IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. DA 23-0017

STATE OF MONTANA,
Plaintiff and Appellee,

v.

DARREN CHARLES DEMARIE,
Defendant and Appellant.

REPLY BRIEF OF APPELLANT

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

Appearances:

Nathan D. Ellis
Ellis Law, PLLC
2047 North Last Chance Gulch, #482
Helena, Montana 59601
Phone: (406) 475-5900
Email: nate@ellis.law

Attorney for Defendant and Appellant

Austin Miles Knudsen
Montana Attorney General
Tammy K Plubell
Assistant Attorney General
P.O. Box 201401
Helena, Montana 59620-1401

Kathryn McEnery
Powell County Attorney
409 Missoury Avenue, Suite 301
Deer Lodge, Montana 59722

Patrick J. Moody
Assistant Attorney General
Special Deputy Powell County Attorney
P.O. Box 201401
Helena, Montana 59620-1401

Attorneys for Plaintiff and Appellee

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Defendant and Appellant, Darren Charles DeMarie, respectfully replies to the State's response brief as follows:

ARGUMENT

I. Mr. DeMarie attempted to object during sentencing but was told by the sentencing court that it was not going to have a conversation, and thus Mr. DeMarie was not permitted to make his objection on the record.

When the sentencing court made clear that it was going to illegally sentence Mr. DeMarie based upon his sincerely held religious beliefs, Mr. DeMarie attempted to object on his own but was told by the sentencing court that his objections would not be heard. While Mr. DeMarie did not use the official legal term "objection," the sentencing court's responses indicate that it understood that Mr. DeMarie had repeatedly disagreed with something it had said and that it was not interested in hearing why Mr. DeMarie disagreed with it. Considering the sentencing court's repeated acknowledgement of Mr. DeMarie's attempts to object to its statements along with its repeated statements that it was not interested in hearing what Mr. DeMarie had to say, it is clear that Mr. DeMarie did not waive his right to raise this issue on direct appeal without requesting plain error review.

Despite finding the weapons charges and allegations to be without merit, the sentencing court clearly stated that he was sentencing Mr. DeMarie in part due to the "big plan for weapons." (Tr. of 10/20/22 Sentencing Hearing at 29:25-30:2.)

Since the other weapons discussed during trial were those that Mr. DeMarie expected to be issued to him in Russia, which were necessary defend his Orthodox religion and the oppressed local Russian population who practices Orthodox Christianity in the Donbas from the anti-Orthodox regime in Kiev, it became clear to Mr. DeMarie that he was being sentenced for his sincerely held religious beliefs. When the sentencing court then noted that Mr. DeMarie was on the higher end of the sentencing spectrum, Mr. DeMarie attempted to object, stating "I, I um, I don't follow sir," (Tr. of 10/20/22 Sentencing Hearing at 30:11), to which the sentencing court replied "I'm not trying to open a dialog with you. I'm just explaining, you know, the way I'm thinking about it." (*Id.* at 30:12-14.) After telling Mr. DeMarie that he would not be heard, the sentencing court again made statements about Mr. DeMarie making arrangements to procure a weapon and then going to fight in Ukraine or Russia, to which Mr. DeMarie attempted to object again, stating "Well sir…," (*Id.* at 32:1-2), before he was cut off by the sentencing court again.

While he did not use the formal language of the bar, Mr. DeMarie clearly was trying to voice his objections to the sentencing court's illegal religious discrimination, which the sentencing court also acknowledged said objections. As such, Mr. DeMarie did not waive his right to raise this issue on direct appeal without requesting plain error review.

II. Regardless of whether Mr. DeMarie objected, his sentence was plainly illegal as it was based upon his sincerely held religious beliefs, thus violating his First Amendment rights.

Although Mr. DeMarie asserts that he did not waive this issue by failing to use the word "objection," he also asserts that no objection was necessary as his sentence was illegal due to the sentencing judge's violation his First Amendment rights when he based his sentence on Mr. DeMarie's sincerely held beliefs. As the State correctly notes, under *State v. Lenihan*, this Court will review "any sentence imposed in a criminal case, if it is alleged that such sentence is illegal or exceeds statutory mandates, even if no objection is made at the time of sentencing." *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979). As detailed in his opening brief, Mr. DeMarie's sentence was illegal and invalid due to the sentencing court's violation of Mr. DeMarie's First Amendment rights at sentencing. Specifically, the sentencing court illegally based its sentence on Mr. DeMarie's expressed religious associations with the Orthodox Church, as well as his political associations with the democratically elected republics of the Donbas.

