

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0502

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROGER MICHAEL KEECH,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Kathy Seeley, Presiding

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STATEMENT OF THE ISSUE

Whether the district court imposed an illegal disposition following Keech's second revocation proceeding by failing to award the proper amount of credit for time served.

STATEMENT OF THE CASE

Roger Michael Keech has a significant history of committing criminal offenses in Montana and other states. (Doc. 11.) Relevant to this appeal, on January 9, 2003, Keech was sentenced for two felonies in First Judicial District Court Cause No. CDC-02-181 (CDC-02-181) to the Department of Corrections (DOC) for a net term of 20 years with 16 years suspended. (Docs. 27, 29.)

The State petitioned to revoke Keech's suspended sentence after he violated his sentence and committed new offenses, including felony forgery in Thirteenth Judicial District Court Cause No. DC-08-173 (DC-08-173). (Docs. 36, 43.) In November 2008, Keech was sentenced in DC-08-173 to a five-year DOC commitment to run concurrent to his sentence in CDC-02-181. (Docs. 44, 63.)

On March 12, 2009, the First Judicial District Court revoked Keech's 16-year suspended sentence and imposed a 16-year commitment to the DOC with 11 years suspended. (Docs. 54, 56.) The disposition did not address whether this sentence was to run concurrent or consecutive to any other sentences and the DOC ran it

consecutive to the 5-year DOC commitment in DC-08-173. (Docs. 58-59.) This Court affirmed the DOC's determination in a state habeas proceeding. *See also, Keech v. Kirkegard*, Case No. OP 11-0622, 2012 Mont. LEXIS 116, 374 Mont. 550, 286 P.3d 248 (Order Feb. 7, 2012) (hereinafter, *Keech I*).

The State petitioned to revoke Keech's suspended sentence in 2018 and again in 2019 after Keech absconded from supervision and committed new offenses in Washington State. (Docs. 63, 70.) Pending his revocation, Keech petitioned this Court again challenging the DOC's decision to run his First Judicial District Court disposition consecutive to his five-year DOC commitment in DC-08-173; this Court again affirmed the DOC's calculation. *See Keech v. Bragg*, Case No. OP 23-0220, 2013 Mont. LEXIS 433, 412 Mont. 551, 531 P.3d 543 (Order Apr. 25, 2023) (hereinafter, *Keech III*).

On April 27, 2023, the district court revoked Keech's 11-year suspended sentence and sentenced Keech to the DOC for a term of 11 years with 6 years suspended. The court granted 62 days of credit for time served and 1,167 days of elapsed time credit based on the parties' stipulations. (4/27/23 Tr. (Hr'g); Doc. 93.)

STATEMENT OF THE FACTS

I. Original judgment and sentence; January 9, 2003

Keech committed multiple offenses in the spring and early summer of 2002 in Lewis and Clark County. (Docs. 1-2, 13.) At the time, Keech was serving a deferred imposition of sentence for deceptive practices and was arrested by his probation officer (PO) on July 23, 2002.¹ (*Id.*)

On August 13, 2002, the State charged Keech in CDC-02-181 with Count I, felony deceptive practices, Count II, burglary, Count III, felony accountability to forgery, and several misdemeanors. (Docs. 1-2, 13.) The district court issued a notice to appear, which was served on Keech that same day. (Docs. 4-5.) Keech appeared for his initial appearance on August 15, 2002, where the court set bail at \$10,000 and remanded Keech to the Lewis and Clark County Detention Center (LCCDC). (Doc. 6.)

On September 12, 2002, Keech pled guilty to the charged offenses pursuant to a plea agreement. (Docs. 8-9.) The PSI, filed on September 19, 2002, stated Keech had spent 59 days in jail (7/23/02 to 9/19/02). (Docs. 12-13.)

¹It is unclear whether Keech was jailed in his deferred imposition case (probation hold or petition to revoke) and/or for the new offenses. Since the Presentence Investigation Report (PSI) filed in this case used July 23, 2002 in calculating credit for time served, it will be presumed Keech was arrested for his new offenses on that date. (Docs. 12-13.)

