

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0660

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOSHUA DUANE WOLFBLACK,

Defendant and Appellant.

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**BRIEF OF APPELLEE**

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

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### **STATEMENT OF THE ISSUES**

1. Wolfblack was sentenced in 2010 in Lewis and Clark County after his original sentence in this case was imposed. He was subsequently revoked in this case, and the judgment stated that the sentence ran consecutively to his sentence in Lewis and Clark County. Did the district court correctly determine that Wolfblack had not discharged his 2010 revocation sentence imposed in this case because the Lewis and Clark County sentence ran consecutively to this case pursuant to the statutory default that sentences run consecutively?

2. The State agrees that Wolfblack is entitled to an additional seven days of credit for time served.

3. Is Wolfblack entitled to additional credit for elapsed time during months where he used methamphetamine but did not have a continuous violation for the entire month?

### **STATEMENT OF THE CASE**

Appellant Joshua Duane Wolfblack was originally sentenced in this case in 2003. In 2010, Wolfblack was sentenced for a new offense in Lewis and Clark County. Also in 2010, Wolfblack's suspended sentence in this case was revoked, and the judgment stated that the sentence was being imposed consecutively to his sentence in Lewis and Clark County.

The State filed a petition to revoke the suspended portion of Wolfblack's 2010 suspended sentence in 2022. He moved to dismiss the revocation petition arguing that he had already discharged his sentence because his sentence in this case should have run concurrently with his sentence imposed in 2010 in Lewis and Clark County. The district court denied the petition based on the conclusion that the Lewis and Clark County sentence, by default, ran consecutively to his original sentence in this case. Because the Lewis and Clark County sentence ran first, the Court concluded that Wolfblack had not discharged his sentence.

The court revoked Wolfblack's suspended sentence. The court granted Wolfblack credit for 73 days of time served in jail and 44 days of time that elapsed without violation while he was serving his suspended sentence.

On appeal, he argues that the court erred in denying his motion to dismiss the revocation proceeding and requests additional credit for time served and elapsed time.

## **STATEMENT OF THE FACTS**

### **I. Underlying sentence**

Wolfblack was charged with burglary and theft in Flathead County in 2003 in DC-03-313B. (Doc. 3.) He eventually pleaded guilty to theft and was sentenced

to a ten-year commitment to the Department of Corrections (DOC) with five years suspended. (Doc. 25.)

In 2010, Wolfblack was charged with sexual intercourse without consent (SIWOC) in Lewis and Clark County Cause No. ADC-2010-179. (Doc. 29.) Wolfblack pleaded guilty to SIWOC in ADC-2010-179 and was committed to the DOC for ten years with five years suspended (2010 L&C Sentence). (Doc. 41 at 2.)

The State also petitioned to revoke the suspended portion of Wolfblack's sentence in DC-03-313B in 2010 because he had committed multiple violations and because of his SIWOC charge in Lewis and Clark County. (Docs. 29-30.) Wolfblack admitted to the violations in this case, and the court revoked his suspended sentence. (Doc. 39.) The court sentenced Wolfblack to a five-year commitment to the DOC, with all time suspended (2010 Revocation Sentence). (Doc. 39 at 2.) The judgment states, "This sentence shall run consecutive to the sentence imposed on the Defendant in Lewis and Clark County. (net effect being fifteen (15) years with ten (10) years suspended.)." (Doc. 39 at 2.)

The only document filed in this case between December 2010 and December 2021 was a letter documenting that Wolfblack had paid restitution. (Register of Actions; Doc. 40.) The Report of Violation that was filed in this case in 2021 (2021 Report of Violation) indicates that Wolfblack was released from prison to the suspended portion of his sentence on May 4, 2015. (Doc. 41 at 2.)

The records demonstrate that he was serving the custodial portion of his 2010 L&C Sentence and began serving the suspended portion of his 2010 L&C Sentence upon his release in 2015, rather than his suspended sentence in this case. The 2021 Report of Violation indicates that a Report of Violation was filed in 2016 and a second Report of Violation was filed in 2019. (*Id.*) Those were not filed in this case, so it appears that they were filed in the Lewis and Clark County case. (*See Register of Actions.*)

Wolfblack was released from prison and began serving his suspended sentence in this case on June 26, 2021. (Doc. 41 at 2-3; 9/22/22 Tr. at 4-5.)

