

## IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. DA 23-0017

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STATE OF MONTANA,  
*Plaintiff and Appellee,*

v.

DARREN CHARLES DEMARIE,  
*Defendant and Appellant.*

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**BRIEF OF APPELLANT**

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*On Appeal from the Montana Third Judicial District Court, Powell County,  
the Honorable Ray J. Dayton, Presiding.*

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## **ISSUES PRESENTED**

1. Whether the trial court impermissibly based its sentence upon Mr. DeMarie's religious and political beliefs and associations in violation of the First Amendment.

2. Whether there was sufficient evidence to find that Mr. DeMarie believed there was an official proceeding or investigation pending or about to be instituted when the State's prosecutor confirmed in writing that no investigations or charges were pending roughly nine months after the escape attempt and nearly a year and a half prior to eventually filing charges.

3. Whether Mr. DeMarie's sentence is illegal due to the district court's failure to credit him for each day of incarceration from the date of his arraignment through the date of the district court's imposition of sentence.

## **STATEMENT OF THE CASE AND FACTS**

This appeal arises from Mr. DeMarie's attempted escape from the Montana State Prison ("MSP") that occurred back in February of 2019. (D.C. Doc. 1.) At the time of the escape attempt, Mr. DeMarie was incarcerated at MSP and had been serving sentences for Deliberate Homicide and a weapons enhancement convictions out of Yellowstone County. (*Id.*) Mr. DeMarie had been parole eligible since 2008, and he was set to complete his sentences and discharge from custody in 2037. (*Id.*)

While incarcerated at MSP, Mr. DeMarie had been housed at the Work and Re-entry Center and worked as a Unit Driver who shuttled inmates to their jobs and ran other errands around MSP. (Tr. of 6/23/22 Bench Trial at 19:13-22:2.) At trial, Steven Kremer, a Correctional Unit Manager at MSP, testified that, in February of 2019, they became concerned that Mr. DeMarie was planning to escape as they had received information that Mr. DeMarie had been giving away his personal property to other inmates. (Tr. of 6/23/22 Bench Trial at 22:17-23:11.) Given these reports, guards at MSP searched Mr. DeMarie's cell and found a lack of hobby materials, except for an allegedly completed leather backpack. (Tr. of 6/23/22 Bench Trial at 23:12-24:8.) Because Mr. Kremer knew that Mr. DeMarie had previously been "heavy" into the leather hobby, and because he no longer saw any quantity of leather in the cell, he reported his suspicions to the investigation manager. (Tr. of 6/23/22 Bench Trial at 24:5-20.)

MSP investigators searched Mr. DeMarie's cell later the same day. (Tr. of 6/23/22 Bench Trial at 25:5-7.) During their search of Mr. DeMarie's cell, MSP investigators found a first aid kit, a couple of lists containing MSP staff member's names, and a leather backpack. (Tr. of 6/23/22 Bench Trial at 26:1-8.) Based on his concerns that Mr. DeMarie was a flight risk, Mr. Kremer had Mr. DeMarie transferred that same day to secured housing within MSP. (Tr. of 6/23/22 Bench Trial at 28:15-29:2.)

At trial, the Court heard testimony from Department of Corrections Lead Investigator Jeffrey Crowe, who took part in the investigation. (Tr. of 6/23/22 Bench Trial at 81:1-16 & 82:18-23.) Mr. Crowe testified that he interviewed Mr. DeMarie concerning the alleged escape attempt on February 28, 2019. (Tr. of 6/23/22 Bench Trial at 83:14-17.) During the interview, Mr. DeMarie had been advised of his Miranda rights, which Mr. Crowe testified is only done with criminal investigations. (Tr. of 6/23/22 Bench Trial at 84:5-17.) Concerning the list of names found in Mr. DeMarie's cell, Mr. Crowe testified that Mr. DeMarie had stated "that these were people that he had worked for in the past and some of them were his friends and some of them were not. (Tr. of 6/23/22 Bench Trial at 89:24-90:8.) Mr. Crowe further testified that Mr. DeMarie had not expressed any animosity towards the individuals on the list during the interview. (Tr. of 6/23/22 Bench Trial at 91:3-5.) When asked about Mr. DeMarie's religious beliefs, Mr. Crowe testified that he may have brought it up, but could not recall specifics. (Tr. of 6/23/22 Bench Trial at 96:16-97:9.) However, Mr. Crowe did recall Mr. DeMarie speaking about being a prepper due to his religious belief that the end times were near. (*Id.*)

