

IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. DA 24-0311

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DANIEL BRENDAN LALLY,

Defendant and Appellant.

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**BRIEF OF APPELLANT**

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

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## **STATEMENT OF THE ISSUES**

Whether the District Court unlawfully sentenced Lally upon revocation by misapplying the requirements of MCA § 46-18-203 (7)(a)(iii), when it did not merge DC 2016-198 and DC 2016-10, resulting in a longer sentence than the original commitment.

Whether the District Court unlawfully sentenced Lally upon revocation of his suspended sentence by misapplying MCA § 46-18-203(7)(b), when it miscalculated days of elapsed time credit without a violation.

## **STATEMENT OF THE CASE**

Lally was sentenced in Granite County (Granite) on February 1, 2018, for felony convictions in DC 2016-08 and DC 2016-10, which were run concurrently with DC 2016-198, a felony conviction in Missoula County (Missoula) sentenced on January 11, 2018. (Doc. 36.)

Lally's sentence for DC 2016-08 was five years to the Department of Corrections (DOC), no time suspended. For DC 2016-198 and DC 2016-10, his sentence was ten years DOC, with five years suspended, and credit for jail time.

In DC 2016-198 (Missoula), the District Court dismissed the revocations. (Doc. 38, 78.) However, Lally's probation was revoked twice in DC 2016-10 (Granite). The Revocation Orders, dated May 6, 2022, and March 21, 2024, failed to indicate DC 2016-10 and DC 2016-198 had been merged effective February 1, 2018. Therefore, jail time and street time credit awarded for DC 2016-10 should have applied to DC 2016-198 and vice versa, beginning on February 1, 2018. The District court's error in its Revocation Sentencing Orders resulted in the DC 2016-198 and DC 2016-10 to run consecutive, extending the length of the original commitment. (Doc. 36.)

The District Court also denied Lally 102 days of elapsed time credit for days without a violation by not incorporating the probation officers' records and recollections. (Docs. 38, 77, 78, 87, 115; Hrg. Tr. at 18-20)

Lally argues that the Court should remand to the District Court with instructions to immediately revise the Revocation Judgment Orders for DC 2016-10 dated May 6, 2022, (Doc. 77) and March 21, 2024 (Doc. 115) to reflect DC 2016-10 and DC 2016-198 as merged, effective

February 1, 2018 and to grant 102 additional days of elapsed time credit towards Lally's sentence.

### **STATEMENT OF THE FACTS**

This appeal concerns one of three District Court cases that were initially sentenced to run concurrently in two jurisdictions, but subsequently were not sentenced as merged in two revocation orders. (Doc. 36, 38, 78.) DC 2016-08, DC 2016-10, and DC 2016-198 merged effective February 1, 2018, when they were run concurrently in Granite County. (Doc. 36.)

Only DC 2016-10 is under appeal, as DC 2016-08 had been discharged, effective November 22, 2021, and the District Court in DC 2016-198 did not convict Lally on the Revocations. (Docs. 38, 78.)

#### **DC 2016-198, Missoula County**

On January 11, 2018, in DC 2016-198 (Missoula), Lally was sentenced to ten years DOC, with five years suspended, and granted 414 days of jail time credit. (Doc. 78.)

Missoula County did not prosecute either Petitions to Revoke. (Doc. 78.)

### **DC 2016-10, Granite County**

On September 16, 2016, the State charged Lally with two counts of Obtaining or Exerting Unauthorized Control Over Property Exceeding \$1,500, Theft (F), under MCA §45-6-301(1)(b), involving snowmobiles. He pleaded guilty by Plea Agreement to two counts of felony theft on August 3, 2017. (Doc. 19.)

On February 1, 2018, in DC 2016-10 (Granite), Lally was sentenced on two concurrently run counts, and received ten years DOC, with five years suspended, and granted 436 days of jail time credit and to run concurrently with DC 2016-198 (Missoula) and DC 2016-08 (Granite). (Doc. 36, 38, 78.)

### ***Conditional Release Revoked, February 23, 2021***

On December 27, 2018, Lally began Conditional Release Supervision in Bozeman. (Doc. 78.) While on Conditional Release, Lally was cited for Theft (F) on February 18, 2021, in Madison County, which was later dismissed on September 26, 2022. (Doc. 78.) Lally's Conditional Release was revoked on February 23, 2021, and he spent the remainder of the incarceration segment of his sentence in jail until

November 22, 2021. (Doc. 78.)

