

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0398

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

JASON DANIEL SHEWALTER,

Defendant and Appellant.

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**BRIEF OF APPELLANT**

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On Appeal from the Montana Twentieth Judicial District Court,  
Lake County, the Honorable Deborah Christopher, Presiding

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## **STATEMENT OF THE ISSUES**

1. The District Court mistakenly gave Mr. Shewalter no credit for time served in the judgment on revocation, even though the District Court indicated at sentencing it had given him credit for time served. Is Mr. Shewalter's sentence illegal?

2. Did the District Court abuse its discretion when it denied Mr. Shewalter credit for elapsed time for a five-month period of time without any articulable violations?

3. Did Mr. Shewalter receive ineffective assistance of counsel at the dispositional hearing when his attorney failed to request any elapsed time against his revocation sentence?

## **STATEMENT OF THE CASE**

This is an appeal of a second revocation judgment that was issued by the Lake County District Court in 2022. The underlying offense is a 2006 conviction for a single count of criminal possession with intent to distribute marijuana, for which Mr. Shewalter received a ten-year commitment to the Department of Corrections with eight years suspended. This sentence was ordered to run consecutively to two

sentences from Flathead County. Mr. Shewalter did not appeal his conviction or original sentence.

In 2017, Mr. Shewalter discharged his Flathead sentences and began serving the Lake County sentence at issue in this appeal. In 2018, the District Court revoked the suspended portion of Mr. Shewalter's sentence for the first time. Mr. Shewalter did not appeal the first revocation.

In 2022, the District Court revoked Mr. Shewalter's suspended sentence for a second time. Mr. Shewalter did not timely appeal the second revocation. In 2023, however, Mr. Shewalter filed a *pro se* petition for out-of-time appeal of his second revocation, explaining he told his attorney he wanted to appeal his sentence, but the attorney failed to file an appeal. He requests credit for time served and street time. (Petition for Out-of-Time Appeal (07/20/2023).) This Court granted Mr. Shewalter's petition and appointed the Appellate Defender Division to represent him. (Order (08/01/2023).)

### **STATEMENT OF THE FACTS**

In 2006, Mr. Shewalter pled guilty to and was convicted of one count of criminal possession with intent to distribute, a felony, in

violation of Mont. Code Ann. § 45-9-103(1). (Doc. 29 at 1, attached hereto as Exh. A.) He received a ten-year commitment to the Department of Corrections (“DOC”), with eight years suspended, which ran “consecutive to the sentences imposed in Flathead County.” (App. A at 2.)

Mr. Shewalter “discharged his Flathead County sentences and began serving the suspended portion of his sentence in this matter” on March 14, 2017. (Doc. 33 at 1.) The District Court revoked the suspended portion of Mr. Shewalter’s sentence on December 6, 2018. (Doc. 42 at 5, attached hereto as App. B.) His new sentence following revocation was an eight-year DOC commitment with 5 years suspended. (App. B at 1.) The District Court granted him 49 days of credit for time served against his new sentence and no credit for elapsed time. (App. B at 1.)

On October 17, 2021, Mr. Shewalter began serving the suspended portion of his first revocation sentence. (Doc. 49 at 1.) At that time, Mr. Shewalter lacked a permanent residence and did not receive enough in social security disability payments to live on his own without having employment, which he had a difficult time obtaining. Transportation

issues prevented Mr. Shewalter from keeping up with appointments with his probation officer. Mr. Shewalter admitted to using marijuana, fentanyl, and possibly methamphetamine. He was referred to chemical dependency treatment on April 28, 2022, and on May 18, 2022; given jail sanctions from April 17 through May 18, 2022, and from May 23 through May 26, 2022; and provided an intervention hearing on April 19, 2022. (Doc. 49 at 2 – 3.)

On June 8, 2022, the State prepared a Report of Violation (“ROV”), alleging three violations of Condition 8 of his probationary conditions, i.e., compliance with all laws and ordinances. (Doc. 49 at 1 (filed 06/09/2022).) The State asserted Mr. Shewalter committed three separate offenses on June 3, 2022: (1) criminal trespass to property, a misdemeanor; (2) possession of dangerous drugs, a felony; and (3) possession of drug paraphernalia, a misdemeanor. (Doc. 49 at 1.) Without elaboration, the ROV indicates “[m]ultiple” verbal reprimands were given to Mr. Shewalter. (Doc. 49 at 1.)