## **II. Revocation proceeding**

On December 3, 2021, Wolfblack's probation officer filed the 2021 Report of Violation in this case alleging that Wolfblack absconded and failed to inform the probation officer he had changed his residence. (Doc. 41 at 3.) The State petitioned to revoke Wolfblack's suspended sentence on March 3, 2022. (Doc. 42.)

The State later filed an Addendum Report of Violation in which it alleged that Wolfblack had absconded again and violated the condition prohibiting him from possessing alcohol or drugs. (Doc. 61 at 3.) The State filed a second petition for revocation based on the new allegations. (Doc. 62.)

The State subsequently filed a second Addendum Report of Violation alleging that Wolfblack had failed to comply with the law and had been charged with two counts of obstructing a peace officer and trespassing. (Doc. 69 at 3.)

Wolfblack filed a motion to dismiss the revocation proceeding. (Doc. 55.) He argued that Judge Lympus did not have the authority to order the 2010 Revocation Sentence to be served consecutive to the 2010 L&C Sentence. (*Id.*) He argued that the five-year sentence imposed in this case on November 10, 2010, therefore, had to expire on November 10, 2015. (*Id.* at 1-2.) He did not address whether the 2010 L&C Sentence had been imposed concurrently to or consecutively to his sentence in this case. (*See* Doc. 55.)

The State filed a response setting out the factual history of the case. (Doc. 58 at 1-2.) The State stated that Wolfblack began serving his 2010 L&C Sentence in 2010, that sentence was revoked in 2017, and he discharged that sentence on June 26, 2021. (Doc. 58 at 1-2.) The State stated that Wolfblack began serving his 2010 Revocation Sentence on June 26, 2021, and indicated that the sentence would expire on February 19, 2026. (*Id.* at 2.)

The State argued that Wolfblack's claim challenging the sentence imposed upon revocation should not be reviewed because he had not appealed his sentence. (*Id.* at 2.) The State argued that if the claim was reviewed, it should be rejected because the cases Wolfblack cited did not prohibit a revocation court from



ordering a sentence to run consecutively to another sentence. (*Id.* at 3.) The State also explained that Wolfblack's assertion that his sentence should have expired in 2015 was incorrect because the DOC had the authority to run his 2010 L&C Sentence, which had a custodial portion, before his fully suspended 2010 Revocation Sentence. (*Id.* at 4.) The State explained that Wolfblack's 2010 L&C Sentence ran before his sentence in this case, and his sentence in this case would not expire until 2026. (Doc. 58 at 4.)

At the next hearing, Wolfblack's counsel informed the court that Wolfblack was not present, and counsel was waiting for the court to rule on the motion to dismiss. (6/23/22 Tr. at 4.) The court indicated that it had quickly reviewed the motion and would like additional argument from counsel. (*Id.* at 4-5, 8-9.) Wolfblack's counsel asked for a short continuance so that he could present an argument with Wolfblack present. (*Id.* at 5.) The State explained that Wolfblack had not been complying with his conditions and could not be located. (*Id.* at 5-7.) At the State's request, the court issued an arrest warrant. (*Id.* at 7.) The court gave the State the opportunity to clarify its argument, but then concluded that a hearing should be held when Wolfblack was back in custody. (*Id.* at 10.)

At the beginning of the hearing held August 11, 2022, the court heard testimony from Wolfblack's probation officer, Tanya Kenworthy, about Wolfblack's probation violations. (8/11/22 Tr. at 5-14.) She testified that he had

failed to report to her, failed to maintain his address with the sexual offender registry, and admitted to using methamphetamine. (*Id.* at 8-10.)

After Kenworthy testified, Wolfblack’s counsel reminded the court that it had not ruled on the motion to dismiss. (*Id.* at 15.) Wolfblack was represented at that hearing by Daniel Wood, who was filling in for the attorney who filed the motion, Liam Gallagher. (*See generally id.*; Doc. 55.) After some discussion, the court allowed Wood to make an argument about the motion. (8/11/22 Tr. at 20-22.)