On November 22, 2021, upon release, he began serving his suspended sentence. (Doc. 78.) The anticipated discharge date of his suspended sentence was November 21, 2026, before application of any credits during probation for elapsed or jail time served. (Doc. 78.)

***Report of Violation One, dated October 8, 2021***

While incarcerated on the Conditional Release Revocation, and before the suspended portion of Lally's Sentence had begun, Probation Officer (P.O.) Sean Daly prepared a Report of Violation (ROV) dated October 8, 2021, which he submitted to the Granite and Missoula County Attorney's Office. (Doc. 38.) On October 18, 2021, the Granite County Attorney's Office filed a Petition to Revoke Lally's forthcoming suspended sentence, citing one count, a law and conduct non-compliance violation, for the charge in Madison County on February 18, 2021. (Doc. 38.) Missoula County did not prosecute this revocation. (Doc. 78.)

On April 21, 2022, an evidentiary hearing was held, during which the court found that Lally had violated the terms of his probation due to

the Madison County charge, even though he had not been convicted.  
(Doc. 68.)

On May 5, 2022, a Disposition Hearing was held. (Doc. 76.) On May 6, 2022, the court prepared a Revocation Judgment. (Doc. 77.) The District Court failed to run DC 2016-10 concurrently with DC 2016-198 (Missoula), even though both cases had merged on February 1, 2018; an error that carried through to the Second Revocation. (Docs. 36, 77 at 3-4.) The court granted 45 days of credit for elapsed time and 119 days of jail time credit. (Doc. 77 at 4.)

***Report of Violation Two, April 7, 2023. (Doc. 78.)***

The Second Revocation Judgment Order for DC 2016-10, dated March 21, 2024, covers eligible street time credit from May 5, 2022, to March 21, 2024, totaling 687 days. (Doc. 78.) Lally's violations were documented in the ROV prepared by P.O. Spragg (Doc. 78), an amended ROV prepared by P.O. Poole (Doc. 87), and his testimony during the Dispositional Hearing. (Hrg. Tr. at 8-20.)

From May 5, 2022, to April 7, 2023 (338 days), Lally did not violate the terms of his probation. (Doc 78.)

On April 7, 2023, Lally was cited for Criminal Possession of a Dangerous Drug (F) during an incident that occurred at a Bozeman Casino, where the case was later dismissed on February 29, 2024. (Doc. 78.) Lally was arrested on April 7, 2023, and on that day admitted to using meth. (Doc. 78.) (One-day violation)

From April 8, 2023, to June 1, 2023, no violations were reported (**55 days**). (Doc. 78, 87, 115; Hrg. Tr. at 17-20, 29-32.)

***Amended Report of Violation Two, June 16, 2023. (Doc. 87.)***

The Amended Report of Violation, dated June 16, 2023, prepared by P.O. Poole included compliance violations where Lally admitted to meth use from June 2, 2023, to June 14, 2023 (13-day violation). (Doc. 87.) After June 14, 2023, Lally entered treatment at MCDC for approximately one month. (Hrg. Tr. at 17-20, 29-32.)

From June 15, 2023, to March 20, 2024, no violations were reported (**280 days**). (Doc. 78, 87, 115; Hrg. Tr. at 17-20, 29-32.)

On March 20, 2024, Probation and Parole collected a urinalysis test from Lally that resulted in an inexplicable presumptive positive result for cocaine and amphetamine (one-day violation). (Hrg. Tr. at 28.)

On March 21, 2024, at the Evidentiary and Dispositional Hearing, the court relied on the testimony of P.O. Poole. (Hrg. Tr. at 17-20, 29-32.) At the hearing, P.O. Poole testified to Lally's presumptive positive UA on March 20, 2024, but did not testify to any other violation dates. (Hrg. Tr. at 17-20, 29-32.) Additional violation dates were verified in the ROV prepared by P.O. Spragg on April 7, 2023, and in the ROV prepared by P.O. Jared Poole on June 16, 2023. (Docs. 78, 87.)