Mr. Shewalter’s probation officer recommended a five-year DOC commitment with no time suspended and no credit for street time. (Doc. 49 at 3.) The State filed a petition to revoke on June 10, 2022.



The District Court issued an arrest warrant on June 16, 2022, setting bail at \$25,000.

On June 28, 2022, before the arrest warrant was served on Mr. Shewalter, the State prepared an addendum to its ROV alleging Mr. Shewalter committed three new violations of Condition 8 of his probationary conditions. (Doc. 52 at 1.) The State asserted Mr. Shewalter committed three separate offenses on June 23, 2022, including another alleged drug possession offense. (Doc. 52 at 1.) Again the ROV indicates “[m]ultiple” verbal reprimands were given to Mr. Shewalter without any elaboration. (Doc. 52 at 1.) The probation officer remarked in the ROV that Mr. Shewalter’s “current illegal substance use seems to be steady, constant use[,]” and that he “will continue to couch surf and stay with people whom are engaged in using illegal substances.” (Doc. 52 at 2.) Again the State recommended a five-year DOC commitment with no time suspended and no credit for street time. (Doc. 52 at 2.) The State filed an amended petition to revoke on July 7, 2022.

The arrest warrant was served on Mr. Shewalter on July 10, 2022. (Doc. 56.) Mr. Shewalter was transferred to the Lake County Detention

Center on July 13, 2022, and posted a bail bond of \$25,000 on August 18, 2022. (Docs. 54, 61.) Mr. Shewalter failed to appear at his adjudication hearing on August 25, 2022. (08/25/2022 Tr. at 2—3.)

Without objection, the District Court heard testimony from Columbia Falls police officer Wayne Stufflebeem concerning Mr. Shewalter's whereabouts. (08/25/2022 Tr. at 3 – 4.) Officer Stufflebeem testified he had arrested Mr. Shewalter about 4 a.m. that morning at the home of his girlfriend who had overdosed.<sup>1</sup> (08/25/2022 Tr. at 4 – 5.) Stufflebeem stated Mr. Shewalter told him he had court in the morning and was enrolling in a treatment plan. (08/25/2022 Tr. at 6.) The District Court issued another arrest warrant, this time setting bail at \$150,000. (Doc. 65; 08/25/2022 Tr. at 7 – 8.)

The new arrest warrant was served on Mr. Shewalter at the Flathead County Detention Center on September 1, 2022. (Doc. 66, Return of Service by Flathead County Sheriff's Office.) Mr. Shewalter

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<sup>1</sup> Subsequently, at the dispositional hearing Mr. Shewalter explained he was the person who called the authorities about his girlfriend being unresponsive. He admitted to having been trespassed from her home because of his drug conviction, but he went there that day anyway because she “begged” him to come over and he found her “dead on the couch” and “called 911.” (10/13/2022 Tr. at 23.)

was back at the Lake County Detention Center on September 6, 2022.  
(Doc. 66, Warrant Return of Service from Lake County.)

A combined adjudication and disposition hearing occurred on October 13, 2022. Officer Stufflebeem testified about his arrest of Mr. Shewalter on August 25, and about the offenses the State asserted Mr. Shewalter committed on June 3 and June 23, as alleged in the two ROVs. (10/13/2022 Tr. at 5 – 12.) Stufflebeem said he was unsure whether Mr. Shewalter had been charged with any crimes in Flathead County on account of the alleged offenses. (10/13/2022 Tr. at 11.)

The probation and parole officer, Ron Linn, who prepared the two ROVs also testified. (10/13/2022 Tr. at 13 – 15.) Mr. Linn stated he had supervised Mr. Shewalter since October 17, 2021,<sup>2</sup> averring Mr. Shewalter was not “a compliant model probationer.” (10/13/2022 Tr. at 13.) The Prosecutor and Mr. Linn had the following conversation about Mr. Shewalter’s performance during supervision:

Q. Okay. When was the first time that he caused a problem for you or needed to be sanctioned?

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<sup>2</sup> The first ROV indicated Mr. Shewalter returned to Montana on October 17, 2021, “from Washington State for Violating Interstate Compact Rules – Technical Violation[,]” and “started the probation portion of his sentence in Kalispell.” (Doc. 49 at 1.)