In addition to the testimony from various state employees, the district court also heard testimony from both of Mr. DeMarie's alleged co-conspirators. Ernest Gates was an acquaintance of Mr. DeMarie, who he had met while incarcerated at MSP during the late 1990's. (Tr. of 6/23/22 Bench Trial at 111:15-19.) Mr. Gates

had remained in contact with Mr. DeMarie following his release from MSP and had started to receive calls and text messages from Mr. DeMarie coming from a cell phone Mr. DeMarie had found in late 2018. (Tr. of 6/23/22 Bench Trial at 114:14-25.) Mr. Gates testified that Mr. DeMarie had informed him that he intended to escape MSP and that he wanted Mr. Gates to come up and give him a ride out of the area. (Tr. of 6/23/22 Bench Trial at 116:20-23.) Mr. DeMarie had arranged for Mr. Gates to be paid \$4,000 for his services, which Mr. Gates received in cash prior to driving to MSP. (Tr. of 6/23/22 Bench Trial at 118:7-11.) Mr. Gates ultimately drove from Tennessee up to MSP in order to pickup Mr. DeMarie on or about February 14, 2019, however Mr. DeMarie had been transferred to a secure housing unit before the two could meet up. (Tr. of 6/23/22 Bench Trial at 123:5-126:13.) Mr. Gates further confirmed that he did not have any weapons in his car, that he would not allow any weapons in his car, and that Mr. DeMarie had not asked him to obtain a firearm for him. (Tr. of 6/23/22 Bench Trial at 127:23-128:9.) After Mr. DeMarie failed to show at the pickup location, Mr. Gates drove directly back to his home in Tennessee. (Tr. of 6/23/22 Bench Trial at 129:15-19.)

Mr. Gates would not hear from Mr. DeMarie until several months later, on or about April 11, 2019, when he called from the Shelby prison to ask him to delete his Facebook page as he no longer had access to the cell phone. (Tr. of 6/23/22 Bench Trial at 130:6-16 & D.C. Doc. 1.) Mr. Gates further testified that their arrangements



for the planned escape had been made via text messages, and that he was not aware of any evidence that was on Mr. DeMarie's Facebook account. (Tr. of 6/23/22 Bench Trial at 135:9-136:15.) Ultimately, Mr. DeMarie's cell phone was found on May 15, 2019, by an inmate who had been assigned to clean the vehicle previously used by Mr. DeMarie. (Tr. of 6/23/22 Bench Trial at 101:1-21.)

Mr. DeMarie's other alleged co-conspirator, Jared Hoehne, also testified at his trial concerning his interactions with Mr. DeMarie. Generally, Mr. Hoehne testified that Mr. DeMarie had asked him to procure camping and survival gear and to come pick him up after he escaped MSP. (Tr. of 6/23/22 Bench Trial at 152:6-24.) Mr. Gates further testified that Mr. DeMarie had told him that his plan following his escape from MSP was to go disappear into the woods. (*Id.*) However, when Mr. Hoehne received payment from Mr. DeMarie for the requested supplies, Mr. Hoehne instead spent the money on himself. (Tr. of 6/23/22 Bench Trial at 156:18-157:20.) Eventually, Mr. Hoehne came clean and informed Mr. DeMarie that he would not assist him with his escape from MSP. (*Id.*) After testifying to how he misled Mr. DeMarie and stole his money, Mr. Hoehne then claimed that Mr. DeMarie had requested that he purchase him an assault rifle. (Tr. of 6/23/22 Bench Trial at 158:10-13.) However, Mr. Hoehne did confirm that in all of his conversations with Mr. DeMarie, he had never mentioned going after people after escaping MSP, rather that

he was just going to disappear into the woods. (Tr. of 6/23/22 Bench Trial at 172:11-19.)

Following his interview with Mr. Crowe, Mr. DeMarie attempted several times to ascertain whether he was still under investigation for the alleged escape attempt to no avail. (Tr. of 6/24/22 Bench Trial at 283:24-284:25.) Mr. DeMarie testified that based on his past experiences and observation of others at MSP, he thought that there was no longer an active investigation once he had been released from the hole, and that since he had been released from the hole without charges and sent to the private for-profit prison in Shelby, he thought that the matter had been concluded. (Tr. of 6/24/22 Bench Trial at 282:1-21 & 283:24-284:25.) Mr. DeMarie further confirmed that he wrote to the prosecutor, Patrick Moody, to ask whether he was currently under investigation in late 2019. (*Id.*) Notably, on December 13, 2019, Mr. Moody replied:

I am in receipt of your letter. There are no charged felonies against you by the Powell County Attorney's Office. I am unaware whether any law enforcement agency is investigating you for potential crimes.

(Defendant's Trial Exhibit A, Letter from Patrick Moody to Darren DeMarie, Dec. 13, 2019.) Despite these representations, Mr. Moody then then waited nearly a year and a half to charge Mr. DeMarie for his attempted escape from MSP. (D.C. Doc. 1.) Notably, Mr. DeMarie was charged with tampering with physical evidence when believing that an official proceeding or investigation is pending or about to

instituted, despite the prosecutor allegedly not even knowing that Mr. DeMarie was under investigation for his escape attempt.