Wood acknowledged that “there may be some missing piece,” (*id.* at 20), but he set out the argument made in the motion. (*Id.* at 20-22.) Wood explained, “the argument is effectively that if the Lewis and Clark County matter—and this is where the blind spot is, I’m acknowledging, Judge, but if the Lewis and Clark County matter” was imposed concurrent to original sentence in this case, “then Judge Lympus would not have been able to on his own say well, this is going to be consecutive to that case.” (*Id.* at 21-22.) Wood stated that he had attempted to determine the specifics of the Lewis and Clark County sentence, but had not been able to do so. (*Id.* at 22.) Although he did not know whether the sentence in Lewis and Clark County had been imposed concurrently or consecutively to the original sentence in this case, he explained that the position in the motion was that the sentence imposed in 2010 upon revocation in this case should have run concurrently to the 2010 L&C Sentence. (*Id.*)

After the court clarified that Wolfblack’s counsel did not have information demonstrating that the 2010 L&C Sentence was imposed concurrently to the original sentence in this case, the court noted, “And I think if it’s not stated as concurrent it’s presumed to be consecutive, is it not?” (*Id.* at 23.)<sup>1</sup> Wood replied, “I believe that is the—,” and was cut off before completing his statement. (*Id.*)

The prosecutor told the court that the 2010 revocation was resolved through a global plea agreement between the two counties in which it was “explicitly clear that these two sentences would run consecutive.” (*Id.* at 23.) The prosecutor represented that “[t]he Lewis and Clark [County] sentence makes no mention of the Flathead County case.” (*Id.*) But the prosecutor noted that the judgment revoking Wolfblack’s sentence in Flathead County explicitly stated that it would run consecutively to the Lewis and Clark County sentence. (*Id.* at 23-24.)

The court denied the motion based on the statutory presumption that sentences run consecutively. (*Id.* at 24.) The court then found that Wolfblack had committed the violations in the 2021 Report of Violation and the violations in the first addendum. (*Id.* at 25.) The court revoked Wolfblack’s suspended sentence based on those violations. (*Id.*)

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<sup>1</sup> The transcript indicates that the prosecutor made this statement about not having that information. (8/11/22 Tr. at 23.) When read in context, it is clear that this statement was made by Wood, who had already made the same statements. (*Id.* at 21-23.)

At the disposition hearing, Kenworthy testified about the timing of Wolfblack's violations between the beginning of his suspended sentence in this case on June 26, 2021, and when he absconded in November 2021. (9/22/22 Tr. at 5-12.) Kenworthy recommended that he not receive any credit for the time his sentence had elapsed because during that time, he moved residences without notifying her, used drugs, and quit jobs without notifying her. (*Id.* at 5.) In response, the court noted that it needed a month-by-month recitation of what violations occurred. (*Id.*)

Kenworthy then testified that in the beginning of July, Wolfblack changed his residence without notifying her. (*Id.* at 5-6, 10.) She also said he was fired from his job in July, and he failed to inform her of that. (*Id.* at 6, 9-10.) On August 25, 2021, Wolfblack tested positive for methamphetamine. (*Id.* at 6, 11.) In September, Wolfblack tested positive for methamphetamine and failed to report a change in his residence and employment. (*Id.* at 6, 11-12.) His methamphetamine use was discovered on September 28, 2021. (*Id.* at 12.) Wolfblack reported as required in October and did not have any other violations until he absconded as of November 10, 2021. (*Id.* at 7.)

The court initially indicated, based on the State's direct examination of Kenworthy, that it believed Wolfblack was entitled to 4 days of elapsed time credit for the end of June and 30 days for October. (*Id.* at 8-9.) After Wolfblack's

counsel elicited Kenworthy's testimony that he did not have any violations in November before he absconded, the prosecutor agreed that he was entitled to an additional 10 days of credit for elapsed time, for a total of 44 days. (*Id.* at 9, 16-17.) The prosecutor also stated that Wolfblack was entitled to 73 days of credit for actual jail time served. (*Id.* at 17.)

Wolfblack's counsel argued that his sentence should have discharged years earlier and that he should not be committed to the DOC. (*Id.* at 19-20.) His counsel did not make any argument about the number of days of credit he was entitled to for elapsed time or time served. (*Id.*)

The court committed Wolfblack to the DOC for five years and gave him credit for 73 days served in custody and 44 days of elapsed time. (*Id.* at 25; Doc. 79, available at Appellant's App. A.)

### **SUMMARY OF THE ARGUMENT**

The court's determination that Wolfblack's two sentences ran consecutively was based on the 2010 L&C Sentence, not the 2010 Revocation Sentence. The district court correctly concluded that the statutory presumption that sentences run consecutively caused Wolfblack's 2010 L&C Sentence to run consecutively to the sentence originally imposed in this case. Because the 2010 L&C Sentence ran consecutively to the sentence originally imposed in this case, the 2010 Revocation

Sentence had to run consecutively to the 2010 L&C Sentence, even without the revocation court ordering the 2010 Revocation Sentence to run consecutively to the 2010 L&C Sentence. As a result, Wolfblack had not begun serving his 2010 Revocation Sentence until 2021, when he discharged his 2010 L&C Sentence, and he was still serving his 2010 Revocation Sentence when the State filed a petition to revoke on March 3, 2022.

