IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0330

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BRADLEY MEFFORD,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Second Judicial District Court,
Silver Bow County, the Honorable Kurt Krueger, Presiding

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STATEMENT OF THE ISSUES

Issue One: The Fourth Amendment and the Montana Constitution prohibit warrantless intrusions into a person's cell phone absent a recognized exception. Appellant allowed a probation and parole officer to look at a conversation on his phone in Facebook Messenger to confirm that Appellant had been on his phone after curfew. After the officer viewed Facebook Messenger and confirmed that Appellant had been on his phone, the officer exited Facebook Messenger and scrolled through Appellant's photo gallery application. Did the State demonstrate a warrant exception permitted the warrantless intrusion into unauthorized areas of Appellant's cell phone?

Issue Two: Alternatively, did Appellant receive an illegal sentence when 558 days of credit for time served was omitted from his sentence?

STATEMENT OF THE CASE

In April 2018, the State filed a complaint in justice court alleging that Appellant Bradley Mefford ("Brad") committed one count of sexual abuse of children under Mont. Code Ann. § 45-5-625(1)(e), for allegedly possessing roughly 30 images of child pornography in November 2016.

(D.C. Doc. 2, Complaint.) On April 26, 2018, Brad was served with an arrest warrant. (D.C. Doc. 2, Warrant for Arrest.) Three months later, the State filed an Information in district court with the same felony charge. (D.C. Doc. 4.)

The suspected child pornography was discovered during a search of the photo gallery application on Brad's cell phone. (D.C. Doc. 36 at 1-2.) Brad filed a motion to suppress any evidence resulting from the search of his phone, which served as the basis for later search warrants. (D.C. Doc. 17 at 10-11.) After a hearing, the district court issued an order denying Brad's motion. (D.C. Doc. 36, attached as App. A.)

The case proceeded to a jury trial. Brad was found guilty. (11/4-11/5/19 Tr. at 341-42; D.C. Doc. 98.)

On April 16, 2020, Brad was sentenced to five years to Montana State Prison (MSP). (4/16/20 Tr. at 13-14; D.C. Doc. 111, attached as App. B.) It had been 721 days since Brad had been served with the April 2018 arrest warrant, and he was incarcerated during that time. (D.C. Doc. 2, Warrant for Arrest; *see* 4/16/20 Tr. at 6.) The district court only granted Brad credit for 163 days served from the date of trial until sentencing. (*See* 4/16/20 Tr. at 5; D.C. Doc. 111 at 2-3.)

Brad timely appealed. (*See* D.C. Docs. 111, 115; *State v. Garner*, 2014 MT 312, ¶¶ 23-24, 377 Mont. 173, 339 P.3d 1 (holding issuance of an amended judgment restarts the timeline to appeal).)

STATEMENT OF THE FACTS

In November 2016, 34-year-old Brad had a "smart" cell phone, like most Americans. (*See* 1/7/19 Tr. at 20-21.) It contained a variety of applications typical on such a phone. (*See* 1/7/19 Tr. at 22-23.) These included the Facebook Messenger application and a photo gallery application. (*See* 1/7/19 Tr. at 11.)

On Saturday, November 26, 2016, Brad was sitting inside his parked car in the parking lot outside his apartment after midnight. (1/7/19 Tr. at 8, 17-18.) Brad was on Facebook Messenger on his cell phone messaging with his teenage daughter in California. (1/7/19 Tr. at 9, 11, 16-18.) Brad was excited to contact his daughter as he had not spoken with or seen her or her mother since his daughter was an infant. (*See* 1/7/19 Tr. at 17-18.) He was in the parking lot because the Wifi at his apartment was set up so that it could only be accessed in the parking lot. (1/7/19 Tr. at 14, 20; *see also*, 11/4-11/5/19 Tr. at 306-07

(Brad's girlfriend explaining at trial this Wifi situation did not involve hijacking another's Wifi).)

Brad was on parole, and probation and parole officer Jake Miller was on call on November 26, 2016. (1/7/19 Tr. at 7-8; D.C. Doc. 17 at 2.) Brad had been paroled for nearly two years for a non-sexual offense conviction from 2006. (D.C. Doc. 17 at 2; 4/16/20 Tr. at 6.) Brad was in the intensive supervision program (ISP). (1/7/19 Tr. at 18.) The State did not offer into evidence the parole release conditions ordered upon Brad or the conditions he agreed to. The State asserted it would provide the district court with a copy of the ISP rules (1/7/19 Tr. at 32, 41), but the record does not contain that information.