The District Court revoked Lally's sentence and sentenced him to five years DOC, with no time suspended. (Doc. 115.) In the Revocation Order, effective 3/21/2024, the District Court granted Lally 616 days for elapsed time credit for the following dates: 45 days (11/22/21 to 5/5/2022) + 338 days (5/5/2022 to April 7, 2023) + 233 days (7/?/2024 to 3/20/2024). (Doc. 77, 78, 87, 115; Hrg. Tr. at 17-20, 29-32.) The District Court credited his sentence with 125 days of cumulative jail time credit. (Doc. 115.) The total credit granted was 741 days (616 elapsed time credit + 125 days jail time credit). (Doc. 115.)

The record indicates that Lally violated his probation for fifteen days and should have been granted 718 days of credit for elapsed time

for the following dates: 45 days (11/22/21 to 5/5/2022) + 338 days (5/5/2022 to 4/7/2023) + 55 days (4/8/2023 to 6/1/2023) + 280 days (6/15/2023 to 3/21/2024). (Doc. 78, 87, 115; Hrg. Tr. at 17-20, 29-32.)

With the uncontested jail time credit of 125 days, the total credit should be 843 days (718 elapsed time credit + 125 jail time credit).

The merged probation period was projected to end on November 22, 2026, before any application of elapsed and jail time credits. Applying the current total credit of 741 days results in Lally's sentence ending on November 11, 2024. Applying the revised total credit of 843 days results in Lally's sentence ending on August 1, 2024. Lally remains under DOC supervision as of the date of this Appeal.

In its Revocation Order, dated March 24, 2024, the District Court failed to run DC 2016-10 (Granite) concurrently with DC 2016-198 (Missoula), despite the cases having been merged effective February 1, 2018, an error that carried through from the first revocation to the second revocation, unlawfully extending his sentence. (Doc. 36, 77, 115.)

### **STANDARD OF REVIEW**

This Court reviews a criminal sentence “for legality by determining

whether the sentence is within statutory parameters.” *State v. Seals*, 2007 MT 71, ¶ 7, 336 Mont. 416, 156 P.3d 15. “[T]he interpretation and construction of a statute is a matter of law, and we review whether the district court interpreted and applied a statute correctly de novo.” *State v. Jardee*, 2020 MT 81, ¶ 5, 399 Mont. 459, 461 P.3d 108 (quoting *State v. Triplett*, 2008 MT 360, ¶ 13, 346 Mont. 383, 195 P.3d 819).

This Court has determined that “revocation decisions involve both legal and factual findings, and this Court reviews a district court’s legal findings de novo and its factual findings for clear error; thus, findings of fact regarding a probationer’s credit for elapsed time or time served are reviewed for clear error.” *State v. Jardee*, 2020 MT 81, ¶¶ 5, 12, 399 Mont. 459, 461 P.3d 108.

A district court’s calculation of credit affects the lawfulness of a sentence; therefore, this Court reviews such a claim even if not preserved. *State v. Souther*, 2022 MT 203, ¶ 12, 410 Mont. 330, 519 P.3d 1 (citing *State v. Lenihan*, 184 Mont. at 343, 602 P.2d 997, 1000 (1979)).

“Calculating credit for elapsed street time and time served is not a discretionary act, but a legal mandate.” *State v. Pennington*, 2022 MT

180, ¶ 18, 410 Mont. 104, 517 P.3d 894 (citing *State v. Tippetts*, 2022 MT 81, ¶ 10, 408 Mont. 249, 509 P.3d 1).

## SUMMARY OF THE ARGUMENT

The District Court exceeded the statutory parameters of MCA § 46-18-203(7)(a)(iii) when it did not indicate in its Revocation Orders, dated May 6, 2022 (Doc. 77) and March 21, 2024 (Doc. 115) that DC 2016-198 and DC 2016-10 had merged, effective February 1, 2018, which unlawfully exceeded the original sentence. (Doc. 36.) As a result, Lally remains under the supervision of the DOC, Probation and Parole, when it appears he should have been released from his sentence before now.

When the District Court determined the credit for elapsed time, it did so without incorporating the probation officers' records or recollection of days with violations. (Doc. 38, 78, 87; Hrg. Tr. at 8-20.) The record and recollection of the probation officers show fifteen days with violations from May 5, 2022, to March 21, 2024. (Doc. 38, 78, 87; Hrg. Tr. at 8-20.) Therefore, the District Court miscalculated the correct credit for elapsed time lawfully owed to Lally, by shorting him 102 days

that should have been applied to his sentence per MCA § 46-18-203(7)(a)(iii).