On November 22, 2002, Keech filed an unopposed motion for an order releasing him to his mother so he could attend treatment at the Montana Chemical Dependency Center (MCDC). (Doc. 19.) The court granted Keech's motion and ordered that if he failed to complete the program an arrest warrant would be issued. (Docs. 19-20.) From July 23, 2002 to November 21, 2002, Keech was in LCCDC for **122 days**.

Keech entered MCDC on November 22nd, but walked out on December 23, 2002, so a warrant was issued for his arrest. (Docs. 21-23.) Keech had spent **31 days** at MCDC.

Keech was served the arrest warrant on December 30, 2002. (Doc. 24.) It was later learned that Keech had committed a burglary in Butte after leaving MCDC. (Doc. 63.)

Keech appeared for sentencing on January 9, 2003. (Docs. 27, 29.) As of that date, Keech had been in LCCDC for **11 days** (12/30/02 to 1/9/03). The court followed the plea agreement and sentenced Keech to concurrent terms as follows: for Count II (burglary), a term of 20 years in the DOC with 16 years suspended; for Counts I and III, concurrent 10-year terms in the DOC with 6 years suspended; and for the misdemeanors, concurrent jail terms. (*Id.*) The minute entry was silent on the issue of credit for time served, but the judgment and sentence granted Keech

credit for 59 days (the number of days listed in the PSI). (*Id.*) Keech did not appeal.

Keech was sentenced in the Second Judicial District Court Cause No. DC-08-173 on December 4, 2003. (Doc. 63.) The court sentenced Keech to the DOC for five years, with two years suspended and ordered this sentence to run concurrently with CDC-02-181. (*Id.*)

II. First revocation proceeding; March 12, 2009 disposition

Keech was placed in various programs and treatment centers through his DOC commitment and absconded from conditional release at least once. (Docs. 31-34, 63, 74.) After Keech began serving the suspended portions of his sentence in December 2006, Keech again absconded. (*Id.*; *Keech I*). Keech traveled to Nebraska where he allegedly stole a vehicle and passed bad checks. (Doc. 36.) Keech was stopped in Wyoming for speeding and was also cited for driving on a suspended license and not carrying insurance. (Doc. 36.)

The State filed a petition to revoke the suspended portions of Keech's sentence on July 10, 2007. (Doc. 36.) A warrant was served on Keech in Wyoming on July 11, 2007.² (Doc. 38.) On September 11, 2007, the State faxed

²The record suggests that Keech was also being held on a Nebraska warrant: the PO's July 10, 2007 affidavit explained Keech was wanted for stealing a vehicle in Nebraska and, as of December 10, 2007, Keech was in jail in Nebraska. (Docs. 36, 40.)

Wyoming officials a request that Keech not be released, but it appears that request was not honored by either Wyoming or Nebraska because as of the spring of 2008, Keech was in Billings committing new offenses.³ (Docs. 39, 40, 44.)

On March 7, 2008, Keech committed accountability to forgery, a felony common scheme, in Yellowstone County as charged in DC-08-173. (Doc. 44.; *Keech I.*) In April 2008, the First Judicial District Court issued another warrant for Keech in his revocation proceeding. (Doc. 41.) Keech was served with that warrant on June 5, 2008, in Yellowstone County, where he was incarcerated in Cause No. DC-08-173 and remained so through sentencing in that case.⁴ (Doc. 43.)

On September 23, 2008, the State filed an addendum to the July 2007 report of violation in CDC-02-181 listing Keech's recent conviction for forgery as additional grounds for revocation. (Doc. 44.) Keech was incarcerated in Yellowstone County from June 5 to November 23, 2008 (**172 days**) for both his new offense and having been served the arrest warrant in CDC-02-181.

³It appears that Keech was released in Nebraska before resolving his charges there because in May 2009 he returned to Nebraska where he entered guilty pleas and was sentenced for time served. (Docs. 63, 74.)

⁴On September 5, 2008, Keech pled guilty to forgery in Thirteenth Judicial District Court Cause No. DC-08-173 and on November 24, 2008, he was sentenced to the DOC for a period of five years. (Docs. 44, 63.) The district court ordered Keech's sentence to run concurrently with his First Judicial District Court sentence. *Keech I.*

After his November 24, 2008 sentencing in DC-08-173, Keech was transported to LCCDC and appeared on December 4, 2008, where he admitted that he had violated the terms of his suspended sentences. (Docs. 45, 56.)