As a result of the above events, Mr. DeMarie was eventually charged over two years later with Conspiracy to Commit Escape, a felony, in violation of Mont. Code Ann. §§ 45-5-102 & 45-7-306; Conspiracy to Commit Transferring Illegal Articles, a felony, in violation of Mont. Code Ann. §§ 45-4-102 & 45-7-307; Conspiracy to Commit Tampering with or Fabricating Physical Evidence, a felony, in violation of Mont. Code Ann. §§ 45-4-102 & 45-7-207; and Solicitation to Commit Unlawful Possession of Firearm by Convicted Person, a felony, in violation of Mont. Code Ann. § 46-11-201. (D.C. Docs. 1 & 4.) Ultimately, after a bench trial, Mr. DeMarie was found guilty on Counts 1 and 3; Conspiracy to Commit Escape and Conspiracy to Commit Tampering with or Fabricating Physical Evidence. (D.C. Doc. 44.)

A bench trial was held on June 23 through June 24, 2022, in Powell County Montana. (D.C. Doc. 35.) At trial, Mr. DeMarie testified on his own behalf as to his religious motivations for attempting to escape and his plans for the future. As an initial matter, Mr. DeMarie was completely forthright and admitted up front that he had intended to escape from MSP in February of 2019. (Tr. of 6/24/22 Bench Trial at 232:10-13.) When asked why he had decided to escape MSP, Mr. DeMarie testified that following the installation of President Porshenko in Ukraine, and the resulting conflict that arose from the genocide of ethnic Russians living in the former

eastern territories of Ukraine, he felt that God was providing a path for atonement for his prior sins. (Tr. of 6/24/22 Bench Trial at 232:21-233:14.) Mr. DeMarie then discussed his frustrations with the Parole Board refusing to grant him parole or to even give him a reason why he had been denied, and how he would be 79 years old when he finally discharges his sentence. (Tr. of 6/24/22 Bench Trial at 234:19-20.)

When asked about his plans after escaping MSP, Mr. DeMarie testified that he had been in contact with the Luhansk People's Republic concerning his military service in exchange for citizenship. (Tr. of 6/24/22 Bench Trial at 236:1-237:21.) His plan was to peacefully make his way to a Russian consulate where he would be able to catch a diplomatic flight to the Luhansk People's Republic in order to fight for their independence and to secure his own future with his family. (*Id.*) Specifically, Mr. DeMarie testified that:

if you make—if you're hurting people, if you're doing bad things in the process of leaving, you're leaving a trail, a honey like bread crumbs like Hansel and Gretel to where you're going and where you may be. But if I pay cash, if I use this money and you can be good in Donetsk uh, five to \$6,000.00 U.S. will carry me for a full year over there.

(Tr. of 6/24/22 Bench Trial at 243:15-24.)

Mr. DeMarie was then asked about his firearms related conversations with Mr. Gates prior to his escape attempt. (Tr. of 6/24/22 Bench Trial at 238:1-240:5.) While he admitted to discussing various firearms, Mr. DeMarie clearly explained that these messages and conversations were in the context of their religious belief

that we are on the verge of the apocalypse. (*Id.*) Specifically, Mr. DeMarie stated that as an Orthodox Christian he believed that “the armies described in the Bible are being unmasked right now<sup>1</sup>” and that Christ will return at the end of the age of the gentiles, which began when Vladimir Putin was elected president of Russia. (*Id.*) Mr. DeMarie then stated that he believed that “[t]his is the time where you need to declare yourself for God or not and you need to move forth in faith and you need to be ready to lay your life on the line for it.” (*Id.*) As such, these discussions were mainly fantasy discussions of what they would do under a hypothetical apocalypse situation. On cross examination, Mr. DeMarie further stated that the foreign sourced weapons they were discussing were to be issued by the legitimate government upon his enlistment. (Tr. of 6/24/22 Bench Trial at 298:4-7.)

After discussing how he believed the armies gathering were the Biblical armies of Gog and Magog, Mr. DeMarie discussed other aspects of his practice of Orthodox Christianity. (Tr. of 6/24/22 Bench Trial at 240:7-241:5.) Specifically, Mr. DeMarie testified about spiritual hymn of Judiath belief, Kabala, and how there is a process or method to prayer that requires the correct words. (*Id.*) Mr. DeMarie then discussed how the list of names found in his cell was a prayer list for both his friends

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<sup>1</sup> Revelation 20:7-9.

and those who were not his friends, and that as provided for in Psalm 94 he prayed that God would either spite them or change their hearts. (*Id.*)

Mr. DeMarie then testified as to the circumstances surrounding the evidence tampering charge. When he was asked why he asked Mr. Gates to delete his Facebook account, Mr. DeMarie testified that he was concerned his friends would be wondering what happened to him since his profile was active, but he had stopped using it for several months. (Tr. of 6/24/22 Bench Trial at 248:1-249:24.) Since the confiscated cell phone was his only means of accessing his Facebook account, he asked Mr. Gates to delete his account so that his online friends would know that he is no longer accessible via Facebook. (*Id.*) At the time he requested Mr. Gates delete his account, Mr. DeMarie was not aware of any kind of criminal investigation against him and had thought the matter had concluded. (*Id.*) Mr. DeMarie did not learn about the charges brought against him until over two years later, in May of 2021. (Tr. of 6/24/22 Bench Trial at 253:1-20.) Notably, Mr. DeMarie testified that he did not use Facebook to communicate with Mr. Hoehne. (Tr. of 6/24/22 Bench Trial at 295:10-12.)