A. To be sanctioned – the sanctions can be as little as a verbal warning. And I've given him many to try to work with him and get him to comply with little conditions that the court wants him to do.

Q. Okay. Has that noncompliance existed throughout the year that you've been supervising him, or was it something that just most recently happened in June, I guess, is what I'm getting at?

A. The serious violations were – began on June 3. But the ones that just required minor sanctions, like verbal warnings and redirect (sic), happened the whole year.

...

Q. ... [W]hy did you see fit to file a Report of Violation based on these new allegations?

A. I believe that it would – if I didn't intervene with a revocation, then this could result in a new crime.

(10/13/2022 Tr. at 14 (parenthetical original).) Linn admitted he had not spoken with anyone in the Flathead County Attorney Office about

the allegations in his two ROVs.<sup>3</sup> The State rested after Stufflebeem and Linn testified. (10/13/2022 Tr. at 15.)

At that point, the judge stated to Defense Counsel, “I guess I’d let you make what argument you can[,]” but then proceeded to keep talking and revoke Mr. Shewalter’s sentence before allowing the Defense to say anything. (10/13/2022 Tr. at 15.) The District Court ruled:

THE COURT: . . . And so on the Amended Petition to Revoke, then the Court does find that it would – it’s appropriate for the Court to revoke the suspended sentence based on the fact that the Defendant does have competent counsel, who is here attempting to defend his actions; that the allegations against him are sufficient to create significant concern because many of them are not – a failure to comply with law enforcement and drug circumstances, one that sounds like maybe somebody could have died if law enforcement didn’t show up and weren’t providing other things.

There is, obviously, no argument with regard to – because we haven’t discussed the Defendant – some of the other findings that the Court typically makes under these matters, and there aren’t any admissions that have been made by the Defendant.

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<sup>3</sup> No publicly available records indicate Mr. Shewalter was charged in Flathead County for any of the alleged offenses listed in either of the two ROVs in the instant case.

So based on the testimony of the witnesses provided by the State, then the Defendant's suspended sentence is revoked. Are the parties prepared to proceed to sentencing or does either party wish additional time?

[THE PROSECUTOR]: The State is prepared, Judge.

[DEFENSE COUNSEL]: (No response.)

THE COURT: Okay.

(10/13/2022 Tr. at 15 – 16 (parenthetical in original).) The Prosecutor and Mr. Linn commenced discussing the State's recommended disposition, without Mr. Linn leaving the witness stand. (10/13/2022 Tr. at 16 – 17.)

Mr. Linn reiterated the recommendation he made in the two ROVs, i.e., a five-year DOC commitment with no time suspended. Mr. Linn was not sure if he would recommend a 90-day Connections/Corrections treatment program or a nine-month stay at NEXUS for addiction treatment. (10/13/2022 Tr. at 17.) Regarding street time, Linn stated he would not recommend street time credit because Mr. Shewalter had been "very difficult to work with" on "minor things" and that he could not find "one instance per month" of compliance by Mr. Shewalter. (10/13/2022 Tr. at 18.)

In his allocution, Mr. Shewalter acknowledged, “I completely understand that I have been, for lack of – I have been a ‘shit show’ for the entire summer. I’m not going to lie. I’m not trying to lie.”

(10/13/2022 Tr. at 24.) Regarding the State’s disposition recommendation, Mr. Shewalter explained, “I think that five years is too much of a time. I’ve already finished five years. I got ten years. I’ve already done a whole five years for this marijuana charge.”

(10/13/2022 Tr. at 24.) Defense Counsel noted Mr. Shewalter “has some mental health issues” and, even though he had “screwed up,” argued he “has just been punished, and punished, and punished.” (10/13/2022 Tr. at 18, 21 – 22.) Therefore, Counsel requested a five-year sentence with three years suspended. (10/13/2022 Tr. at 22.) Mr. Shewalter personally requested “a three-year suspended sentence with two years and Connections/Corrections[.]” (10/13/2022 Tr. at 27.)