P.O. Miller noticed from Brad's GPS unit that he was in the parking lot of his apartment building sometime between midnight and 3:00 a.m. (1/7/19 Tr. at 8.) P.O. Miller testified Brad was in violation of the curfew condition of his parole, even though he was just in his own parking lot. (1/7/19 Tr. at 8.)

Three days later, November 29, 2016, was Brad's reporting day. (1/7/19 Tr. at 18.) He had hurt his back at work. (1/7/19 Tr. at 18.) He had a doctor's note directing him to stay in bed for five days. (1/7/19 Tr.

at 19.) Brad had his girlfriend call his supervising officer, Jerry Finley. (1/7/19 Tr. at 8, 19.) She asked if they could come to his apartment instead of making him come into the office because of his injury. (1/7/19 Tr. at 19.)

A couple of hours later, P.O. Finley did a home visit. (1/7/19 Tr. at 7, 19.) P.O. Miller came, too, as a cover officer. (1/7/19 Tr. at 10.[1])

P.O. Finley asked about the curfew situation the previous weekend. (1/7/19 Tr. at 20.) Brad admitted he had been sitting inside his parked car in the parking lot of his residence late into the evening. (*See* 1/7/19 Tr. at 18, 20.)

Brad explained he was on the phone with his teenage daughter in California. (*See* 1/7/19 Tr. at 9, 20, 23.) P.O. Miller had called Brad's phone the evening he observed Brad in the parking lot, and the phone had been disconnected. (1/7/19 Tr. at 10.) P.O. Miller asked why Brad's phone had been disconnected. (D.C. Doc. 29, Ex. A; *see* 1/7/19 Tr. at 10.) Brad explained that he was messaging with his daughter over Wifi, not talking directly with her. (D.C. Doc. 29, Ex. A; *see* 1/7/19 Tr. at 20-21.)

[1] P.O. Miller testified at the suppression hearing. P.O. Finley did not.

Brad explained the Wifi set-up at his apartment and how he could only access it in the parking lot. (1/7/19 Tr. at 14, 20.)

P.O. Miller did not testify what condition of supervision he suspected Brad of violating at this point. The State later argued the situation now implicated the condition "that the supervisee must be honest in all communications and dealings with the officer." (D.C. Doc. 18 at 3.)

P.O. Miller testified he asked Brad "if I could view the phone to confirm his story of being on the phone" at the time of the alleged curfew violation. (1/7/19 Tr. at 10.) Brad asked his girlfriend to grab his phone "so I can show him the messages from the time and date that was of concern." (1/7/19 Tr. at 21.)

Brad's girlfriend gave the phone to P.O. Miller, and Brad explained where P.O. Miller would find the messages in question—the Messenger application, in a conversation with a person named Faith at the relevant time. (1/7/19 Tr. at 21-22.) Brad consented to P.O. Miller viewing the Messenger application to find and view his conversation with Faith. (1/7/19 Tr. at 23.) He did not consent to P.O. Miller searching his entire phone or anywhere else. (1/7/19 Tr. at 23, 31.) As

Brad later testified, there was "no reason to," as the only reason for P.O. Miller viewing Brad's phone was to demonstrate he had been on his phone after curfew. (1/7/19 Tr. at 22-23.)

P.O. Miller went to Facebook Messenger consistent with Brad's directions. (1/7/19 Tr. at 11.) P.O. Miller confirmed Brad was telling the truth about being on the phone. (1/7/19 Tr. at 11.) "[T]here were messages at that time frame like the defendant said." (1/7/19 Tr. at 11; D.C. Doc. 36 at 2.) The content of the messages did not strike P.O. Miller as suspicious or inconsistent with Brad's account, as he did not testify to such.

But P.O. Miller did not give back Brad's phone. P.O. Miller thought the profile picture associated with Faith's Messenger account "didn't appear to be a younger female like he had described." (1/7/19 Tr. at 11.) The State did not admit into evidence a copy of Faith's profile picture at the suppression hearing.

Without inquiring any further with Brad or asking his permission to look elsewhere on his phone, P.O. Miller exited the Messenger application, went to Brad's home screen, and opened Brad's photo gallery application. (*See* 1/7/19 Tr. at 11, 23.) He began scrolling

through the pictures. (1/7/19 Tr. at 11-12.) P.O. Miller testified he went to the photo gallery "to confirm that his daughter was the person sending these messages." (1/7/19 Tr. at 11.) P.O. Miller did not explain how Brad's photo gallery would enable him to do so.