Mr. DeMarie was ultimately found guilty on Counts 1 and 3. (D.C. Doc. 35.) Notably, the trial court did not find Mr. Hoehne credible, stating “I wish Mr. Hoehne all the luck in the world in his new life, but I wouldn’t buy a used car from him.” (Tr. of 6/24/22 Bench Trial at 358:10-14.) Because of Mr. Hoehne’s credibility

issues, the trial court found Mr. DeMarie not guilty on the charge of Solicitation to Commit Unlawful Possession of Firearm by Convicted Person. (Tr. of 6/24/22 Bench Trial at 357:6-9.)

While the trial court claimed it was not sentencing Mr. DeMarie for his attitudes, philosophies, religious beliefs, or political ideology, (Tr. of 10/20/22 Sentencing Hearing at 295:10-12), this was betrayed by the trial court's subsequent statements. Despite finding the firearm allegations unsubstantiated, the trial court based its sentencing decision in part on the allegations he was making arrangements to obtain a weapon. (Tr. of 10/20/22 Bench Trial at 295:10-12.) Likewise, in rejecting Defendant's request for a suspended sentence, the trial court stated:

A suspended sentence is for a guy who tells me, convinces me that, you know, let me do my time or don't let me do any time, put me on supervision, uh, uh where I can integrate myself back into uh, society, be a law-abiding guy. That's not your plan. If I put you—you know, you, you want to go to the Ukraine uh, or Russia and get involved in the war.

(Tr. of 10/20/22 Sentencing Hearing at 31:17-32:2.)

Ultimately, Mr. DeMarie was sentenced on Count 1 to eight years, to run consecutively to any underlying sentence, and on Count 3 to eight years, to run consecutively to any underlying sentence but concurrently to Count 1. The trial court did not give Mr. DeMarie credit for his time served during the pendency of the matter as “he was incarcerated and serving time on an underlying sentence the entire time this case was pending.” (D.C. Doc. 35.)

## STANDARDS OF REVIEW

A district court's sentence is reviewed for legality. *State v. Spagnolo*, 2022 MT 228, ¶ 4, 410 Mont. 457, 520 P.3d 330. The legality of a sentence is reviewed *de novo* as it presents a question of law. *Id.* "The law affords a sentencing court no discretion to grant credit for time served," and its calculations of time served credit are reviewed *de novo*. *Spagnolo*, ¶ 5.

After reviewing the evidence in the light most favorable to the prosecution in insufficient evidence claims, this Court determines whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Granby*, 283 Mont. 193, 199, 939 P.2d 1006, 1009-10 (1997). This standard applies findings of fact made by both judges and juries. *Id.* Further, this Court "will not overturn judge-made findings of fact unless they are clearly erroneous." *State v. Shannon Davis*, 253 Mont. 50, 61, 830 P.2d 1309, 1316-17 (1992).

## SUMMARY OF THE ARGUMENT

The trial court's statements at sentencing establish that it was impermissibly basing its sentencing on Mr. DeMarie's religious and political beliefs and associations. While the trial court claimed it was concerned Mr. DeMarie would seek a life of violence, this is not supported in the record. Rather, it was uncontradicted that Mr. DeMarie intended to travel to present day Russian territory to enlist in the



war due to his sincerely held religious beliefs, as well as in order to secure citizenship and safe passage for himself and his family<sup>2</sup>.

It is important to note that Mr. DeMarie did not intend on returning to a life of illegal violence, but rather to the service of a sovereign nation in its “legitimate” monopoly of violence. As the U.S. Supreme Court noted in 1896, it is not illegal for citizens of the U.S. to travel to the territory of another sovereign with intentions of enlisting in their armed forces. *Wilborg v. U.S.*, 163 U.S. 632, 653 (1896).

Because choice of sovereign is based upon political and/or religious motivations, the district court’s sentence could only be based upon impermissible considerations. Likewise, this country has a history of offering military service as an option to low level offenders in lieu of jail time<sup>3</sup>, and as such it would be disingenuous to claim that legal military service is the same as engaging in illegal violent crime. Finally, there was no evidence that Mr. DeMarie intended to use violence in his escape, while his own testimony demonstrated the futility of such in successfully achieving his goals.