## ARGUMENT

### **I. The District Court unlawfully sentenced Lally upon revocation by misapplying the requirements of MCA § 46-18-203(7)(a)(iii), when it did not merge DC 2016-198 and DC 2016-10, resulting in a longer sentence than the original commitment.**

In *State v. Tracy*, this Court held that credit must be given for all sentences that are being served concurrently, noting that “concurrent means operating at the same time.” *State v. Tracy*, 2005 MT 128, ¶¶27, 28, 327 Mont. 220, 113 P.3d 297. Therefore, a defendant sentenced to concurrent terms in effect receives credit against each sentence, and the sentences are said to have “merged.” *State v. Youpee*, 2018 MT 102, ¶ 8, 391 Mont. 246, 416 P.3d 1050. Unrelated sentences merge when the court orders that one run concurrently with the other. *Id.* See *Tracy*, 2005 MT 128 at ¶27.

The term of commitment on a new sentence on revocation may not exceed the original term of commitment. Mont. Code Ann. § 46-18-203(7)(a)(iii).

Here, on February 1, 2018, Lally was sentenced in DC 2016-10 to ten years DOC, with five years suspended to run concurrently with Missoula County DC 2016-198 and Granite County DC 2016-08. (Doc. 36.) He received 436 days of jail time credit at sentencing. (Doc. 36.)

On May 6, 2022, the court prepared the first Revocation Judgment Order. (Doc. 77.) The District Court failed to run DC 2016-10 concurrently with DC 2016-198 (Missoula), even though both cases had merged on February 1, 2018, resulting in consecutive sentences that extended his original commitment; an error that carried through to the second Revocation. (Docs. 36, 77 at 3-4.)

In its second Revocation Order, dated March 24, 2024, the District Court failed to run DC 2016-10 (Granite) concurrently with DC 2016-198 (Missoula), despite the cases having been merged effective February 1, 2018, which is an error that carried through from the first revocation compounded in the second revocation unlawfully extending his sentence. (Doc. 36, 77, 115.)

Lally argues that the Revocation Judgment Orders in DC 2016-198 and DC 2016-10 be remanded with instructions that the District

Court revise them to show that DC 2016-198 and DC 2016-10 were originally sentenced to run concurrently and therefore have merged, effective February 1, 2018.

**II. The District Court unlawfully sentenced Lally upon revocation of his suspended sentence by misapplying MCA § 46-18-203(7)(b), when it miscalculated the days of elapsed time credit without a violation.**

Lally should have received credit for all days of elapsed time where the probation officer's record or recollection did not document a violation. MCA Section 46-18-203(7)(b)(2023), states:

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. Credit must be allowed for time served in a detention center or for home arrest time already served.

“When a [district] court calculates credit for elapsed street time served, this Court has held that it is not a discretionary act, but a legal mandate.” *State v. Pennington*, 2022 MT 180, ¶ 18, 410 Mont. 104, 517 P.3d 894. (citing *State v. Tippets*, 2022 MT 81, ¶ 10, 408 Mont. 249, 509 P.3d 1.) The State bears the burden of proving that a violation has

occurred and that credit for elapsed time should not be granted. Mont. Code Ann. § 46-18-203(6).

“It is insufficient for a [district] court to base a denial of elapsed time credit solely on a 'pattern' of criminal behavior. Such generalized assessments of a probationer's conduct do not render the elapsed-time credit discretionary. Rather, specific violations established upon the record or recollection of the probation officer are necessary to establish a basis for denial of street time credit for the period claimed, and must be stated by the sentencing court.” *State v. Gudmundsen*, 2022 MT 178, ¶13, 410 Mont. 67, 71, 517 P.3d 146, 149 (citing *State v. Jardee*, 2020 MT 81, ¶5, 399 Mont. 459, 461 P.3d 108).

Similar to the facts in *Gudmunson*, here, the District Court did not rely on the record and recollections of the probation officers when it denied credit for the elapsed time and instead based its decision on an overall impression of P.O. Poole's testimony as evidence of Lally's pattern of violations, which was insufficient as a basis for denying street time credit. *Id. Gudmundsen*, 2022 MT 178, at ¶10.