On December 18, 2008, the district court entered an order releasing Keech on his own recognizance. (Doc. 46.) Since Keech had been sentenced to a five-year custodial sentence in DC-08-173, he was transferred to Montana State Prison (MSP). (Docs. 46, 63.) From November 24 to December 18, 2008, Keech had been incarcerated at LCCDC for **25 days**.

On March 12, 2009, Keech appeared via video conferencing from MSP for his dispositional hearing in CDC-02-181. (Docs. 54, 56.) The district court committed Keech to the DOC for the following concurrent terms: 4 years to the DOC for Counts I and III; and 16 years with 11 years suspended for Count II. (*Id.*) The minute entry was silent on credit for time served, but the order of revocation, and judgment and sentence, gave Keech credit for time served between September 23, 2008 and December 18, 2008 (87 days). (*Id.*)

Keech did not appeal this revocation or disposition.

III. 2011 petition for state habeas relief and appeal from DC-08-173.

Keech returned to MSP in November 2009, after going to Nebraska to resolve his pending charges there. (Docs. 63, 74.) In late 2009, Keech wrote to the First Judicial District Court complaining that the DOC was not running his sentence concurrently with his sentence in DC-08-173 as Keech alleged that the First Judicial District Court had ordered. (Doc. 58.)

The Honorable District Court Judge Kathy Seeley wrote back to Keech after reviewing the hearing transcript. (Doc. 59.) Judge Seeley explained to Keech that during the dispositional hearing there had been only a passing reference to Keech's Thirteenth Judicial District Court sentence and she made no mention of running his disposition consecutive or concurrent to that sentence. (*Id.*)

In February 2010, Keech filed a motion to clarify his sentence in his Thirteenth Judicial District Court case. *See State v. Keech*, 2013 MT 111N, ¶ 5, 370 Mont. 552, 311 P.3d 443 (hereinafter, *Keech II*). Keech again argued that the DOC was improperly running his First Judicial District Court disposition consecutive to his five-year custodial sentence in DC-08-173. No immediate action was taken on Keech's motion. *Id.*

Keech was transferred to Connections Corrections in March 2010, and transitioned to the Butte Prerelease in May 2010. (Docs. 61, 63.) In January 2011, Keech committed forgery and burglary in Gallatin County and was charged with

those offenses in Eighteenth Judicial District Court Cause No. DC-11-072(B).

(*Id.*)⁵

In late 2011, Keech filed a petition for state habeas relief with this Court complaining that his disposition in CDC-02-181 was not running concurrently with DC-08-173. *Keech I*. This Court denied Keech’s petition, explaining that when the Thirteenth Judicial District Court imposed Keech’s five-year sentence, his First Judicial District Court sentence had not been revoked, so the Thirteenth Judicial District Court “had no authority to order Keech’s new sentence to run concurrently with the First Judicial District Court sentences that had yet to be imposed.”

Keech I, *3 (citing *State v. McGuire*, 260 Mont. 386, 388, 860 P.2d 148, 150 (1993)).

This Court further explained that after revoking his suspended sentences, the First Judicial District Court “imposed new sentences based upon Keech’s behavior under community supervision,” adding that because it was the court that imposed the “latter sentence [it was] informed of the extent of incarceration and supervision an offender is facing, and ha[d] authority to determine if a sentence should be served concurrently or consecutively.” *Keech I*, *3-4.

⁵ See Montana DOC online offender search at: offenderserach.mt.gov/conweb

In March 2012, Keech was sentenced in his Eighteenth Judicial District Court case to two, ten-year terms which were ordered to run concurrent to his First Judicial District Court sentence. (Docs. 63, 74.)

On June 13, 2012, Keech filed a motion to withdraw his plea in his Thirteenth Judicial District Court case. *Keech II*, ¶ 5. The district court treated Keech's motion as a petition for postconviction relief and denied his petition as statutorily time barred. *Keech II*, ¶ 6. Keech appealed and this Court affirmed the district court's order denying relief. *Keech II*, ¶ 7.