While the state is correct that *U.S. v. Lemon*, is not directly controlling law in this state, it fails to address that *Lemon* was cited approvingly by the Ninth Circuit, and that *Lemon* was decided upon the First Amendment to the U.S. Constitution, which has been incorporated through the Fourteenth Amendment. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). As such, Mr. DeMarie is still afforded the

protections of the U.S. Constitution despite his crime occurring in Montana. Given this, our Federal Circuit's approval of another Circuit's interpretation of First Amendment rights is highly persuasive in the interpretation of Mr. DeMarie's rights under the U.S. Constitution.

Likewise, the State's reliance upon *Tippets* is misplaced as that case did not involve an illegal sentence based upon the defendant's sincerely held religious beliefs. Rather, in *Tippets*, the only complaint was that the sentencing court failed to follow the statutory procedures of Mont. Code Ann. § 46-18-203(8). *State v. Tippets*, 2022 MT 81, ¶ 12, 408 Mont. 249, 509 P.3d 1. As such, even if this Court does not find that Mr. DeMarie used the proper words when attempting to object on his own behalf, it should still review his sentence on appeal as it is clearly illegal under the U.S. Constitution.

The State's reliance on *Finney* is also misplaced and easily distinguishable from the present case. As discussed in detail in Mr. DeMarie's Opening Brief, *Finney* did not involve association with a religious organization, but rather association with a notorious prison gang. *State v. Finney*, 281 Mont. 58, 61, 931 P.2d 1300, 1302 (1997). Further, unlike in *Finney*, where there was significant evidence to support the sentence without relying upon the defendant's association with a prison gang, here the only evidence found credible by the sentencing court

concerning Mr. DeMarie's alleged plans to obtain weapons and engage in violence is his religious and political associations.

Finally, as the D.C. Circuit of Appeals correctly noted after discussing the relevant holdings of the First, Second, and Eighth Circuit Courts of Appeal, that the U.S. Constitution compels the finding that "[a] sentence based to any degree on activity or beliefs protected by the first amendment is constitutionally invalid." *U.S. v. Lemon*, 723 F.2d 922, 938 (D.C. Cir. 1983) (emphasis added).

The sentencing court in this case disingenuously claimed that it was not sentencing Mr. DeMarie for his sincerely held religious beliefs before going on to discuss at length Mr. DeMarie's plans to fight for Russia in the Donbas protecting Orthodox Christianity. While the State tries to impute a hidden meaning, that the sentencing court was concerned about absconding, this was never mentioned at sentencing despite the sentencing court being familiar with the term. Rather, from its actual statements, it is clear that the sentencing court's concern was that Mr. DeMarie was going to follow a calling from God and end up in a war zone, which the sentencing court clearly found offensive. The sentencing court was completely free to sentence Mr. DeMarie for his actual conduct that day, but instead decided to sentence him for his sincerely held religious beliefs. As such, Mr. DeMarie's sentence should be overturned and remanded for resentencing in accordance with the requirements of the U.S. Constitution.

III. Destruction of evidence that could lead to an investigation is not the same as the destruction of evidence in the belief that an official proceeding or investigation is pending or about to be instituted.

In an attempt to obfuscate the issues, the State argues that because the evidence that Mr. DeMarie attempted to delete could lead to an investigation, Mr. DeMarie somehow violated Mont. Code Ann. § 45-7-207(1)(a). (Reply Br. at 31.) However, as the statute clearly states, a person must believe that an official proceeding or investigation is pending or about to be instituted before he can be convicted of tampering with physical evidence. Mont. Code Ann. § 45-7-207(1)(a). In other words, it is not enough to merely show that the evidence at issue could be damaging or could lead to an investigation, rather the evidence must show not only that the defendant tampered with physical evidence, but that he also believed that there was an investigation pending or about to begin at the time.

While the state pays lip service to the statutory elements of Mont. Code Ann. 45-7-207(1)(a), it essentially argues that the destruction of any evidence that could possibly lead to an investigation is all that is needed. In other words, it appears that the State is attempting to condense the several elements of Mont. Code Ann. § 45-7-207(1)(a), when it argues that demonstrating that the evidence tampered with could lead to an investigation also impliedly satisfies the remaining elements. The effect is to dramatically expand the reach of Mont. Code Ann. § 45-7-207(1)(a) to the extent it becomes constitutionally overbroad and violates due process

protections. Given that the State was required to establish more than the just the destruction of evidence that could lead to an investigation, 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.

IV. The clear, explicit, and unambiguous holdings in *Killam*, *Spangnolo*, and *Pitkanen* provide that Mr. DeMarie shall be given credit for each and every day of incarceration served prior to sentencing in the current matter.

