolfblack's 2010 Revocation Sentence was facially invalid and thus void at inception.

A sentence or sentencing provision is illegal when the "sentence or sentencing provision [is] not authorized by statute… [or] otherwise exceeds the statutorily authorized range or limit for that type of sentence or condition…" *State v. Thibeault*, 2021 MT 162, ¶ 10, 404 Mont. 476, 490 P.3d 105. An illegal sentence "is not void ab initio… but is good insofar as the power of the court extends and is invalid only as to the excess." *DeShields v. State*, 2006 MT 58, ¶ 11, 331 Mont. 329, 132 P.3d 540; *see also Southwick*, ¶ 26 (Any portion of a sentence that exceeds the district court's statutory authority is "illegal and facially invalid.") In other words, if part(s) of the sentence are legal and other part(s) illegal, the lawful portion(s) remain while the unlawful portion(s) are void.

As addressed above, during his 2010 revocation disposition the district court had the statutory authority to revoke and re-impose the 5-year suspended portion of Mr. Wolfblack's 2003 Theft Sentence. However, the court was prohibited under 46-18-203(7)(a)(iii) from running Mr. Wolfblack's revocation sentence consecutive to his 2010 SIWOC Sentence. Accordingly, the "consecutive" portion of Mr. Wolfblack's 2010 Theft Revocation Sentence was facially invalid and

thus void pursuant to *DeShields* and *Southwick*. This in turn means Mr. Wolfblack began serving his 2010 Theft Revocation Sentence the day it was imposed, November 10, 2010. (D.C. Doc. 39, at 1-2.)

D. Because Mr. Wolfblack's 2010 Theft Revocation Sentence expired in 2015, the State's 2022 Petition to Revoke was untimely under 46-18-203(2).

Section 46-18-203(2) advises that a revocation petition "must be filed… during the period of suspension… but not after the period has expired[]"; *see also Southwick*, ¶ 29 ("A petition to revoke a suspended sentence cannot be filed after the term of a sentence expires.")

In *Southwick* the defendant (Mr. Southwick) was charged with multiple felonies for issuing a bad check and forgery. *Southwick*, ¶ 6. At the time he committed the offenses (1998) the maximum DOC commitment was 5-years. *Southwick*, ¶ 8. Mr. Southwick eventually pled guilty and was sentenced in February of 2001, receiving a DOC commitment of 15-years with 10-years suspended and 614-days credit for pre-trial incarceration. *Southwick*, ¶¶ 6-7.

In February of 2005 the State filed a petition requesting the court revoke the 10-year suspended portion of Mr. Southwick's sentence. *Southwick*, ¶ 10. The district court obliged and ordered Mr. Southwick

to serve an additional 5-years. *Southwick*, ¶ 10.

On appeal this Court reversed, holding that because "Southwick had discharged the maximum time he *could have been committed* to DOC before the petition to revoke was filed in 2005… the District Court had no authority to revoke a suspended commitment that was illegally imposed." *Southwick*, ¶27 (emphasis added). The Court's reasoning was simple and straightforward: Because the statutory maximum for a DOC commitment in 1998 was 5-years, the 10-year suspended portion of Mr. Southwick's sentence was facially invalid; this in turn meant Mr. Southwick's sentence expired in June of 2004—not June of 2014—rendering the State's 2005 petition to revoke untimely under 46-18-203(2). *Southwick*, ¶¶10 & 28-29. *Southwick* stands for the proposition that once the valid portion of a sentence has expired the district court lacks the authority to revoke, even when a facially invalid portion of a suspended sentence remains.

Circling back to Mr. Wolfblack's case, as addressed above the "consecutive" portion of his 2010 Theft Revocation Sentence was facially invalid and hence void. This means Mr. Wolfblack began serving his 5-year revocation sentence the day it was imposed—November 10, 2010—

which in turn means it expired on November 10, 2015. Thus, as in *Southwick*, the State's 2022 petition to revoke Mr. Wolfblack's 2010 Theft Revocation Sentence was untimely under 46-18-203(2).

E. Mr. Wolfblack's failure to appeal his 2010 Theft Revocation Sentence does not bar his claim.

Section 46-18-116(3) advises that courts "may correct a factually erroneous sentence… at any time… [but] [i]llegal sentences must be addressed in the manner provided by law for appeal and postconviction relief." Montana Rule of Appellate Procedure 5(b) advises that "[i]n criminal cases an appeal from a judgment entered pursuant to section 46-18-116… must be taken within 60 days after entry of judgment…" M.R. App. P. 5(b).