The District Court imposed the Prosecutor’s recommended disposition – a five-year DOC commitment with a recommendation for NEXUS, pre-release, and mental health treatment. (10/13/2022 Tr. at 28 – 29, attached hereto as App. C.) After the District Court’s oral pronouncement, Mr. Shewalter – not his attorney – inquired:

THE DEFENDANT: I'm not a lawyer or anything, but I've been led to believe that I would get credit for street time up until my revocation was filed. So from October 17 until June of this year I should get credit for street time because that's when – that's just what I've been led to believe. I could be wrong. But I've been told the rules have changed and that I have – that I am entitled to credit for street time.

THE COURT: Mr. [Prosecutor], are you aware of anything with regard to this?

[THE PROSECUTOR]: Judge, as far as I can tell, the Court is required to address the issue of street time. And you should try and find, if you can, periods of time while he was succeeding on probation and give him credit for that period of time.

THE COURT: So I –

[THE PROSECUTOR]: I don't believe there is a hard and fast rule that he gets credit for all the time up until an ROV was filed. **And based on the testimony of the witnesses we've had here today, he has been problematic the entire time he was on probation. And I believe the probation officer testified he couldn't find a solid month-long block during the year where he was not requiring counseling, redirection, or interventions. And so that's why we are specifically requesting in this instance that he not receive any credit for street time because he just wasn't ever good.**



THE COURT: Well, the officer did testify that he used lesser degrees of redirection and verbal warnings during the time and things just continued to get worse. So the Court has significant concern that we're going to get anywhere with some of the things that are happening.

But if in anybody's review of this there would be an appropriate amount of street time, then I'd be willing to consider it. But based on the testimony here today, and the information that's been provided, and the Defendant – the Defendant, obviously, has a significant issue with drugs and they're increasingly more dangerous to him. And that being the case, I want him to have as much time as he can to work in a safe environment to avoid that and to develop tools to deal with it.

**And so we've been messing with this case since 2006. That's a long time to have that out there. And I have given credit for any time that has been served. And in this case I'm not going to grant any street time just because there's been a continued involvement of Probation and Parole for purposes of trying to keep everybody straight and appropriate.**

(App. C at 30 – 32 (emphasis added).)

No credit for time served was granted in the oral disposition. At no point did Defense Counsel advocate to support her client's request for street-time credit.

The written dispositional order, entitled Judgment on Second Revocation, is consistent with the oral pronouncement. (Doc. 69, attached hereto as App. D.) Specifically, it revokes Mr. Shewalter’s five-year suspended sentence issued on December 6, 2018, and imposes a five-year DOC commitment with no time suspended. (App. D at 1.) The District Court granted no credit for time served or street time.

### **STANDARDS OF REVIEW**

Calculating credit for time served is a question of law subject to de novo review. *State v. Parks*, 2019 MT 252, ¶ 7, 397 Mont. 408, 450 P.3d 889 (citations omitted).

“[R]evocation decisions involve both legal and factual findings, and we review a district court’s legal findings de novo and its factual findings for clear error.” *State v. Jardee*, 2020 MT 81, ¶ 5, 399 Mont. 459, 462, 461 P.3d 108 (citation, internal quotation marks omitted; formatting modified). A district court’s factual findings are clearly erroneous if they are not supported by substantial credible evidence, if the court misapprehended the effect of the evidence, or if a review of the record leaves this Court with the definite firm conviction that a mistake

has been made.” *Jardee*, ¶ 5, 3 (citation, internal quotation marks omitted).

“Ineffective assistance of counsel claims are mixed questions of law and fact which we review de novo.” *State v. Wright*, 2021 MT 239, ¶ 7, 405 Mont. 383, 495 P.3d 435 (citations omitted).

### **SUMMARY OF THE ARGUMENT**

Jason Shewalter is statutorily entitled to credit for time he served in this case during two separate jail sanctions before the State filed the instant petition to revoke, and during two separate periods after the State filed the petition to revoke. Failure to grant credit for time served renders his revocation sentence illegal. This Court should reverse the District Court’s failure to grant any credit for time served and remand with instructions for the District Court to amend the judgment on second revocation by crediting Mr. Shewalter with 149 days of time served calculated as follows: April 17 through May 18, 2022; May 23 through May 26, 2022; June 16 through August 18, 2022, and from August 26 through October 13, 2022, all dates inclusive.