IV. Second revocation petition; dismissed May 1, 2019

Keech began serving the remaining 11-year suspended sentence on December 21, 2017. (4/27/23 Tr. at 10, 21.) In June 2018, Keech's PO gave him permission to travel to Washington State, but Keech failed to check in or return when ordered. (Doc. 63.) By late July 2018, Keech was deemed an absconder, and the State filed a petition to revoke on August 10, 2018. (*Id.*) The district court issued a warrant that was served on Keech in Washington State on September 21, 2018. (Docs. 67, Ex. A, 74.)

Revocation proceedings were not timely initiated and, following Keech's motion to dismiss, the State moved to withdraw the petition and quash the warrant on April 26, 2019. (Docs. 66-68.) On May 1, 2019, the court granted the State's

motion. (Doc. 69.) From September 21, 2018, to May 1, 2019, Keech was in custody in Washington State for 223 days.

V. Third revocation proceeding; April 27, 2023 disposition

While in Washington State, Keech was charged with two felony drug charges and bail jumping, so the State initiated a third revocation proceeding. (Doc. 70.) The district court issued a warrant on May 1, 2019. (Doc. 71.) While the warrant return indicates it was served in Thurston County, Washington (where Keech was being held on a methamphetamine charge), the date of service is not indicated. (Docs. 72, 73.) The warrant return was docketed with the district court on May 7, 2019. (Doc. 72.) On September 20, 2019, Keech returned to MSP.⁶ (Doc. 74.) From May 7, 2019 to September 20, 2019, Keech was in jail for 137 days.

Within days of discharging his Eighteenth Judicial District Court sentence in March 2021, Keech absconded from supervision, used methamphetamine, and had contact with law enforcement in Ravalli County. (Doc. 74.) The State filed

⁶Most likely, Keech returned to MSP under the 10-year custodial sentences imposed by the Eighteenth Judicial District Court that had been ordered to run concurrently with his disposition in CDC-02-181. (*See* Hr'g at 10.) It is unknown why Keech did not return to Lewis and Clark County or appear via video conferencing to answer the May 1, 2019 petition to revoke.

another petition to revoke on March 16, 2021, and a warrant was issued two days later. (Docs. 74-75.)

Keech was served with the warrant at the Nisqually Corrections Center in Washington State on March 19, 2021. (Doc. 80.) Keech did not appear for the two June 2021 revocation hearings held in the First Judicial District Court, presumably because he was in custody serving a sentence in Washington. (Docs. 78-79.) Based on later comments in the record, it appears that Keech was transferred from Washington State to LCCDC on or about February 24, 2023. (Hr'g at 12.) From March 19, 2021, to February 24, 2023, Keech was in custody for **708 days**.

On March 21, 2023, Keech appeared with counsel for his initial appearance on the petition to revoke. (Doc. 81.) Keech entered denials at the March 30, 2023 hearing and the court denied his request for bail reduction on April 13, 2023. (3/30/23 Tr.; 4/13/23 Tr.)

The day before his bail reduction hearing, Keech had filed a petition for state habeas relief with this Court. *See Keech III*. Keech reasserted his complaint about his dispositional sentence in CDC-02-181 not running concurrently to his Thirteenth Judicial District Court case. *Keech III*. On April 25, 2023, this Court denied and dismissed Keech's petition based on its decisions in *Keech I* and *Keech II*. *Keech III*.

On April 27, 2023, Keech appeared with counsel for his revocation hearing. (Hr’g.) Keech admitted he had absconded from supervision, and the court revoked his 11-year suspended sentence. (*Id.*) The parties explained that after consultation with the PO they had agreed that Keech should receive 1,166 days of elapsed time credit (12/21/17 to 3/1/21). (*Id.* at 9-15.) The parties further agreed that Keech was entitled to 62 days (2/24/24 to 4/27/23) of credit for time served. (*Id.*)

The district court sentenced Keech to the DOC for a term of 11 years with 6 years suspended. (Hr’g at 21.) The court recommended Keech be screened for substance abuse treatment and granted him 62 days of credit for time served and 1,166 days of elapsed time credit. (*Id.*; Doc. 93.)