Further, Mr. DeMarie’s conviction for tampering with physical evidence must be reversed as it is logically impossible for an individual to believe that an official

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<sup>2</sup> Notably, the United States and France also grant citizenship in exchange for military service. See <https://www.uscis.gov/military/naturalization-through-military-service> & <https://foreignlegion.info/joining/#FAQ>

<sup>3</sup> *New Legislation Would Allow Military Service In lieu of Prison Time*, Jake Stofan, Dec. 27, 2021, last accessed on 6/5/2024 at <https://www.wjhg.com/2021/12/28/new-legislation-would-allow-military-service-lieu-prison-time/>.

proceeding or investigation is pending or about to be instituted, when the individual in charge of investigating and bringing charges against Mr. DeMarie stated that he did not know of any such proceedings or investigations shortly after the alleged tampering took place. While Mr. DeMarie did request Mr. Gates delete his Facebook account, this was not until months after he had been interviewed by Department of Corrections Investigators and released from the hole without charges. Despite his repeated requests to confirm whether he was still under investigation, Mr. DeMarie was never informed of the pending investigation or charges until *several years* later. As such, it defies logic to assert that Mr. DeMarie believed an official proceeding or investigation is pending or about to be instituted when he had repeatedly been told by prison officials and Mr. Moody that he was not under investigation for his attempted escape.

Finally, the district court's sentence was illegal as it disregarded the clear holding of *Killam v. Salmonsens*, in failing to credit Mr. DeMarie with time served credit for each and every day he spent incarcerated prior to sentencing.

## **ARGUMENT**

- I. The district court impermissibly based its sentencing decision upon Mr. DeMarie's sincerely held religious and political beliefs when it penalized him for his religious calling to fight for an Orthodox Christian nation instead of a secular Western nation.**

The district court violated Mr. DeMarie's First Amendment rights under the United States Constitution, as well as those under Montana Constitution, Article II

§§ 5 & 6 and Mont. Code Ann. § 46-18-101(3)(c), when it issued its sentence based upon Mr. DeMarie’s religious and political beliefs and associations. While the district court claimed it was not sentencing Mr. DeMarie for his religious and political beliefs and associations, it then went on to discuss at length its concerns with Mr. DeMarie’s religious and political associations in violation of his constitutional rights.

The protections of the U.S. Constitution continue to apply after conviction during the sentencing process. *U.S. v. Lemon*, 723 F.2d 922, 937 (D.C. Cir. 1983). As noted by the Eighth Circuit:

“[c]onsideration of political beliefs, as distinguished from criminal activity, would clearly be impermissible in determining defendants’ sentences, because it would impair the rights of the defendants under the First Amendment, protecting public expression of their political beliefs, by word and symbols.”

*Lemon*, 723 F.2d at 937 (quoting *U.S. v. Bangert*, 645 F.2d 1297, 1308 (8<sup>th</sup> Cir. 1981), *cert. denied*, 454 U.S. 860 (1981)). Concerning religious beliefs and the related right of association, the D.C. Circuit stated that it believed that the U.S. Constitution compelled their finding that “[a] sentence based *to any degree* on activity or beliefs protected by the first amendment is constitutionally invalid.” *Lemon*, 723 F.2d at 938; *see also United States v. Juarez*, No. 96-50140, 1997 U.S. App. LEXIS 15322, at \*6 (9<sup>th</sup> Cir. June 20, 1997) (quoting *Lemon* with approval). In a similar manner, Mont. Code Ann. § 46-18-101(3)(c) provides that “[s]entencing

practices must be neutral with respect to the offender's race, gender, religion, national origin, or social or economic status.”

In *Lemon*, the defendant had plead guilty to one count of interstate transportation of a stolen security in violation of 18 U.S.C. § 2314. *Lemon*, 723 F.2d at 924. At sentencing, the government argued that the court should consider the defendant’s alleged membership in the Black Hebrews, which was alleged to be a religious cult involved in both legal and illicit activities, and that it should further consider that the defendant had failed to cooperate with the government in its investigation of the Black Hebrews. *Lemon*, 723 F.2d at 927-929. In response, defendant argued that he was not a member of the Black Hebrews, but that he had made acquaintances with a few members of that organization while working at a radio station at Howard University. *Id.* The defendant in *Lemon* also argued that he could not cooperate with the government in its investigation of the Black Hebrews because he was not a member, and he did not have knowledge of any illegal conduct by its members. *Id.* Ultimately, the trial court in *Lemon*, gave the defendant an unusually harsh sentence for a first offender. *Lemon*, 723 F.2d at 932.