The State concedes that Wolfblack is entitled to an additional seven days of credit for time served.

Wolfblack is not entitled to any additional credit for elapsed time because he used methamphetamine during the periods in question, and he committed other violations before and after those periods. Wolfblack routinely failed to comply with the conditions of his supervision and is not entitled to any more than the 44 days of credit he already received.

## **ARGUMENT**

### **I. Standard of review**

This Court reviews a district court's revocation of a suspended sentence for abuse of discretion. *State v. Gudmundsen*, 2022 MT 178, ¶ 8, 410 Mont. 67, 517 P.3d 146. When the district court's authority to take a specific action is at issue, however, the question is one of law and is reviewed de novo. *Id.*

Because calculating credit for time served is a legal mandate, rather than a discretionary act, a district court's determination of credit for time served is reviewed for legality. *Id.* Further, the interpretation of a statute is a matter of law. This Court reviews whether a court correctly interpreted and applied a statute de novo. *Id.*

**II. Wolfblack's sentence in this case had not expired prior to the filing of the petition to revoke because the 2010 L&C Sentence did not merge with the sentence originally imposed in this case. As a result, the 2010 Revocation Sentence could not begin to run until Wolfblack discharged his 2010 L&C Sentence on June 26, 2021.**

The district court correctly denied Wolfblack's motion to dismiss because Wolfblack was serving his 2010 Revocation Sentence when the State petitioned to revoke his suspended sentence. A petition to revoke must be filed before a suspended sentence has expired. Mont. Code Ann. § 46-18-203(2). Because the 2010 L&C Sentence was imposed consecutively to the original sentence in this case pursuant to Mont. Code Ann. § 46-18-401(1), the 2010 Revocation Sentence did not begin to run until Wolfblack discharged his 2010 L&C Sentence on June 26, 2021. As a result, the court properly determined that the petition to revoke was filed before Wolfblack's 2010 Revocation Sentence expired.

The determination of whether two sentences run concurrently (i.e., merge) or run consecutively, is determined by the court that imposes the original sentence in

the latest case to be sentenced. *See State v. Thiel*, 242 Mont. 77, 788 Mont. 337 (1990) (interpreting a prior version of Mont. Code Ann. § 46-18-401). Sentences are presumed to run consecutively under Mont. Code Ann. § 46-18-401, which provides:

(1) *Unless the judge otherwise orders:*

(a) whenever a person serving a term of commitment imposed by a court in this state is committed for another offense, the shorter term or shorter remaining term *may not be merged* in the other term; and

(b) whenever a person under suspended sentence or on probation for an offense committed in this state is sentenced for another offense, the period still to be served on suspended sentence or probation may not be merged in any new sentence of commitment or probation.

....

(4) Separate sentences for two or more offenses must run consecutively unless the court otherwise orders.

(Emphasis added.)

Pursuant to Mont. Code Ann. § 46-18-401(1), a new sentence does not merge with, or run concurrently to, a previously imposed sentence that has not discharged unless the sentencing court explicitly so orders. That interpretation is demonstrated by the plain language of the statute and also by the legislative history. The presumption was established in 1989 by HB 168, which amended Mont. Code Ann. § 46-18-401(1). 1989 Mont. Laws, ch. 76. The synopsis to



HB 168 stated that it was “an act providing that if a person serving a sentence is again convicted, the two sentences are served consecutively unless the court orders otherwise[.]” 1989 Mont. Laws, ch. 76, synopsis (capitalization removed).

Here, Wolfblack incorrectly focuses on the sentence imposed upon revocation to argue that his sentences should have run concurrently. Wolfblack’s argument that the 2010 Revocation Sentence had to run concurrently because the original 2003 sentence could not have been imposed consecutive to the subsequent 2010 L&C Sentence ignores the impact of the 2010 L&C Sentence. (*See* Appellant’s Br. at 13-15.) By operation of law, Wolfblack’s 2010 L&C Sentence would run consecutively to his Flathead County sentence *unless* the 2010 L&C Sentence was imposed concurrently to his Flathead County sentence. Because the 2010 L&C Sentence was not ordered to run concurrently to Wolfblack’s Flathead County sentence, the cases had to run consecutively by operation of law.