In the photo gallery, P.O. Miller viewed photos that were "not . . . right." (1/7/19 Tr. at 11-12.) They were of a sexual nature involving nude young children. (1/7/19 Tr. at 12.) The officers detained Brad. (1/7/19 Tr. at 12.) The phone was seized and turned over to law enforcement. (1/7/19 Tr. at 12-13.)

Later, the State obtained two search warrants to conduct a forensic examination of the contents of the phone (the second was obtained after the first expired). (D.C. Doc. 36 at 2; D.C. Doc. 17 at 10-11.) The only grounds put forth in the warrant applications were a description of the pictures seen by P.O. Miller in the photo gallery application. (D.C. Doc. 17 at 10-11; *see* 1/7/19 Tr. at 41.)

In the suppression proceedings, Brad pointed out that P.O. Miller viewed Brad's phone not as a search of a probationer or parolee but in reliance on Brad's consent. (D.C. Doc. 17 at 6; 1/7/19 Tr. at 14-15.) Brad argued that the warrantless intrusion into the photo gallery

application exceeded Brad's consent to view the phone. (D.C. Doc. 17 at 6-7.) In response, the State argued P.O. Miller's viewing of the phone was premised upon Brad's supervision and was supported by reasonable cause. (D.C. Doc. 18 at 3.) Brad replied that the warrantless search exception for probationers and parolees did not apply to Brad's phone. (*See* D.C. Doc. 29 at 2-7.) Brad explained that the search provision relating to parolees and probationers in Mont. Admin. R. 20.7.1101(7) does not include a cell phone. (D.C. Doc. 29 at 6-7.) Thus, Brad argued the unique and heightened privacy implications arising from cell phones, as recognized by *Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473 (2014), applied to Brad's phone and required the State to obtain a warrant. (*See* D.C. Doc. 29 at 2-7.)

The district court concluded P.O. Miller's warrantless search of the photo gallery application did not exceed Brad's consent to view the phone. (D.C. Doc. 36 at 5.) "[C]onsent applied to all areas of the phone needed to verify" the information Brad had given, "not just the messaging app." (D.C. Doc. 36 at 5.) The district court further concluded that P.O. Miller could search Brad's phone as a warrantless probation and parole search because "Mefford's behavior, being outside

his home after curfew hours, raised reasonable suspicion that he was engaged in suspicious activity giving the officer reasonable cause to search his phone." (D.C. Doc. 36 at 3.) In addition, the district court concluded "the fact that Mefford was on probation and was acting suspiciously was an exigent circumstance that allowed the search of his phone." (D.C. Doc. 36 at 4.)

STANDARDS OF REVIEW

The Court reviews the denial of a motion to suppress "to determine whether the district court's findings of fact are clearly erroneous and whether the district court's interpretation and application of the law is correct." *State v. Thomas*, 2020 MT 222, ¶ 9, 401 Mont. 175, 471 P.3d 733. The Court reviews a lower court's factual findings to determine whether they are clearly erroneous. *State v. Hoover*, 2017 MT 236, ¶ 12, 388 Mont. 533, 402 P.3d 1224. A lower court's factual findings are clearly erroneous if they are not supported by substantial credible evidence, misapprehend the effect of the evidence, or leave the Court with the firm and definite conviction that a mistake was made. *Hoover*, ¶ 12.

The Court reviews a district court's sentence for legality, which is a determination subject to de novo review. *State v. Mendoza*, 2021 MT 197, ¶ 8, 405 Mont. 154, 492 P.3d 509. "A sentence is legal if it falls within the parameters set by applicable sentencing statutes and if the sentencing court adheres to the affirmative mandates of those statutes." *Mendoza*, ¶ 8.

SUMMARY OF THE ARGUMENT

The district court erred in denying Brad's motion to suppress because P.O. Miller's warrantless intrusion into the photo gallery application on Brad's cell phone was illegal under Montana law and the Montana and federal constitutions. The State failed to demonstrate the consent exception, the probation or parole search exception, or the exigent circumstances exception justified this warrantless intrusion into Brad's phone.