On appeal, the *Lemon* court first considered whether the trial court had based its sentence on defendant’s alleged association with the Black Hebrews. *Lemon*, 723 F.2d at 929. In doing so, it considered the government’s sentencing arguments, as well as the trial court’s comments and recommendations relative to parole. *Lemon*,

723 F.2d 929-930. After discussing the government's reliance upon its Black Hebrews association allegation throughout the case, the court turned to the trial court's representations. Notably, while the trial court stated its belief that the defendant "had already determined to become a professional criminal" when he left his employment with the university radio station, the *Lemon* court found that this was not supported by the conclusions of the presentence report. *Lemon*, 723 F.2d at 931. Because there was no other evidence in the record supporting this conclusion, the *Lemon* court noted that this particular statement could only be supported by reliance upon the government's association allegations. *Id.* After considering the whole record, the *Lemon* court found that the trial court had necessarily relied upon the alleged association with the Black Hebrews. *Id.*

The *Lemon* court then considered the defendant's First Amendment claim that he was impermissibly sentenced based on his alleged association with the Black Hebrews in the absence of a finding that he intended to further an illegal objective of the group. *Lemon*, 723 F.2d at 936. After first concluding that the First Amendment prohibited the consideration of certain factors related to religious association, and then concluding that the Black Hebrews were an organization protected by the First Amendment, the *Lemon* court then discussed application of the First Amendment in sentencing. *Lemon*, 732 F.2d 936-937. Specifically, the *Lemon* court found that its review of Supreme Court precedent left it with "no doubt

that the first amendment proscribes punishment of an individual for membership in a protected organization unless the organization has illegal aims and the individual intends to further those aims.” *Lemon*, 723 F.2d at 939-940. Because there was no evidence linking the defendant and illegal activity by the Black Hebrews, the *Lemon* court vacated the sentence holding that it was improper to consider the alleged association as an aggravating factor in sentencing. *Lemon*, 723 F.2d 942.

It appears that this Court has also considered a similar challenge in *State v. Finney*, 281 Mont. 58, 931 P.2d 1300 (1997). In *Finney*, the defendant claimed he had been improperly sentenced based upon his affiliation with the Aryan Nations and White Power. *Finney*, 281 Mont. at 61, 931 P.2d at 1302. At sentencing, evidence was produced showing that Finney had a significant criminal history, had been unsuccessful when on probation previously, had fled from supervision, and that he had committed the presently charged crime after only a couple of weeks of being on parole. *Finney*, 281 Mont. at 59, 931 P.2d at 1301. More importantly, at sentencing, Finney testified that he “had never been employed and that crime was his way of making a living.” *Id.* Finney further testified that “it did not really matter to him whether he was in prison or on the streets, and that he was more used to prison life than to street life.” *Id.* Likewise, during his presentence investigation interview, Finney stated that he knew he would be going back to prison after he gets out from

this ordeal, and that prison did not bother him as his people, the Aryan Nation, were present in prison. *Finney*, 281 Mont. at 60, 931 P.2d at 1302.

In contesting his sentence, Finney relied upon *Dawson v. Delaware*, 503 U.S. 159 (1992), which involved erroneous admission of the prosecutor's statements concerning the defendant's membership in the Aryan Brotherhood during sentencing. These statements were based upon a stipulation, which provided:

The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware.

*Dawson*, 503 U.S. at 162. Ultimately, the U.S. Supreme Court held that it was error to admit evidence concerning defendant's membership in the Aryan Brotherhood as "the narrowness of the stipulation left the Aryan Brotherhood evidence totally without relevance to Dawson's sentencing proceeding." *Dawson*, 503 U.S. at 165.

Given Finney's other statements and conduct, the Court found that the record did not support a conclusion that the trial court has relied upon Finney's association with the Aryan Nations or White Power in determining the sentence. *Finney*, 281 Mont. at 63, 931 P.2d at 1304.

In the present matter, Mr. DeMarie received an illegal sentence as the district court impermissibly considered his religious and political beliefs and associations. As an initial matter, other than the district court's disingenuous statement that it was

not sentencing Mr. DeMarie based upon his political or religious beliefs, it is clear from the district court's explicitly stated reasons that it did exactly the opposite.

As noted above, the district court took great issue with the fact that Mr. DeMarie had planned on traveling to Russia in order to enlist in its military, stating “[t]hat’s not your plan. If I put you—you know, you, you want to go to the Ukraine uh, or Russia and get involved in the war.” (Tr. of 10/20/22 Sentencing Hearing at 31:17-32:2.) Like in *Lemon*, where there was no evidence, other than defendant’s alleged religious associations, to support the district court’s conclusions about the defendant thus implying an improper consideration of defendant’s right to associate with a religious sect, here the only evidence of Mr. DeMarie’s alleged violent nature was his objective to enlist in the Russian or Luhansk People’s Republic armed forces in furtherance of his sincerely held religious beliefs. However, unlike in *Lemon*, where the reviewing court was left to imply the district court’s basis for sentencing, here it is clear from its explicit statements, that the district court admitted its main consideration in sentencing was Mr. DeMarie’s choice of religious and political association.