Additionally, Mr. Shewalter is entitled to credit for elapsed time against his revocation sentence for the time period during which he had

no documented violations of his probationary conditions. The District Court abused its discretion by denying such credit. Further, Mr. Shewalter received ineffective assistance of counsel when his attorney failed to advocate for elapsed time credit on his behalf. This Court should reverse the District Court's failure to grant any credit for elapsed time served and remand with instructions for the District Court to amend the judgment on second revocation by crediting Mr. Shewalter with elapsed time from October 17, 2021, through March 16, 2022, dates inclusive. Because Mr. Shewalter has no documented violations of his probationary conditions during this time period, he is statutorily entitled to receive street-time credit for these days.

### **ARGUMENT**

**I. Mr. Shewalter's sentence is illegal because it denies him credit for time he served during the instant revocation proceedings.**

"Calculating credit for time served is not a discretionary act, but a legal mandate." *Parks*, ¶ 9 (citations omitted). "The *Lenihan* rule<sup>[4]</sup> provides a sentence not objected to in the district court that is 'illegal or exceeds statutory mandates,' *Lenihan*, 184 Mont. at 343, 602 P.2d at

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<sup>4</sup> *State v. Lenihan*, 184 Mont. 338, 602 P.2d 997 (1979).

1000, and not merely an ‘objectionable’ statutory violation, *State v. Kotwicki*, 2007 MT 17, ¶ 13, 335 Mont. 344, 151 P.3d 892 (citations omitted), may be reviewed on appeal.” *State v. Hansen*, 2017 MT 280, ¶ 12, 389 Mont. 299, 405 P.3d 625 (citations omitted), overruled in part on other grounds *Gardipee v. Salmonsens*, 2021 MT 115, 486 P.3d 689 (pro se petition for writ of habeas corpus). This Court may review Mr. Shewalter’s credit-for-time-served claim under *Lenihan*, notwithstanding the lack of an objection below.

Mont. Code Ann. § 46-18-203(7)(b) provides that if a suspended sentence is revoked, “Credit must be allowed for time served in a detention center or for home arrest time already served.” This language is not discretionary when it comes to awarding of credit for time served on a revoked sentence. *State v. Crazymlule*, 2024 MT 58, ¶ 9, 415 Mont. 537, 545 P.3d 66.

Similarly, Mont. Code Ann. § 46-18-403(1) requires, “A person incarcerated on a bailable offense against whom a judgment of imprisonment is rendered must be allowed credit for each day of incarceration prior to or after conviction, except that the time allowed as a credit may not exceed the term of the prison sentence rendered.”

“By its plain language, § 46-18-403(1), MCA, leaves no discretion to the sentencing court to determine whether a defendant incarcerated on a bailable offense receives credit for incarceration time prior to or after conviction.” *Killam v. Salmonsens*, 2021 MT 196, ¶ 13, 405 Mont. 143, 492 P.3d 512 (*en banc*) (footnote omitted).

“A trial court maintains supervisory control over a defendant during a suspended sentence.” *Crazymule*, ¶ 12 (citation omitted).

After a warrant is issued pursuant to a revocation petition,

[i]t is of no consequence that bond was never posted or that [the defendant] was serving a period of incarceration for a different offense. The event here triggering the District Court’s jurisdiction and its reach over [the defendant] was issuance of the arrest warrant following the filing of the State’s revocation petition with the court.

*Crazymule*, ¶ 12.

Here, the ROV establishes that before the petition to revoke was filed Mr. Shewalter was jailed for alleged probationary violations between April 17 through May 18, 2022, and from May 23 through May 26, 2022. (Doc. 49 at 2 – 3.) Then, the District Court issued its first arrest warrant on June 16, 2022. (Doc. 51.) The ROV dated June 8, 2022, indicated Mr. Shewalter was incarcerated at the Flathead County

Detention Center at that time. (Doc. 49.) Mr. Shewalter was served with the June 16 warrant on July 10, 2022, while still detained at the Flathead County Detention Center. (Doc. 56.) He was transferred to Lake County Detention Center on July 13, 2022, and remained incarcerated there through August 18, 2022, when he posted bail of \$25,000. (Doc. 61.)