Brad's consent to P.O. Miller accessing certain information on his phone did not extend to P.O. Miller going beyond Facebook Messenger and into the photo gallery application. The undisputed limited purpose of the consent was to verify that Brad was on his phone when he was in his parking lot after curfew, which P.O. Miller accomplished through

review of Facebook Messenger. Brad's consent could not reasonably be understood to extend to his personal photo gallery where there was no purported activity there and a similar or matching photo in the photo gallery would not confirm that the person in the Facebook Messenger profile was Brad's daughter.

Nor can the State justify the warrantless intrusion as premised upon on Brad's conditions of supervision. P.O. Miller's rummaging through Brad's phone violated Mont. Admin. R. 20.7.1101(7) because the search was not supported by a "reasonable suspicion" of a condition violation. P.O. Miller did not possess specific, articulable, and objective data from the alleged picture discrepancy alone to establish a reasonable suspicion that Brad had violated the honesty condition of his supervision and that any evidence of a violation would be contained in the photo gallery application. Nor did Mont. Admin. R. 20.7.1101(7)'s plain language authorize the search of a "cell phone."

Even if the search was authorized under Mont. Admin. R. 20.7.1101(7), the federal and Montana constitutions prohibited P.O. Miller's warrantless intrusion into Brad's cell phone. Similar to *Riley*'s holding that an arrestee's diminished right to privacy does not justify a

search of a cell phone found on a person incident to arrest, Brad's diminished expectation of privacy did not justify P.O. Miller's warrantless rummaging through his phone here on the purported basis of confirming his honesty on non-criminal matters.

The district court also erred in *sua sponte* determining that exigent circumstances applied due, in large part, to the mere fact of Brad's supervisee status. Neither Brad's status alone nor any of the facts of the case demonstrated an emergency justifying the exigent circumstances exception.

The State's subsequently obtained search warrants based solely on the fruits of P.O. Miller's illegal intrusion were unlawfully obtained. The evidence obtained from Brad's phone must be suppressed, and the charge must be dismissed.

Alternatively, the matter must be remanded for an amended judgment adding 558 days of credit for time served. Brad received 163 days of credit for time served, but Brad was in custody on the arrest warrant issued in this matter for a total of 721 days prior to sentencing. In accordance with *Mendoza* and the plain language of Mont. Code Ann. § 46-18-403(1)(a), he is entitled to 558 more days of credit for time

served. At a minimum, Brad is entitled to a hearing to determine proper credit for time served.

ARGUMENT

I. P.O. Miller's warrantless intrusion into unauthorized areas of Brad's cell phone was illegal under Montana law and the Montana and federal constitutions.

The Fourth Amendment to the United States Constitution and Article II, Section 11 of the Montana Constitution protect persons from unreasonable searches and seizures by government officials. The Montana Constitution separately provides the "right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Mont. Const. art II, § 10.

The Court "address[es] Article II, §§ 10 and 11 in analyzing and resolving a search or seizure issue that specifically implicates the right to privacy." *Thomas*, ¶ 13. "[T]he range of warrantless searches which may be conducted pursuant to Montana's Constitution is narrower than the corresponding range of searches which may be lawfully conducted under the Fourth Amendment to the U.S. Constitution." *Thomas*, ¶ 13.

Warrantless searches "are *per se* unreasonable under the Fourth Amendment and Montana Constitution, Article II, section 11." *Hoover*, ¶ 14. The State bears the burden to establish an exception to the warrant requirement. *State v. Goetz*, 2008 MT 296, ¶ 40, 345 Mont. 421, 191 P.3d 489. Exceptions to the warrant requirement are "'jealously and carefully drawn.'" *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S.Ct. 2022, 2032 (1971) (citations omitted).

This case involves the search of a cell phone and requires the Court to apply the heightened privacy rights contained within a person's cell phone recognized in *Riley*. Cell phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley*, 573 U.S. at 385, 134 S.Ct. at 2484. A significant majority of adults own a cell phone. *Riley*, 573 U.S. at 385, 134 S.Ct. at 2484. The privacy implications arising from the voluminous quality and quantity of the contents of cell phones are astounding. *See Riley*, 573 U.S. at 393-94, 134 S.Ct. at 2489.

Not only does *Riley* demonstrate the heightened privacy rights contained with a modern cell phone. Montana, too, recognizes the

contents of a cell phone (a modern minicomputer) deserve special protection from non-owners. Montana law criminalizes the "unlawful use of a computer" which a person generally commits by "obtain[ing] the use of any computer, computer system, or computer network without consent of the owner." Mont. Code Ann. § 45-6-311.