Next, it would appear almost self-evident that one of the three main branches of Christianity<sup>4</sup>, Orthodox Christianity, is a religious organization entitled to First

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<sup>4</sup> Meyendorff, John. "Eastern Orthodoxy". Encyclopedia Britannica, 10 May. 2024, <https://www.britannica.com/topic/Eastern-Orthodoxy>. Accessed 12 June 2024.



Amendment protections. As such, any consideration of Mr. DeMarie's religious beliefs or associations would be impermissible without evidence that he intended to further that organization's illegal objectives.

However, there was no evidence of any illegal activity planned or supported by Mr. DeMarie. As an initial matter, unlike the Black Hebrews in *Lemon*, the Orthodox Church is not commonly known as a criminal enterprise in this country, and Mr. DeMarie is unaware of any alleged illegal objectives of the Orthodox Church. While the district court took great issue with his plans to fight in the war against the Ukraine, this is not illegal. As the U.S. Supreme Court noted in 1896, it is not illegal for citizens of the U.S. to travel to the claimed territory of another sovereign with intentions of enlisting in the armed forces. *Wilborg v. U.S.*, 163 U.S. 632, 653 (1896). In fact, getting involved in guerrilla warfare has long been part of American culture, as fictionally illustrated in *For Whom the Bell Tolls*, which featured a University of Montana professor traveling to Spain to fight against General Franco during the Spanish Civil War<sup>5</sup>.

Likewise, although *Finney* did not involve a religious organization, it is also notable that unlike in *Finney*, where there was significant evidence to support the sentence without relying upon the defendant's association with the Aryan

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<sup>5</sup> Ernest Hemmingway, *For Whom the Bell Tolls* (1940).

Brotherhood, here the only credible evidence concerning Mr. DeMarie's plans to obtain weapons and engage in violence is his religious and political associations. In other words, without the improper consideration of Mr. DeMarie's religious and political beliefs and associations, the only other evidence of his alleged violent nature was the unsupported allegation from Mr. Hoehne that Mr. DeMarie had requested that he obtain a firearm for use after his escape, which the trial court explicitly found to be unbelievable.

While the district court attempted to cloak its impermissible conduct behind its stated concerns about the alleged violent nature of Mr. DeMarie, due to his stated goal of fighting in the Ukraine, this country's history of encouraging criminal offenders to join the armed forces to commit violence on behalf of the government betrays the district court's stated basis for its sentence. As noted above, many countries, including the United States and France exchange citizenship for military service, and as such, the only difference between enlisting with the United States or the French Foreign Legion as compared to Russia is that the latter is the predominate protector of Orthodox Christianity while the former countries are secular nations. Because the only credible evidence of potential violence was Mr. DeMarie's alleged attempt to obtain weapons for use as a uniformed soldier, and because it is not illegal to enlist in the military of a foreign sovereign, the district court violated Mr. DeMarie's First Amendment rights, as well as those under Montana Constitution,

Article II §§ 5 & 6 and Mont. Code Ann. § 46-18-101(3)(c), when it sentenced him based upon his religious and political beliefs and associations.

**II. It was clearly erroneous for the district court to find that Mr. DeMarie believed there was an official proceeding or investigation pending as the State’s prosecutor admitted in writing over a year earlier that no investigations or charges were pending.**

The district court’s finding that Mr. DeMarie believed there was an official proceeding or investigation pending or about to begin are clearly erroneous as they are contrary to the written admissions of the State’s own prosecutor.

Montana Code Annotated § 45-7-207(1)(a), provides that:

**(1)** A person commits the offense of tampering with or fabricating physical evidence if, believing that an official proceeding or investigation is pending or about to be instituted, the person:

**(a)** alters, destroys, conceals, or removes any record, document, or thing with purpose to impair its verity or availability in the proceeding or investigation....

In *State v. Staat*, this Court discussed the compiler’s comments to the statute, noting that “all that is required is that the accused believe an official proceeding or investigation is pending or imminent and that he act with the purpose of impairing the availability or verity of the physical evidence.” *State v. Staat*, 251 Mont. 1, 9, 822 P.2d 643, 644 (1991). In *Staat*, the defendant admitted that he knew a serious crime had been committed and that he believed that an investigation was about to begin, but that he did not act with the purpose of impairing the investigation. *Id.* Ultimately, the *Staat* Court held that there was sufficient evidence to find that the

defendant acted with the purpose of impairing the investigation as his statements implied that his conscious object was to make the evidence unavailable to investigating officers. *Id.*

As is clearly stated by the statute, a person must believe that an official proceeding or investigation is pending or about to begin. While Mr. DeMarie did request Mr. Gates delete his Facebook account, this was not until months after he had been interviewed by Department of Corrections Investigators and released from the hole without charges. As he testified, at this point he believed this investigation was complete based on his prior experiences and observations while under DOC custody.