As this Court has repeatedly held, all defendants, including Mr. DeMarie, are entitled to credit for each and every day of incarceration served prior to sentencing. Despite this Court's explicit acknowledgement that the Legislature's enactment of Mont. Code Ann. § 46-18-201(9) eliminated the sentencing court's "need to determine whether a defendant is incarcerated on a 'bailable offense,'" *Killam v. Salmonsen*, 2021 MT 196, ¶15, 405 Mont. 143, 492 P.3d 512, the state continues to argue about whether defendants were incarcerated on a billable offense. However, as this Court clearly stated in *Killam*, this determination is no longer required following the enactment of Mont. Code Ann. § 46-18-201(9). *Killam*, ¶ 15. Rather, a sentencing court is only required to review the record of the case before it in determining a defendant's entitlement for credit for time served. *Killam*, ¶ 17. In this case, the record before the sentencing court establishes that Mr. DeMarie had been

incarcerated since the commission of the alleged offense, on February 28, 2019, and that Mr. DeMarie was arraigned on May 25, 2021, thus resulting in at least 514 days of time served between his initial appearance and sentencing on October 20, 2022.

Next, the state argues that Mr. DeMarie should not receive any credit for time served as they allege that he did not serve any time incarcerated on the present offense. (Reply Br. at 36-37.) Misapplying dicta in *Killam*, discussing how district courts should calculate time served credits, the State asserts that as long as no warrant is served then there can be no time served.

As an initial matter, it is absurd to argue that someone who is serving a sentence at the Montana State Prison is not "serving" time. Likewise, the dictum of *Killam* discusses the time from arrest until sentencing, however, it does not require that a warrant be issued for the purposes of calculating time served. *Killam*, ¶ 17. Rather, it is clear that this Court was discussing the start and stop time of incarceration in a case set for sentencing. *Id.*

In other words, this Court was clearly directing the lower courts to look at the time the defendant had spent incarcerated during the pendency of the case before them without reference to other matters. This becomes apparent when one considers the common situation where a defendant is arrested during the commission of an offense without a warrant, such as during DUI stop and investigation. Clearly a DUI

defendant arrested without a warrant on the night of the offense would be entitled to credit for each and every day of incarceration served prior to sentencing.

While there was not an arrest or warrant issued in this case, these are not the only events a lower court is permitted to consider. Rather, the clear holdings of this Court instruct that the sentencing courts shall consider the record before them and give credit for each day of incarceration served during the pendency of the action before them. *Killam*, ¶ 17. For example, in rejecting the state's arguments in *Killam*, this Court highlighted that the DOC records showed that Killam was only held for one day on the parole violation followed by his arraignment the following day on the pending charges. *Killam*, ¶ 19. In other words, in *Killam*, like here, the defendant was still serving a DOC sentence when he was arraigned on new charges, and yet this Court still held that Killam was entitled to credit for each day served during the pendency of his case. *Killam*, ¶¶ 18-20. As such, Mr. DeMarie should be entitled to credit for each day of imprisonment served during the pendency of his case.

CONCLUSION

Mr. DeMarie's sentence should be overturned and remanded for sentencing in accordance with the requirements of the U.S. Constitution as it is an illegal sentence that was 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, at resentencing, Mr. DeMarie is entitled to credit for each day served during the pendency of this matter.

Respectfully submitted this 2nd day of December, 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 Reply 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 2,308, excluding the Cover Page, Table of Contents, Table of Authorities, Certificate of Compliance, Certificate of Service, and Appendices.

DATED this 2nd day of December, 2024.

/s/ Nathan D. Ellis
Nathan D. Ellis
Attorney for Defendant and Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of December, 2024, I caused a true and accurate copy of the foregoing **REPLY BRIEF** to be electronically served to:

Austin Miles Knudsen
Montana Attorney General
Tammy K Plubell
Assistant Attorney General
215 North Sanders
Helena, Montana 59620

Kathryn McEnery
Powell County Attorney
409 Missoury Avenue, Suite 301
Deer Lodge, Montana 59722

Patrick J. Moody
Assistant Attorney General
Special Deputy Powel County Attorney
Prosecution Services Bureau
P.O. Box 201401
Helena, Montana 59620-1401

/s/ Nathan D. Ellis
Nathan D. Ellis
Attorney for Defendant and Appellant

CERTIFICATE OF SERVICE

I, Nathan Daniel Ellis, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 12-02-2024:

Kathryn McEnery (Govt Attorney)
409 Missouri Ave, Suite 301
Deer Lodge MT 59722
Representing: State of Montana
Service Method: eService

Tammy K Plubell (Govt Attorney)
215 N. Sanders
Helena MT 59601
Representing: State of Montana
Service Method: eService

Tammy Ann Hinderman (Attorney)
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena MT 59620
Representing: Darren Charles Demarie
Service Method: eService

Electronically Signed By: Nathan Daniel Ellis
Dated: 12-02-2024