None of the warrant exceptions addressed below—consent, Brad's terms of supervision, and exigent circumstances—justified P.O. Miller's warrantless intrusion into unauthorized areas of Brad's cell phone, and the district court erred in concluding otherwise. (D.C. Doc. 36 at 3-5.)

In district court, P.O. Miller agreed that he searched Brad's phone based on the permission he had been given by Brad. (1/7/19 Tr. at 14-15.) He did not search the phone as a probationary or parole search. (1/7/19 Tr. at 14-15.) Thus, the first and most pertinent exception to address is whether Brad consented to P.O. Miller's warrantless intrusion into the photo gallery application of the phone.

A. P.O. Miller exceeded the scope of Brad's consent.

The Court looks to the totality of the circumstances to determine whether consent was voluntarily given. *State v. Wetzel*, 2005 MT 154, ¶ 16, 327 Mont. 413, 114 P.3d 269. The State carries the burden to

establish the defendant gave consent. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 222-23, 93 S.Ct. 2041, 2045 (1973).

The standard for measuring the scope of consent "is that of 'objective' reasonableness-what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S.Ct. 1801, 1803-04 (1991); *see also*, *Wetzel*, ¶ 21; *State v. Parker*, 1998 MT 6, ¶ 21, 287 Mont. 151, 953 P.2d 692. "It bears emphasis that the standard is that of a typical reasonable person, not a typical reasonable police officer." *Commonwealth v. Ortiz*, 90 N.E.3d 735, 739 (Mass. 2018). An individual's consent to search includes a particular object where the given consent could "reasonably be understood to extend to a particular container." *Parker*, ¶ 21.

"The scope of a search is generally defined by its expressed object." *Jimeno*, 500 U.S. at 251, 111 S.Ct. at 1804. This means that "[w]hen a purpose is included in the request [to search], then the consent should be construed as authorizing only that intensity of police activity necessary to accomplish the stated purpose." 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 8.1(c) (6th

ed.). In addition, a person may set "the scope of the search to which he consents." *Jimeno*, 500 U.S. at 252, 111 S.Ct. at 1804. For example, consent to search a car's trunk does not consent to search the interior. *United States v. Neely*, 564 F.3d 346, 350-51 (4th Cir. 2009). Consent to search a car does not include consent to search a fanny pack on a defendant's person outside the car. *State v. Pearson*, 2011 MT 55, ¶¶ 9, 22, 359 Mont. 427, 251 P.3d 152.

These principles must be carefully applied to cell phones due to their unique differences both quantitatively and qualitatively from other objects. *See Riley*, 573 U.S. at 393, 134 S.Ct. at 2489. A cell phone "collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video," in addition to "photographs, picture messages, text messages, Internet browsing history, a calendar, a thousand-entry phone book, and so on." *Riley*, 573 U.S. at 394, 134 S.Ct. at 2489. While it is physically impossible for persons to "lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read," that is exactly what most Montanans do every day as they carry their cell phone. *Riley*, 573 U.S. at 394-95, 134 S.Ct.

at 2489. Given that cell phones are minicomputers, they "could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." *Riley*, 573 U.S. at 393, 134 S.Ct. at 2489.

The usual physical realities that set expectations about permissible areas that consent may include (where the item was located, the purpose of the item, whether the item had a physical lock) do not apply to a cell phone. *Cf. Riley*, 573 U.S. at 393, 134 S.Ct. at 2489 (noting "physical realities" that limit a search of a person but do not apply to the search of a cell phone found on a person). It takes a few seconds, if that, to switch from one application to another. But such a simple action can be the physical equivalent of rummaging through a person's recent mail at his house and then thumbing through his filing cabinets at an off-site storage facility and then sifting through his personal photo albums and home videos and then rolling through his rolodex. All these places can be easily but unknowingly accessed by an officer holding another's phone though the defendant lacks an opportunity to object to an expanded search. *But see Parker*, ¶ 22

(holding outside the cell phone context that a defendant's failure to object supports an expanded search).

Riley rejected the premise that permitting a search of all content on a cellphone is "materially indistinguishable" from searches of other items like a cigarette pack, wallet, or purse. *See Riley*, 573 U.S. at 393, 134 S.Ct. at 2488-89. Rather, the distinct types of information, often stored in different applications of the phone, should be carefully analyzed. The Kentucky Supreme Court addressed consent as to a cell phone and held that consent to look at a phone to find a phone number of one's boyfriend located under a pet name may include viewing the "contacts" directory or text messages. *Commonwealth v. Jennings*, 490 S.W.3d 339, 346-47 (Ky. 2016). But a detective exceeds his authority when he clicks on a photo in the contacts directory that appears next to a person identified as "my man." *Jennings*, 490 S.W.3d at 347.