Unlike in *Staat*, where the defendant admitted that he believed an investigation was about to begin and his statements implied a conscious object to deprive law enforcement of evidence, here Mr. DeMarie testified that he believed that the investigation that was started when he was placed in secured confinement in February of 2019 had ended upon his release back into the general population. Further, Mr. DeMarie's testimony at trial implies that his conscious object was not to deprive law enforcement of evidence, but rather to communicate to others that he was no longer accessible through Facebook. Likewise, both Mr. Gates and Mr. DeMarie testified that they only used text messages for the escape planning.

Further, Mr. DeMarie did not only rely upon his own assumptions but rather made repeated requests to confirm whether he was still under investigation, to which the State's prosecutor responded that no such investigations or charges were pending at that time. As such, it would appear to be beyond dispute that an investigation was initiated when Mr. DeMarie was moved to secured housing and questioned by investigators in February of 2019, and likewise, it would appear beyond dispute that there was no investigation or charges pending by December 13, 2019. However, since Mr. Moody eventually charged Mr. Demaire with violating Mont. Code Ann. § 45-7-207, it would appear that Mr. Moody was either intentionally lying to Mr. DeMaire or that this investigation was re-opened after his December 13, 2019, letter. Notably, Mr. DeMarie was never informed of the pending investigation or charges until *several years* later when he was presented with the formal charges. As such, the district court's findings of fact are clearly erroneous as the entirety of the evidence establishes that Mr. DeMarie did not believe that an official proceeding or investigation was pending or about to be instituted at the time he requested Mr. Gates delete his Facebook account.

**III. The district court erred in failing to grant Mr. Damarie credit for all time he served during the pendency of this matter.**

The sentence in this matter is illegal as Mr. DeMarie was not given credit for every day he served prior to sentencing. Mont. Code Ann. § 46-18-201(9) provides that: "[w]hen 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.”

In interpreting this statute, this Court stated that the statute “provides 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 v. Salmonsens*, 2021 MT 196, ¶16, 405 Mont. 143, 492 P.3d 512 (emphasis original). Further, a defendant is entitled to time spent incarcerated pre-trial and pre-sentencing “even if the defendant is also being held on another matter.” *Spangnolo*, ¶ 9. Notably, in *State v. Pitkanen*, the Montana Supreme Court held that a defendant is entitled to credit for time served even if the defendant was being held on another sentence. *State v. Pitkanen*, 2022 MT 231, ¶¶ 23-26, 410 Mont. 503, 520 P.3d 305; *see also State v. Stockdale*, 2023 MT 18N, ¶¶ 5-6, 411 Mont. 389, 523 P.3d 530.

As noted above, the district court held that Mr. DeMarie was not eligible for time served credit during the entire pendency of this matter as “he was incarcerated and serving time on an underlying sentence the entire time this case was pending.” (D.C. Doc. 35.). However, as this Court noted in *Spangnolo*, Mr. DeMarie was entitled to credit for all time served “even if the [he] is also being held on another matter.” *Spangnolo*, ¶ 9. Further, this Court has clearly held that this still applies to defendants who are being held on sentences from other matters. *Pitkanen*, ¶¶ 23-26.

As such, Mr. DeMarie's sentence in this matter is illegal as he was not given credit for each day of incarceration from the date of his initial arraignment through the date of the court's imposition of sentence.

### CONCLUSION

Mr. DeMarie's sentence should be reversed as it was impermissibly based upon his sincerely held religious and political beliefs and associations. Further, Mr. DeMarie's conviction for violating Mont. Code Ann. 45-7-207(1)(a) must be reversed as the evidence establishes that Mr. DeMarie did not believe that an official proceeding or investigation is pending or about to be instituted at the time he requested Mr. Gates delete his Facebook account. Finally, Mr. DeMarie is entitled to credit for each day served during the pendency of this matter.

Respectfully submitted this 13<sup>th</sup> day of June, 2024.

ELLIS LAW, PLLC

/s/ Nathan D. Ellis

Nathan D. Ellis

*Attorney for Defendant and Appellant*

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and quoted, indented material; and the word count calculated by Microsoft Word is 6,714, excluding the Cover Page, Table of Contents, Table of Authorities, Certificate of Compliance, Certificate of Service, and Appendices.

DATED this 13<sup>th</sup> day of June, 2024.

/s/ Nathan D. Ellis

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Nathan D. Ellis

*Attorney for Defendant and Appellant*



## CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June, 2024, I caused a true and accurate copy of the foregoing **OPENING BRIEF** to be electronically served to:

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## APPENDIX

Transcript of Sentencing Hearing pp. 1-35 (October 20, 2022).....	App. A.
District Court’s Judgment and Sentence (November 22, 2022).....	App. B.

## **CERTIFICATE OF SERVICE**

I, Nathan Daniel Ellis, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 06-13-2024:

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