Mr. Wolfblack anticipates the State will argue 46-18-116(3) procedurally bars his claim owing to his failure to appeal his 2010 Theft Revocation Sentence. *See Adams*, ¶ 17 (Advising that a defendant's failure to appeal his initial sentence prevented the court from correcting the initial sentence during a revocation proceeding.)

This is a specious argument, however, because Mr. Wolfblack is not attempting to correct his initial 2003 Theft Sentence, nor is he attempting to correct his 2010 Theft Revocation Sentence. Rather, as

addressed above, Mr. Wolfblack is merely pointing out that as in *Southwick* the facially invalid portion of his sentence (i.e. the "consecutive" portion) was void at inception. This in turn means his 2010 Theft Revocation expired in November of 2015, rendering the State's 2022 petition to revoke untimely under 46-18-203(2).

II. In the alternative, 46-18-116(3) is facially unconstitutional to the extent it prohibits courts from correcting an illegal sentence after the time to file an appeal or post-conviction petition has expired.

Prior to 2001, Montana courts were authorized to correct illegal sentences at any time pursuant to § 46-18-117, MCA. *State v. Christianson*, 1999 MT 156, ¶ 23, 295 Mont. 100, 983 P.2d 909. In 2001, however, Montana legislators repealed 46-18-117 and replaced it with 46-18-116(3), which advises that courts "may correct a factually erroneous sentence or judgment at any time[] [but] [i]llegal sentences must be addressed in the manner provided by law for appeal and postconviction relief." In other words, in repealing 46-18-117 and enacting 46-18-116(3), Montana legislatures time-capped the correction of illegal sentences—but not factually erroneous sentences.

Should the conclude Mr. Wolfblack is attempting to and/or required to correct the illegal portion of his 2010 Theft Revocation

Sentence to gain relief—but is procedurally barred from doing so—then Mr. Wolfblack asserts 46-18-116(3) is facially unconstitutional when applied to illegal sentences. The Montana Supreme Court "will address a defendant's facial constitutional challenge to a sentencing statute even if it is raised for the first time on appeal." *State v. Ber Lee Yang*, 2019 MT 266, ¶ 11, 397 Mont. 486, 452 P.3d 897.

A substantive due process claim asks whether the government's actions are reasonable "regardless of the procedures used to implement them…" *State v. Webb*, 2005 MT 5, ¶ 21, 325 Mont. 317, 106 P.3d 521. In a substantive due process challenge, whether facial or as-applied, the challenging party bears the initial burden of showing that the statute interferes with a fundamental right; upon meeting this threshold the burden shifts to the government to show the statute is narrowly tailored to further a compelling government interest. *Clark Fork Coalition v. Mont. Dep't of Natural Res. & Conservation*, 2021 MT 44, ¶ 48, 403 Mont. 225, 481 P.3d 198. To do so the State must show the statute is the least restrictive means to effectuate its compelling government interest. *Gryczan v. State*, 283 Mont. 433, 449, 942 P.2d 112 (1997).

Importantly, strict scrutiny applies when a statute affects a

fundamental right found in the Declaration of Rights. *Driscoll v. Stapleton*, 2020 MT 247, ¶ 18, 401 Mont. 405, 473 P.3d 386. Strict scrutiny applies here because:

> Under the Montana Constitution, physical liberty is a fundamental right, without which other constitutionally guaranteed rights would have little meaning… Any deprivation of one's physical liberty amounts to an infringement upon the fundamental right requiring a compelling state interest sufficient to warrant such an infringement. *Ramon v. Short*, 2020 MT 69, ¶ 12, 399 Mont. 254, 460 P.3d 867 (internal citations and quotations omitted).

Liberty is also a fundamental right under the United States Constitution, as the late Justice O'Connor artfully articulated in her concurrence in *Reno v. Flores*,

> Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. Freedom from bodily restraint means more than freedom from handcuffs… A person's core liberty interest is also implicated when she is confined in a prison… This is clear beyond cavil, at least where adults are concerned. In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration… which is the deprivation of liberty triggering the protections of the Due Process Clause… 507 U.S. 292, 315-316 (1993) (O'Connor, J., concurrence, internal citations and quotations omitted).