STANDARD OF REVIEW

Since “[c]alculating credit for time served is not a discretionary act, but a legal mandate . . . a lower court’s determination of credit for time served is reviewed [de novo] for legality.” *State v. Pennington*, 2022 MT 180, ¶ 18, 410 Mont. 104, 517 P.3d 894 (citation omitted). This Court will review claims concerning mandated credit for time served because a court’s calculation of credit affects the lawfulness of a sentence. *State v. Souther*, 2022 MT 203, ¶ 12,

410 Mont. 330, 519 P.3d 1 (citing *State v. Lenihan*, 184 Mont. 338, 342, 602 P.2d 997, 1000 (1979)).

SUMMARY OF THE ARGUMENT

When imposing the original sentences upon Keech in January 2003, the district court failed to account for 74 days Keech was in custody pending resolution of his case. In the first revocation proceeding in March 2009, the district court did not account for all the days Keech had been detained since the original sentencing hearing. Accordingly, the court's dispositional granting 87 days of credit for time served failed to include 110 additional days that Keech had been incarcerated. Regarding the April 2023 revocation, the record establishes Keech was entitled to an additional 708 days of credit for time served.

This Court should remand this matter to the district court for an amended dispositional order granting Keech credit for an additional 892 days of credit for time served.

Keech's attempt to challenge the DOC's decision to run his 2009 dispositional sentence consecutive to his custodial sentence in DC-08-173 is untimely and barred by this Court's two opinions in *Keech I* and *Keech III*. The legal principles of res judicata and law of the case preclude this Court from considering this long-resolved claim.

Nonetheless, should this Court reach this claim based on the apparent conflict between its holdings in *Keech I* and *Keech III* and other opinions, and determine Keech's 2009 disposition should not have been run consecutively to his custodial sentence in DC-08-173, then this matter should be remanded to the district court for a new dispositional hearing. At that time, the parties can present argument for appropriate days of credit for time served and elapsed time credit given the unique procedural circumstances of this proceeding.

ARGUMENT

I. Original judgment and sentence

Pursuant to Mont. Code Ann. § 46-18-403(1) (2001),

“Any person incarcerated on a bailable offense and 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.”

In the January 9, 2003 judgment and sentence, the district court stated Keech was entitled to 59 days of credit, which was the number of days listed in the PSI. This amount accounted for time served between July 23, 2002, and September 19, 2002.

However, as described above, the record indicates that prior to sentencing, Keech had been incarcerated for a total of 133 days at LCCDC as follows: 122 days (7/23/02 to 11/21/02) and 11 days (12/30/02 to 1/9/03).

Keech asserts that he is entitled to credit for an additional 31 days while he was in treatment at MCDC from November 22 to December 23, 2002, citing Mont. Code Ann. § 46-18-403(1)(b). (Opening Brief (Br.) at 9-10.) However, the statute in effect when Keech committed his offense did not include time spent in a treatment facility. Subsection (1)(b) of that provision was not enacted until 2021. *See* 2021 Mont. Laws, Ch. 283, § 1. “The law in effect at the time an offense is committed controls as to the possible sentence for the offense, as well as the revocation of that sentence.” *State v. Tirey*, 2010 MT 283, ¶ 26, 358 Mont. 510, 247 P.3d 701 (citing *State v. Tracy*, 2005 MT 128, ¶ 16, 327 Mont. 220, 113 P.3d 297); *State v. Thomas*, 2019 MT 155, ¶ 10, 396 Mont. 284, 445 P.3d 777.

As this Court observed in *State v. Byrd*, 2015 MT 20, ¶¶ 18-19, 378 Mont. 94, 342 P.3d 9, “the Montana legislature has limited [the meaning of] incarceration to location at a county detention center or a state prison.” Thus, since Mont. Code Ann. § 46-18-403(1) permits credit against a sentence “for each day of incarceration prior to or after conviction,” and a “district court has no statutory authority to decide that placement at a treatment center constitutes incarceration,” this Court held that Byrd was not entitled to credit for time spent at a treatment

center. The same would be true for Keech who was sentenced under that same version of Mont. Code Ann. § 46-18-403(1).

Since the record shows Keech spent 133 days in LCCDC, but the district court granted him only 59 days of credit for time served, Keech is entitled to an **additional 74 days** of credit for time served.

II. Orders of revocation, judgment and sentence⁷

The controlling provision for determining credit against a dispositional sentence following revocation is Mont. Code Ann. § 46-18-203(7)(b), which states that “[c]redit must be allowed for time served in a detention center or for home arrest time already served.”