This Court has affirmed a district court's denial of credit for

elapsed time when the probation record contains substantial evidence of specific and ongoing violations during the claimed period. *State v. Charles*, 2025 MT 58, 565 P.3d 1191, 421 Mont. 210 (citing *State v. Johnson*, 2022 MT 216, ¶ 29, 410 Mont. 391, 519 P.3d 804).

“A district court’s factual findings “are clearly erroneous if they are not supported by substantial, credible evidence, 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 (quoting *State v. Johnson*, 2018 MT 277, ¶ 10, 393 Mont. 320, 430 P.3d 494). The State bears the burden of proving that a violation has occurred and that credit for elapsed time should not be granted. Mont. Code Ann. § 46-18-203(6).

Here, during the Dispositional Hearing, the District Court indicated it was missing information about a significant amount of specific dates, but still relied on the State’s proffered 571 days of credit for elapsed time (233 days randomly selected, plus the 338 days outlined in the ROV prepared by P.O. Spragg) without sufficient evidence, when it denied elapsed time credit. (Hrg. Tr. at 18) The

District Court stated,

“I have a gap between May, uh, and August, or the end of July, uh, and why would you, if he hasn’t had any violations, uh, until last night, not be recommending street time for the time that has elapsed?” (Hrg. Tr. at 18-19.)

P.O. Poole responded by saying he “doesn’t recommend street time after a report of violation unless there is a significant reason for it.” (Hrg. Tr. at 18-19.)

“A defendant is statutorily entitled to credit unless specific violations during the times in question are demonstrated. This Court found § 46-18-203(7)(b) allows credit for elapsed time for periods after or between violations. *Gudmundsen*, ¶¶ 4-6, 14.

Here, the District Court unlawfully denied the elapsed time credit of 102 days when it did not take into account the record and recollection of the probation officers as required by Mont. Code Ann. § 46-18-203(7)(b). (Hrg. Tr. at 18-20.)

## CONCLUSION

The District Court exceeded the statutory parameters of MCA § 46-18-203 (7)(a)(iii). In its Revocation Orders, dated May 6, 2022 (Doc. 77) and March 21, 2024 (Doc. 115), the District Court did not indicate

that the cases had merged, effective February 1, 2018, resulting in the cases running consecutively, which unlawfully exceeded the length of the original sentence in both cases. (Doc. 36.)

As a result, Lally remains under the supervision of the DOC, Probation and Parole, even though his sentence ended approximately August 1, 2024.

The record and recollection of the probation officers show fifteen days of violations from May 5, 2022, to March 21, 2024. (Doc. 38, 78, 87; Hrg. Tr. at 18-20.) The Revocation Order, dated March 21, 2024 (Doc. 115), should be adjusted from 616 days for elapsed time credit for the following dates: 45 days (11/22/21 to 5/5/2022) + 338 days (5/5/2022 to April 7, 2023) + 233 days (7/?/2024 to 3/20/2024), to **718 days** of credit for elapsed time for the following dates: **45 days** (11/22/21 to 5/5/2022) + **338 days** (5/5/2022 to 4/7/2023) + **55 days** (4/8/2023 to 6/1/2023) + **280 days** (6/15/2023 to 3/20/2024). The jail time credit granted should remain the same at **125 days**. (Doc. 115.) Adding the uncontested jail time credit of 125 days to 718 days of elapsed time credit, the total credit towards his sentence should be **843 days**, instead of the current

741 days.

The District Court erred by miscalculating the periods for which credit should have been granted for elapsed time when no documented violations existed in the record or recollection of the probation officers. (Doc. 38, 78, 87; Hrg. Tr. at 18-20.)

Lally requests that the Court remand to the District Court with instructions to correct the Revocation Orders, dated May 6, 2022(Doc. 77) and March 21, 2024 (Doc. 115) to show that DC 2016-198 and DC 2016-10 merged, effective February 1, 2018, ensuring the revocation sentences did not unlawfully extend the original sentence per MCA § 46-18-203(7)(a)(iii)(2023).

Lally requests that the Court remand to the District Court with instructions to revise its determination of elapsed time credit and grant an additional 102 days of elapsed time credit for periods without violation as set forth below per MCA § 46-18-203(7)(b)(2023).

Respectfully submitted this 1st day of August 2025.

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## **CERTIFICATE OF COMPLIANCE**

Under Rule 11 of the Montana Rules of Appellate Procedure,  
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## CERTIFICATE OF SERVICE

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