Mr. Wolfblack concedes the State has a compelling interest in

revoking and re-imposing previously suspended sentences. The State does not, however, have a compelling interest in incarcerating citizens on *facially invalid sentences*. Indeed, this Court has been crystal clear that "incarceration of an individual pursuant to a facially invalid sentence represents a grievous wrong[] and a miscarriage of justice that warrants relief even if the defendant is otherwise procedurally barred." *Southwick*, ¶ 18 (internal citations and quotations omitted).

The only foreseeable "compelling interest" for time-capping the correction of illegal sentences is judicial economy in the finality of judgements. Yet both the Montana Supreme Court and the United States Supreme have explicitly recognized that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Kills on Top v. State*, 279 Mont. 384, 400, 928 P.2d 182 (1996) *quoting* S*anders v. United States*, 373 U.S. 1, 8 (1963).

But even if *arguendo* judicial economy in the finality of judgments did constitute a compelling reason, prohibiting tardy challenges to illegal sentences could never constitute "the least restrictive means" for achieving this goal. Were it otherwise, 46-18-116(3) would not

authorize courts to "correct a factually erroneous sentence or judgment *at any time*." (Emphasis added.) Additionally, a substantive due process claim requires contemplating whether the challenged statute's restrictions are unreasonable or arbitrary when balanced against the statute's purpose. *Webb*, ¶ 21. The fact that 46-18-116(3) allows courts to correct factually erroneous sentences *at any time*—yet time-caps the correction of illegal sentences—is both unreasonable and arbitrary.

Thus, 46-18-116(3) is facially unconstitutional to the extent it prohibits courts from correcting illegal sentences after the time for filing an appeal or post-conviction petition has run.

III. If necessary the Court should invoke plain error review.

Under the common law plain error doctrine this Court may review an unpreserved error implicating a fundamental right if failing to do so would result in a manifest miscarriage of justice, leave unsettled the fundamental fairness of the proceeding, or comprise the integrity of the judiciary. *State v. Hayden*, 2008 MT 274, ¶ 17, 345 Mont. 252, 190 P.3d 1091. The party requesting plain error review bears the burden of burden of demonstrating the claimed error implicates a fundamental right that results in a manifest miscarriage of justice, leaves unsettled

the fundamental fairness of the proceeding, or comprises the integrity of the judiciary. *Akers*, ¶¶ 13 & 17. Mr. Wolfblack easily satisfies both requirements.

First, Mr. Wolfblack is incarcerated on a facially invalid sentence which implicates his fundamental right to liberty. *Ramon*, ¶ 12 ("Under the Montana Constitution[] physical liberty is a fundamental right…" *Ramon*, ¶ 12; *see also Flores*, 507 U.S. at 315-316 (1993) (O'Connor, J., concurrence) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause...") (Internal citations and quotations omitted.)

Second, incarcerating Mr. Wolfblack on a facially invalid sentence constitutes a manifest miscarriage of justice. *Southwick*, ¶ 18 ("[I]ncarceration of an individual pursuant to a facially invalid sentence represents a grievous wrong[] and a miscarriage of justice…" (Internal citations and quotations omitted.)

Thus, if necessary this Court can and should invoke plain error review.

IV. At a minimum Mr. Wolfblack is entitled to an additional 102-days of credit.

Section 46-18-203(7)(b) advises in substance that when a

suspended sentence is revoked the court must award incarceration credit as well as "street time" i.e., "all of the elapsed time served without any record or recollection of violations…" Awarding street time requires thoroughly reviewing the record to "pars[e] out" compliance periods. *State v. Jardee*, 2020 MT 81, ¶ 10, 399 Mont. 459, 461 P.3d 108; *see also Gudmundsen*, ¶ 14 ("The defendant is statutorily entitled to the credit unless specific violations during the times in question are demonstrated.") During revocation proceedings the state bears the burden of proving that credit should be denied. *Jardee*, 2020 MT at n. 1.