Following revocation of a suspended sentence, the district court’s sentencing authority at disposition “is ‘particularly and expressly’ governed by § 46-18-203, MCA.” *Souther*, ¶ 10. As this Court has explained,

General provisions governing criminal sentencing do not apply to revocation matters. Criminal sentencing statutes, such as § 46-18-201, MCA, apply to the initial sentence imposed after conviction of a crime upon a verdict or plea. In contrast, § 46-18-203(7)(b), MCA, applies after a district court has found that the defendant has violated

⁷ Keech does not challenge the amount of elapsed time credit he received in either of his revocation proceedings. Accordingly, the State will not address the issue of elapsed time credit.

the terms of the original suspended sentence imposed under § 46-18-201, MCA.

Souther, ¶ 11 (internal quotations and citations omitted).

Since revocations are expressly governed by Mont. Code Ann. § 46-18-203, *Killam v. Salmonsens*, 2021 MT 196, 405 Mont. 143, 492 P.3d 512, which expressly relied upon the general sentencing provision at Mont. Code Ann. § 46-18-201(9) (2017), would not be applicable to dispositional orders following a revocation which is strictly governed by Mont. Code Ann. § 46-18-203. *See, e.g., Killam*, ¶ 17 (explaining Mont. Code Ann. § 46-18-201 “sets forth ‘Sentences that may be imposed’ and applies” when a defendant is sentenced “for an offense for which the defendant has been found guilty”).

Moreover, the general sentencing provision at Mont. Code Ann. § 46-18-201(9) was not enacted until 2017, which further limits application of *Killam* and *State v. Mendoza*, 2021 MT 197, ¶ 12, 405 Mont. 154, 492 P.3d 509, to Keech’s first revocation proceeding which occurred in 2009. Notably, when subsection (9) was enacted, the Legislature specified that it would apply to offenses committed on or after the effective date, which was October 1, 2021. *See* Mont. Laws 2021, ch. 537, § 4.

Keech cites to *State v. Oropeza*, 2020 MT 16, ¶ 4, 398 Mont. 379, 456 P.3d 1023, for the proposition that “all” reforms to probation and parole provisions are applied retroactively. (Br. at 9-10.) However, the 2017 legislation did not change

anything about credit for time served relative to the revocations. The provision at issue in his current appeal is the last sentence of Mont. Code Ann. § 46-18-203(7)(b) (credit for time spent incarcerated pending disposition), which was not amended by the laws discussed in *Oropeza* (e.g., enactment of informal alternatives to revocations).

Keech also relies upon *State v. Little Coyote*, 2023 MT 243, 414 Mont. 299, 539 P.3d 1142, but it is unclear for what proposition. In *Little Coyote*, this Court exercised its unique discretion to deem a direct appeal as a request for state habeas relief because of the party's mutual mistake concerning credit for time served represented a grievous wrong and a miscarriage of justice. Keech has not argued, let alone established, any grievous wrong and miscarriage of justice that occurred in his cases. Nor has he requested this Court treat his direct appeal from his second revocation as a petition for state habeas.

A. March 12, 2009 disposition

Keech began serving his suspended sentences in December 2006. On July 11, 2007, he was arrested in Wyoming on a warrant from Nebraska and was also served a revocation warrant. However, Keech was not actually detained by the revocation warrant and was transported to Nebraska and eventually released. Keech was not apprehended again until after he committed a new felony in

Yellowstone County in 2008. Thus, Keech's claim that he was in custody from July 2007 until March 12, 2009, is inaccurate. (*See Br. at 5.*)

Keech was served with a second revocation warrant in Yellowstone County on June 5, 2008, where he remained until being transferred to LCCDC on November 23, 2008 (172 days). Keech was incarcerated in LCCDC from November 24, 2008 to December 18, 2008 (25 days), when he was released on his own recognizance.

Keech is incorrect that he was entitled to credit from December 18, 2008, until March 12, 2009 (*see Br. at 5-6*), because when the district court released him on his own recognizance on December 18, 2008, he was no longer being held on a warrant in the First Judicial District Court revocation matter.