When Mr. Shewalter failed to appear at his hearing on August 25, 2022, because he had been arrested the night before and was incarcerated in Flathead County Detention Center, the District Court issued another arrest warrant on August 26, 2022. (Doc. 65.) Mr. Shewalter was served with that warrant while still incarcerated in Flathead County on September 1, 2022. He was transferred to Lake County Detention Center on September 6, 2022. (Doc. 66.) He remained incarcerated on \$150,000 bail through the combined adjudicatory and dispositional hearing on October 13, 2022. (Doc. 66.) Even though the District Court stated in the oral disposition that it had provided Mr. Shewalter credit for time served, no credit for time served was mentioned orally or written in the dispositional order.

Mr. Shewalter is entitled to credit for time served while he was incarcerated during two separate jail sanctions and upon the two separate arrest warrants the District Court issued in the instant revocation proceedings. Accordingly, the Court should remand the written revocation judgment with instructions to amend it by including 149 days of credit for time served from: April 17 through May 18, 2022 (32 days); May 23 through May 26, 2022 (4 days); June 16 through August 18, 2022 (64 days); and August 26 through October 13, 2022 (49 days). Mont. Code Ann. §§ 46-18-203(7)(b), 46-18-403; *Crazymule*, ¶ 15 (reversing denial of credit for time served against a revocation sentence where defendant was incarcerated in a tribal detention center when an arrest warrant was issued pursuant to a revocation petition but not yet served).

**II. The District Court abused its discretion when it denied Mr. Shewalter any credit for elapsed time.**

If a suspended or deferred sentence is revoked, **the judge shall 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.** 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) (emphasis added). This statute requires elapsed time, referred to also as street time, to be granted against a revocation sentence for periods of time where there have been no documented violations. *Jardee*, ¶ 10. Street time may not be denied simply because “many probation violations ‘permeated’ the entirety of [a defendant’s] time on supervision. The statute now requires a specific demonstration of a ‘record or recollection of violations’ in the period in question to defeat the credit.” *Jardee*, ¶ 10 (footnote omitted). The plain meaning of § 46-18-203(7)(b) unambiguously means the district court and the parties “might be tasked with parsing out periods of time for compliance determination.” *Jardee*, ¶ 10.

Consequently, it is now insufficient for a district court to base a denial of street time credit solely on a “pattern” of criminal behavior[.] . . . The State must now point to an actual violation by the defendant, in the relevant time period, found in the record or recollection of the probation officer, to establish a basis for denial of street time credit for that period, here, between the release on bond and sentencing. Likewise, a district court must “state the reasons” for a denial of credit based upon the record or recollection of the probation officer to deny street time credit for the relevant time period.

*Jardee*, ¶ 11.

In proceedings below, the District Court pronounced its oral disposition without mentioning street time. (App. C at 28 – 29.) Immediately thereafter, Mr. Shewalter personally stated to the judge, “I’m not a lawyer or anything, but I’ve been led to believe that I would get credit for street time up until my revocation was filed. So from October 17 until June of this year I should get credit for street time[.]” (App. C at 30 – 31.) Evidently unfamiliar with the statutory changes to street time made five years earlier in 2017, which this Court interpreted in *Jardee* in 2020, the District Court sought the opinion of the Prosecutor about whether Mr. Shewalter was entitled to street time. (App. C at 30 – 31.)

The Prosecutor contended Mr. Shewalter did not deserve street time for various reasons, including that: “he has been problematic the entire time he was on probation[;]” the probation officer “couldn’t find a solid month-long block” where Mr. Shewalter did not require “counseling, redirection, or interventions[;]” and finally, “he just wasn’t ever good.” (App. C at 31.) The judge remarked, “if in anybody’s review of this there would be an appropriate amount of street time, then I’d be

willing to consider it[,]" but then kept talking without offering time for the Defense to respond. (App. C at 32.)

The District Court ruled that "based upon the testimony here today, and the information that's been provided," and in light of Mr. Shewalter's "significant issue with drugs" that were "increasingly more dangerous to him," it was "not going to grant any street time just because there's been a continued involvement of Probation and Parole for purposes of trying to keep everybody straight and appropriate." (App. C at 32.) The judge stated, "I want him to have as much time as he can to work in a safe environment to avoid that [i.e., issues with drugs] and to develop tools to deal with it." (App. C at 32.)