Wolfblack does not dispute the prosecutor’s representation that the Lewis and Clark County judgment did not mention the Flathead County sentence. In the district court, Wolfblack’s counsel acknowledged that his lack of information about the Lewis and Clark County judgment was a “missing piece” or “blind spot.” (8/11/22 Tr. at 20-21). Counsel seemed to acknowledge that Wolfblack could only prevail “if” the 2010 L&C Sentence had been imposed concurrently to the Flathead County sentence originally imposed in this case. (*See id.* at 21-22.) But he did not

dispute the prosecutor's representation that the judgment from Lewis and Clark County did not address the Flathead County sentence or the court's observation that sentences are presumed to run consecutively when a judgment is silent. (*Id.*)

Because Wolfblack failed to rebut the presumption that the 2010 L&C Sentence ran consecutively to the sentence in this case, the district court correctly denied his motion to dismiss. When Wolfblack was sentenced in Lewis and Clark County, he was a person serving a term of commitment for another offense. Under Mont. Code Ann. § 46-18-401(1)(a), his new sentence could not merge with, or run concurrently to, his original sentence in this case unless the court in Lewis and Clark County expressly so ordered. Because that did not occur, the two sentences had to run consecutively.

When Lewis and Clark County imposed a ten-year commitment to the DOC with five years suspended, that sentence began to run. *See* Doc. 41 at 2 (demonstrating the Lewis and Clark County sentence was running); *Pearson v. Fender*, 2016 Mont. LEXIS 343, 383 Mont. 544, 369 P.3d 354 (demonstrating the DOC has the authority to determine which sentence runs first). Wolfblack did not discharge the 2010 L&C Sentence until June 26, 2021, and he did not begin serving his 2010 Revocation Sentence in this case until June 26, 2021. (Doc. 41 at 2-3; 9/22/22 Tr. at 4-5.) As a result, Wolfblack was still serving the 2010 Revocation

Sentence on March 3, 2022, when the State filed a petition to revoke, and the court correctly denied his motion to dismiss.

The State acknowledges that this Court has previously held that a court does not have the authority upon revocation to impose the revocation sentence consecutively to another existing sentence. *Boggs v. McTighe*, 2019 Mont. LEXIS 278, 397 Mont. 552, 449 P.3d 787. But it is unnecessary to address whether Judge Lympus had the authority to impose the revocation sentence consecutively to the 2010 L&C Sentence because the sentences were already running consecutively. Pursuant to Mont. Code Ann. § 46-18-401(1)(a), the 2010 L&C Sentence was running consecutively to the sentence in this case. As a result, Judge Lympus's order did not impact the manner in which the sentences were running.

Similarly, it is unnecessary to address Wolfblack's arguments about procedural bars, plain error, and the constitutionality of Mont. Code Ann. § 46-18-116(3) because his claim challenging the denial of his motion to dismiss can be more efficiently denied on the merits.

### **III. Wolfblack is entitled to credit for seven days of time served in jail.**

The State agrees with Wolfblack's argument that he is entitled to an additional 7 days of credit for time he served in jail before the dispositional hearing. As Wolfblack notes, he served 5 days in jail from March 13, 2022, when he was

arrested on a warrant, and March 17, 2022, when he was released on his own recognizance. He was arrested on another warrant on July 9, 2022. It appears that he remained incarcerated until the dispositional hearing was held September 22, 2022. (*See* 9/22/22 Tr. at 17.) There are 75 days between July 9, 2022, and September 22, 2022, so the State agrees that Wolfblack should have been awarded 80 days of credit for time served, rather than 73 days. The State therefore concedes that Wolfblack is entitled to an additional 7 days of credit for time served.

**IV. Wolfblack is not entitled to additional credit for time that elapsed before his sentence was revoked.**

When sentencing an offender upon revocation of a suspended sentence, a sentencing court must “consider any elapsed time, consult the records and recollection of the probation and parole officer, and allow all of the elapsed time served without any record or recollection of violations as a credit against the sentence.” Mont. Code Ann. § 46-18-203(7)(b). “If the judge determines that elapsed time should not be credited, the judge shall state the reasons for the determination in the order.” Mont. Code Ann. § 46-18-203(7)(b). It is “insufficient for a district court to base a denial of street time credit solely on a ‘pattern’ of criminal behavior.” *Gudmundsen*, ¶ 13. Instead, “specific violations established upon ‘the record or recollection of the probation officer’ are necessary ‘to establish a basis for denial of street time credit’ for the period claimed, and

must be stated by the sentencing court.” *Id.* (quoting *State v. Jardee*, 2020 MT 81, 399 Mont. 459, 461 P.3d 108).