In its March 12, 2009 dispositional order, the district court stated Keech was entitled to 87 days of credit (9/23/08 to 12/18/08). It is unclear why the days of credit were calculated from September 23, 2008, when records establish Keech had been served with an arrest warrant on June 5, 2008. Keech spent 197 (172 + 25) days in custody on his first revocation, not 87 days. Keech is thus entitled to **110 additional** days of credit.

B. April 27, 2023 disposition

At Keech's most recent revocation and dispositional hearing, the court ordered that Keech should receive 1,166 days of elapsed time credit (12/21/17 to 3/1/21)⁸ and 62 days (2/24/24 to 4/27/23) for credit for time served.

The 62 days of credit for days in jail did not account for the 708 days (3/19/21 to 2/24/23) after Keech had been served with the revocation warrant in Washington State. Accordingly, Keech would be entitled to an **additional 708 days** of credit.

Keech argues on appeal that he was entitled to credit for time served prior to December 17, 2017. (Br. at 6-7.) However, prior to that date, Keech was serving the custodial part of his DOC sentence, so the dates listed in the ROVs that indicated he was incarcerated were actually sanctions imposed by the DOC. When Keech was incarcerated during those periods, the clock for his custodial sentence continued to run so he would not be entitled to additional credit against his suspended sentence.

⁸The 1,166 days of elapsed time credit included two periods of time when Keech had been in custody in Washington State on revocation warrants and new charges: 223 days (9/21/18 to 5/1/19); and 137 days (5/19/19 to 9/20/19).

III. This Court has already determined that DOC did not miscalculate Keech's sentence.

Keech asserts that the DOC erroneously ran his 2009 revocation disposition consecutively to his 2008 Thirteenth Judicial District Court sentence. (Br. at 12-14.) However, this Court rejected this precise claim on two prior occasions. *See Keech I; Keech III.*

Keech's reference to *State v. Wolfblack*, 2024 MT 166, 417 Mont. 376, 553 P.3d 9 (Br. at 12-14), does not overcome the fact that this Court has twice denied this specific claim and concluded that the DOC did not miscalculate Keech's sentence. Notably, this Court affirmed its earlier determination during the pendency of Keech's 2023 revocation proceedings from which he now appeals. *Keech III.*

This Court applies the doctrines of law of the case and *res judicata* to preclude an appellant from raising issues that were decided by this Court on a previous appeal. *State v. Black*, 245 Mont. 39, 44, 798 P.2d 530, 533 (1990). "Under the doctrine of law of the case, a prior decision of this Court resolving a particular issue between the same parties in the same case is binding and cannot be relitigated." *State v. Gilder*, 2001 MT 121, ¶ 9, 305 Mont. 362, 28 P.3d 488 (citation omitted). Similarly, *res judicata* dictates that an appellant may not raise issues that this Court has decided in a prior appeal. *Montgomery v. State*, 2016 MT 169, ¶ 12, 384 Mont. 120, 375 P.3d 403.

Res judicata applies if three criteria are met: (1) the ground presented in the subsequent application was determined adversely to the applicant on the prior application; (2) the prior determination was on the merits; and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

Montgomery, ¶ 12. In this instance, the first two criteria are clearly met and Keech has not established that the ends of justice require this Court to look back to the 2009 disposition on an appeal from the 2023 proceedings that revoked that disposition.

The district court should not be faulted for imposing a disposition in 2009 that this Court twice approved. Notably, even if Keech's 2009 disposition should have run concurrently with his Thirteenth Judicial District Court sentence, the State's 2018 petition to revoke was filed before Keech would have discharged the suspended portion of his disposition when the correct amount of credit for time served was applied.⁹

⁹On March 12, 2009, the court sentenced Keech to the DOC for a term of 16 years with 11 years suspended. After reducing that sentence by an additional 74 days Keech spent incarcerated prior to his 2003 original sentence and 194 days he spent incarcerated pending the 2009 disposition, Keech would have discharged his 5-year custodial sentence in July 2013 and his 11-year probationary sentence would have started running with a discharge date of July 2024.