The District Court misunderstood and misapplied governing law. Wanting to provide Mr. Shewalter a more structured environment to keep "straight and appropriate" after "messaging with this case since 2006" might be a valid consideration when determining whether to suspend any portion of the revocation sentence. But that is a different thing than considering whether street time must be granted while Mr. Shewalter was serving his suspended sentence under § 46-18-203(7)(b).

*Jardee* requires the District Court to parse out time when Mr.

Shewalter was compliant or non-compliant while on probation.

A “solid month-long block” of good time is not the statutory standard for receiving credit during a revocation proceeding for elapsed time served while on probation. Neither is being “problematic” or not being “ever good.” These terms are akin to asserted violations “permeating” a defendant’s time on probation or “a ‘pattern’ of criminal behavior[,]” which this Court has rejected as bases for denying credit for elapsed time. *Jardee*, ¶¶ 10, 11. Non-specific allegations of nonconforming behavior fall short of rebutting the statutory presumption of granting street-time credit to offset a revocation sentence.

Here, the initial ROV indicated “a pick up and hold order was issued” on March 17, 2022, due to Mr. Shewalter not reporting to his probation officer and having an alleged warrant for failure to appear in an unidentified case.<sup>5</sup> Thereafter, the ROV sets out a series of

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<sup>5</sup> Curiously, the ROV refers to the March 17 pick up and hold order as a “jail sanction,” even though the ROV identifies no jail period before Mr. Shewalter’s arrest on April 17. (Doc. 49 at 2.)

violations by Mr. Shewalter and time he spent in jail through the day the first ROV was prepared on June 8, 2022. (Doc. 49 at 2 – 3.)

Ron Linn testified he had supervised Mr. Shewalter on probation starting October 17, 2021. Linn stated he had given Mr. Shewalter “many” verbal warnings “to get him to comply with little conditions that the court wants him to do[,]” but “[t]he serious violations were – began on June 3rd.” (10/13/2022 Tr. at 13 – 14.) When asked why he was recommending no street-time credit, Linn explained that Mr. Shewalter was “[v]ery difficult to work with. If he would have shown some compliance with me to want to work with the minor things I wanted him to do, I would – I’d be giving him – requesting that he get street time. But none is welcome in this case.” (10/13/2022 Tr. at 18.)

The combination of Linn’s testimony and the first ROV establish specific violations by Mr. Shewalter beginning on March 17, 2021. *Cf. State v. Johnson*, 2022 MT 216, 410 Mont. 391, 519 P.3d 804 (affirming denial of street time between dates of first and last documented probation violations). But Linn provided no “specific demonstration of a ‘record or recollection of violations’” to defeat credit for street time between October 17, 2021 and March 16, 2022. *Jardee*, ¶ 10 (ruling

credit for street time could not be denied merely upon the State’s argument that “many probation violations ‘permeated’ the entire period that Jardee was supervised). Asserted violations of “little conditions” and “minor things,” which were not described in the ROV or in testimony at the revocation hearing, are akin to a “‘pattern’ of criminal behavior” that is insufficient to deny credit for street time. *Jardee*, ¶¶ 10– 11. *Accord State v. Gudmundsen*, 2022 MT 178, ¶¶ 6, 13 – 14, 410 Mont. 67, 517 P.3d 146 (reversing denial of street-time credit for 10-month period in which there were no recorded probation violations); *State v. Pennington*, 2022 MT 180, ¶¶ 29 – 30, 410 Mont. 104, 517 P.3d 894 (reversing denial of street-time credit for 335-day period without any record of violations).

The District Court abused its discretion by denying Mr. Shewalter credit for elapsed time where there was no documented violation of his probationary conditions. This Court should remand with instructions to amend the dispositional order by granting credit for elapsed time from October 17, 2021, through March 16, 2022, dates inclusive. *Jardee*, ¶¶ 10 – 11; *Gudmundsen*, ¶¶ 14 – 15; *Pennington*, ¶¶ 29 – 30.