A. Mr. Wolfblack was entitled to an additional 7-days of incarceration credit.

During Mr. Wolfblack's 2022 revocation disposition the court awarded him 73-days of incarceration credit. (D.C. Doc. 79, at 1-2; see also 9/22/22 Tr., at 25.) The record is not entirely clear, but presumably the 73-days represents the period beginning on the date Mr. Wolfblack was arrested on the Second Revocation Warrant (July 9, 2022) until his disposition hearing on September 9, 2022. (D.C. Doc. 61, at 3; D.C. Doc. 79, at 1-2; and 9/22/22 Tr., at 25.) However, the period from 7/9/22 –

9/22/22 is actually 75 days—not 73 days as awarded by the court.[4]

Additionally, Mr. Wolfblack spent 5-days in jail starting on March 13, 2022 (when he was arrested on the First Revocation Warrant) until March 17, 2022 (when he was released on his own recognizance). (D.C. Doc. 61, at 3.) Mr. Wolfblack did not receive incarceration credit for these 5-days either.

B. Mr. Wolfblack is entitled to an additional 95-days of street time.

The court also awarded Mr. Wolfblack 44-days of street time. (D.C. Doc. 79, at 2; see also 9/22/22 Tr., at 25.) Probation Officer Kenworthy testified that Mr. Wolfblack began serving his 2010 Theft Revocation Sentence on June 26 (2021) and absconded from probation on November 10 (2021).[5] (9/22/22 Tr., at 4-5 & 9; see also D.C. Doc. 41, at 3.) Officer Kenworthy further advised that Mr. Wolfblack had no probation violations from June 26-30 nor any violations from October 1 – November 9 (2021). (9/22/22 Tr., at 5-7.) This represents the 44-days

[4] 75-days does not include the date of Mr. Wolfblack's disposition hearing (9/22/22), which if included would constitute 76-days.

[5] As addressed above, it is Mr. Wolfblack's contention that he began serving his 2010 Theft Revocation Sentence the day it was imposed—November 10, 2010—not June 26, 2021 as argued by the State.

of street credit awarded by the court. (9/22/22 Tr., at 8-9, 16-17, & 25.)

Mr. Wolfblack was not awarded any street time for the months of July, August, or September of 2021. Mr. Wolfblack concedes he was not entitled to street credit for July or September, but he was entitled to 29-days for the month of August (2021).

Officer Kenworthy initially testified that Mr. Wolfblack had lost his job "by the beginning of [August 2021]", but she never specified precisely when he lost his job nor clarified when he regained employment. The state must present specific evidence of violations during the period in question. *Gudmundsen*, ¶ 14 ("The defendant is statutorily entitled to the credit unless specific violations during the times in question are demonstrated.") The State presented no evidence that Mr. Wolfblack was actually unemployed throughout the month of August (2021). Moreover, Ms. Kenworthy later clarified that Mr. Wolfblack's only violation during the month of August was using drugs on the 25th. (9/22/22 Tr., at 11.) Thus, after removing August 25th for drug use, Mr. Wolfblack should have received an additional 29-days of street credit for the month of August 2021.

Mr. Wolfblack was also entitled to 66-days of street time for the

period from March 18, 2022 to May 26, 2022. As a refresher, Mr. Wolfblack was arrested on the First Revocation Warrant on March 13 and released on his own recognizance 5-days later on March 17 (2022). (D.C. Doc. 61, at 3.) Mr. Wolfblack then absconded for a second time on May 26, 2022. (D.C. Doc. 61, at 3; see also 8/11/22 Tr., at 8.)

The period from March 18, 2022 (the day after his release) to May 25, 2022 (the day before he absconded) is 68-days. On two occasions during that 68-day period Mr. Wolfblack admitted to using drugs. (D.C. Doc. 61, at 3; see also 8/11/22 Tr., at 10.) Mr. Wolfblack is therefore entitled to an additional 66-days of street time for the period between 3/18/22 – 5/25/22.

CONCLUSION

The district court should have granted Mr. Wolfblack's motion to dismiss. Mr. Wolfblack requests this Court remand with instructions to vacate the district court's order revoking his 2010 Theft Revocation Sentence. In the alternative, Mr. Wolfblack requests this Court remand with instructions to award him an additional 102-days of credit.

Respectfully submitted this 18th day of December, 2023.

By /s/ Pete Wood
Pete Wood, Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionally 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 5,289 (including footnotes), but excluding Title Page, Table of Contents, Table of Authorities, Certificate of Compliance, Appendix, and Certificate of Service.

By /s/ Pete Wood
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APPENDIX

CERTIFICATE OF SERVICE

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