*Jardee* illustrates this requirement. The district court in *Jardee* stated that it was denying Jardee credit for a four-month period because of the pattern of criminal behavior Jardee had engaged in. *Jardee*, ¶ 4. The district court also noted that Jardee had continued to lie to his probation officer about his residence. *Id.* This Court explained that the district court’s reliance on Jardee’s “pattern” of criminal behavior was insufficient because it did not demonstrate any violation during the relevant time period. *Jardee*, ¶ 11. But this Court held that the district court did not abuse its discretion when it denied Jardee credit for the time based on Jardee’s violation of his continuing obligation to report his proper address to his probation officer. *Jardee*, ¶ 12.

Similarly, in *State v. Johnson*, 2022 MT 216, ¶ 29, 410 Mont. 391, 519 P.3d 804, this Court held that a district court did not abuse its discretion when it denied Johnson credit for a seven-month period during which Johnson failed to participate in his treatment program, failed to find a replacement treatment provider, and failed to complete a period of supervision at a prerelease center. This Court held that these specific and ongoing violations constituted a sufficient basis upon which to deny credit for elapsed time. *Id.*

This Court has not specified how long a period of time without violations must be before a defendant is entitled to credit for the time. This Court held in *State v. Pennington*, 2022 MT 180, ¶ 29, 410 Mont. 104, 517 P.3d 894, that a court erred in denying a defendant credit for 335 days in which no recorded violations occurred. Similarly, this Court held in *Gudmundsen*, ¶¶ 6, 13, that a court erred in denying Gudmundsen credit for a four-month period and a six-month period in which the defendant had no violations. But, this Court has never suggested that a defendant is entitled to credit for each day that they do not have a documented violation.

In this case, the district court correctly gave Wolfblack credit for months in which he did not have any violation and denied him credit for periods of time in which he committed violations. Wolfblack began serving his revocation sentence on June 26, 2021, and absconded from probation on November 10, 2021. (9/22/22 Tr. at 4-5, 9; Doc. 41 at 3.) Although the probation officer recommended that Wolfblack not receive any credit for elapsed time based on his numerous violations, the court required a timeline of his violations and gave Wolfblack credit for months in which he did not have any violations. (9/22/22 Tr. at 5, 25.) Specifically, the court gave Wolfblack credit for four days in June, the month of October, and the days in November preceding him absconding because he did not have any violations during those periods. (*Id.* at 8-9, 16-17, 25.)

In July 2021, Wolfblack changed his residence and was fired from his job without notifying his probation officer. (*Id.* at 5-6, 9-10.) On August 25, 2021, Wolfblack tested positive for methamphetamine. (*Id.* at 6, 11.) And in September, Wolfblack tested positive for methamphetamine and failed to report his change of residence and loss of employment. (*Id.* at 6, 11-12.)

Wolfblack concedes that he is not entitled to credit for the months of July and September, but requests credit for all but one day in August. (Appellant's Br. at 28.) Given the numerous violations Wolfblack committed from July to September 2021 and his methamphetamine use in August, the district court correctly denied him credit for all the days in August. The denial is supported by evidence of specific violations demonstrating that Wolfblack was not in compliance with the conditions of his probation during this period.

Wolfblack also argues that the court erred in denying him credit for 66 days between March 18, 2022 and May 26, 2022. Unfortunately, these days were not discussed during the dispositional hearing. (*See generally* 9/22/22 Tr.) However, the court did not err in denying Wolfblack credit for these days because he committed violations immediately before and after this time period and admitted to using drugs two times during this time period.

Wolfblack absconded on November 26, 2021, and his whereabouts were unknown until he was arrested on March 13, 2022. (Doc. 61 at 3.) He was

released on his own recognizance on March 17, 2022. By May 26, 2022, Wolfblack had absconded again. (*Id.*) During the 68-day period between his release and his second violation for absconding, Wolfblack admitted to using methamphetamine twice. (*Id.*)

Because Wolfblack was absconding immediately before and after this time period and used methamphetamine at least twice during this period, the district court's denial of credit for these days is supported by sufficient evidence in the record. Accordingly, Wolfblack is not entitled to any additional credit for elapsed time.

### **CONCLUSION**

The district court's revocation of Wolfblack's suspended sentence should be affirmed. This case should be remanded with instructions to grant Wolfblack an additional seven days of credit for time served.

Respectfully submitted this 21st day of February, 2024.

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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 4,820 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ *Mardell Ployhar*

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## **CERTIFICATE OF SERVICE**

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