**III. Mr. Shewalter received ineffective assistance of counsel during the dispositional hearing when his attorney failed to support his request for street-time credit against his revocation sentence.**

Ineffective assistance of counsel claims are appropriate for review on direct appeal when no plausible justification exists for the actions or omissions of defense counsel. *Wright*, ¶ 10 (citations omitted). In such situations, “[w]hether the reasons for defense counsel's actions are found in the record or not is irrelevant. What matters is that there could not be any legitimate reason for what counsel did.” *State v. Koughl*, 2004 MT 243, ¶ 15, 323 Mont. 6, 97 P.3d 1095.

To prevail on an IAC claim, a petitioner must show both that counsel's performance was deficient, and that the deficient performance prejudiced the defense. . . . This Court applies a “strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance” contemplated by the Sixth Amendment. . . . To show prejudice, the defendant must show that there is a reasonable probability the verdict would have been different but for counsel's deficient performance.”

*State v. Tipton*, 2021 MT 281, ¶ 17, 406 Mont. 186, 497 P.3d 610 (citations omitted).

“Prejudice is shown by ‘a probability sufficient to undermine confidence in the outcome’ but need not establish the defendant would

have been acquitted.” *Tipton*, ¶ 19, quoting *Strickland v Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984); *Kougl*, ¶ 25.

Here, there is no plausible justification for Defense Counsel failing to advocate for her client’s request for street-time credit. As set out above, Mont. Code Ann. § 46-18-203(7)(b) and this Court’s precedent make clear that Mr. Shewalter must receive credit for elapsed time between October 17, 2021, and March 16, 2022, because he had no documented violations during this period of time. Mr. Shewalter should not have had to make this request himself to the District Court. His lawyer was right next to him and possessed an obligation to make the street-time request on Mr. Shewalter’s behalf.

The District Court even asked for a response from Defense Counsel after the Prosecutor recommended against elapsed time: “[I]f in anybody’s review of this there would be an appropriate amount of street time, then I’d be willing to consider it.” (App. C at 32.) Yet Mr. Shewalter’s attorney said nothing.

Defense Counsel possessed professional duties at the dispositional hearing to be competent in relevant law and to be an advocate for Mr.



Shewalter within the scope of the representation. Mont. R. Prof. Cond. 1.1, 1.2(a). There is no excuse for Counsel to sit silent while Mr. Shewalter personally requested credit for elapsed time to which he was statutorily entitled – even admitting, “I’m not a lawyer or anything” – as the State’s attorney argued against awarding him street time. But for Defense Counsel’s deficient performance, there is a reasonable probability the District Court would have granted elapsed time credit to Mr. Shewalter.

In addition to reversing the denial of elapsed time due to the District Court’s abuse of discretion, this Court should reverse on account of counsel’s deficient performance that prejudiced Mr. Shewalter at the dispositional hearing. The Court should remand the dispositional order with instructions to grant Mr. Shewalter credit for elapsed time from October 17, 2021, through March 16, 2022, dates inclusive.

### **CONCLUSION**

For the foregoing reasons, Mr. Shewalter requests the Court to reverse the District Court’s mistaken denial of credit for time served and elapsed time, and remand with instructions for the District Court

to issue an amended judgment on second revocation including 149 days of credit for time served from: April 17 through May 18, 2022 (32 days); May 23 through May 26, 2022 (4 days); June 16 through August 18, 2022 (64 days); and August 26 through October 13, 2022 (49 days). granting 149 days of credit for time served, calculated as follows: April 17 through May 18, 2022 (32 days); May 23 through May 26, 2022 (4 days); June 16 through August 18, 2022 (64 days); and August 26 through October 13, 2022 (49 days). Additionally, Mr. Shewalter requests the Court to reverse the District Court's denial credit for elapsed time and to remand for an amended judgment that credits Mr. Shewalter with elapsed time from October 17, 2021, through March 16, 2022, for a total of 151 days.

Respectfully submitted this 17th day of December, 2024.

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately 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 5,975, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Deborah S. Smith  
Deborah S. Smith

## **APPENDIX**

Original Judgment and Commitment.....	App. A
First Revocation Judgment.....	App. B
Oral Disposition on Second Revocation .....	App. C
Judgment on Second Revocation .....	App. D

## **CERTIFICATE OF SERVICE**

I, Deborah Susan Smith, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-17-2024:

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