IV. Alternative remedy; remand for amended disposition

The State recognizes that this Court’s decisions in *Keech I* and *Keech III* conflict with holdings from *State v. Seals*, 2007 MT 71, ¶ 15, 336 Mont. 416, 156 P.3d 15, and *State v. Adams*, 2013 MT 189, ¶ 19, 371 Mont. 28, 305 P.3d 808, that were issued prior to *Keech I* and *Keech III*, respectively. In those cases, this Court stated that, “[w]hile § 46-18-401, MCA, ‘governs the designation of a sentence as consecutive or concurrent,’ this ‘general authority to designate a sentence to run concurrently’ or consecutively ‘is not within the particulars of the revocation statutes and is not an issue that can be addressed during [a] revocation proceeding.’” *Wolfblack*, ¶ 10 (citing *Seals*, ¶ 15; *Adams*, ¶ 19).¹⁰

Accordingly, should this Court determine *Keech I* and *Keech III* do not control as they were erroneously decided, *see, e.g., State v. Southwick*, 2007 MT 257, ¶¶ 17-19, 339 Mont. 281, 169 P.3d 698 (res judicata did not apply when if defendant subject to facially illegal sentence), it must determine the appropriate remedy. As this Court has explained, the proper remedy “depends upon when the illegal sentence is discovered and challenged.” *Wolfblack*, ¶ 10 (citing *Seals*, ¶ 15).

If the illegal sentence is challenged while the defendant is serving the sentence, the court has the authority to correct the sentence by

¹⁰Like the dissent in *Wolfblack*, ¶ 21, while the State agrees that Mont. Code Ann. § 46-18-203 does not authorize a “revocation court” to “newly order sentences to run consecutively,” the State does not agree with the Majority’s subsequent conclusion that the revocation court improperly changed *Wolfblack*’s original sentence to run consecutively.

imposing a sentence that was statutorily authorized . . . at the time the defendant committed his or her offense and giving credit for time served. If, however, the illegal sentence is challenged during a revocation proceeding held while the defendant is serving the suspended portion of the illegal sentence, the court, upon sentencing in the revocation proceeding, is constrained by the particulars of § 4618-203(7), MCA-.

Wolfblack, ¶ 10 (citing *Seals*, ¶ 15).

However, this case presents a complicated procedural posture: although the allegedly illegal sentence was challenged in 2011, it would not be deemed improper until now if this Court finds *Keech I* and *Keech III* were erroneously decided. Given these unique circumstances, and the fact the 2009 disposition has been revoked and thus cannot be corrected, should this Court determine that it was improper for Keech’s 2009 disposition to have run consecutively to his Thirteenth Judicial District Court sentence, this matter should be remanded to the district court for an amended dispositional hearing where the district court will be “constrained by the particulars of § 46-18-203(7), MCA.” *See Seals*, ¶ 15.

This remedy also accounts for the fact that during the 2023 dispositional hearing, the parties stipulated to the amount of elapsed time credit based on their belief that the 2009 disposition was properly ordered to run consecutively to the Thirteenth Judicial District Court sentence. Accordingly, upon remand, the parties would be allowed to present argument (or stipulations) as to the correct amount of

credit Keech is due given the complex history of Keech's performance on probation as evidenced in the ROVs.

CONCLUSION

Keech is entitled to 892 days of additional credit for time served based on review of the record. Accordingly, this Court should remand these matters to the district court with instructions to amend its April 27, 2023 dispositional order to reflect the amounts of credit supported in the record as follows:

- In his second revocation proceeding concluded on April 27, 2023, Defendant is given credit for 770 days of time served (3/19/21 to 4/27/23) and, based on the parties' stipulation, Defendant is given credit for 1,166 days of elapsed time credit (12/21/17 to 3/1/21).
- Defendant is given credit for 197 days of time served (6/5/08 to 12/18/08) in his first revocation concluded on March 12, 2009.
- Defendant is given an additional 74 days of credit for time served prior to his original sentencing on January 9, 2003.

In the alternative, should this Court conclude Keech's 2009 disposition should not have run consecutively to his Thirteenth Judicial District Court sentence, the matter should be remanded for a new dispositional hearing where the

parties may present arguments as to appropriate credit for time served and elapsed time credit and the district court may issue an amended disposition.

Respectfully submitted this 28th day of January, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 5,845 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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CERTIFICATE OF SERVICE

I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 01-28-2025:

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