Here, the scope of the search was set at its inception by its "expressed object" "to confirm [Brad's] story of being on the phone" at the time of the curfew violation. (1/7/19 Tr. at 10; *see Jimeno*, 500 U.S. at 251, 111 S.Ct. at 1804.) Brad gave his phone to P.O. Miller and told him the particular place (Facebook Messenger), the particular time, and

the particular person where P.O. Miller would be able to confirm that he was on his phone. (1/7/19 Tr. at 11, 21-22.) Consistent with this testimony, P.O. Miller immediately went to the Facebook Messenger application. (1/7/19 Tr. at 11.) P.O. Miller "did confirm there were messages at that time frame like the defendant said." (1/7/19 Tr. at 11; D.C. Doc. 36 at 2 ("[P.O. Miller] saw messages between Mefford and his daughter during the hours of concern.").)

Unlike the Facebook Messenger application, Brad's consent could not "reasonably be understood to extend" to P.O. Miller then rummaging through Brad's personal photo gallery application. Facebook Messenger had confirmed that Brad was on his phone after curfew as he had said. The essential purpose for which Brad had allowed P.O. Miller to view his phone had been achieved. *See Jimeno*, 500 U.S. at 251, 111 S.Ct. at 1804. There had been no purported activity in the photo gallery application when Brad was messaging with his daughter. While Facebook Messenger conveys written words to another, a phone's photo gallery application stores and saves a wide variety of visual images. Though contained within one cell phone, these digital data applications serve very different purposes and are not

remotely comparable to a car trunk and the car's interior on the same car like in *Neely*. Brad's consent to P.O. Miller viewing Brad's phone to verify he was on his phone after curfew could not have reasonably been understood as extending to the photo gallery where there was no purported activity there, just as the defendant's consent to search for a phone number did not encompass viewing photos in *Jennings*.

P.O. Miller testified he went past Facebook Messenger and into the photo gallery due to the sole fact that—despite the time, manner, and content of the messages in Facebook Messenger not causing him alarm or unease—the profile picture of Brad's daughter in Facebook Messenger was older than P.O. Miller expected. (1/7/19 Tr. at 11.) P.O. Miller could have addressed his concerns by asking Brad about his daughter's age or appearance. P.O. Miller could have asked Brad to show him a picture of his daughter.

It was objectively unreasonable for P.O. Miller to instead silently exit Facebook Messenger, go to Brad's home page, select the photo gallery application, and scroll through the photos on the premise that there may be a picture in the photo gallery that would show whether the person in Facebook Messenger was Brad's daughter. It would not

be reasonable to believe a photo gallery picture would be marked as "daughter." A photo gallery on a cell phone is unlike a physical family photo album, and often includes a random amalgamation of photos including buildings, wildlife, physical injuries, and household items intended for personal rather than public use. Even a matching picture or one with Brad in it would not confirm the person's relationship to Brad being that of daughter. Furthermore, apart from profile pictures being capable of being a picture of anyone much less an accurate depiction of the person, it was reasonable that Brad—who had spent several years in prison in the recent past—would not have recent pictures of his daughter. Brad had no opportunity to object to the extended search.

The district court concluded that Brad's "consent applied to all areas of the phone needed to verify this information, not just the messaging app." (D.C. Doc. 36 at 5.) But P.O. Miller's foray into the photo gallery fails the district court's set standard. P.O. Miller's search of the photo gallery application was not "necessary" to verify that Brad was on his phone when he said he was. That fact had already been verified by its time, content, and manner through Facebook Messenger.

A matching image in Brad's personal photo gallery would not confirm whether the profile picture depicted Brad's daughter. Brad could not have reasonably anticipated when he consented to P.O. Miller viewing Facebook Messenger that P.O. Miller would end up scrolling through the photo gallery. P.O. Miller exceed the scope of Brad's consent.

B. The State cannot justify the search of Brad's phone as premised upon on Brad's conditions of supervision.

Even if the State attempts to justify P.O. Miller's warrantless intrusion into Brad's photo gallery by the terms of Brad's supervision rather than as a consent search, that argument fails as well. P.O. Miller's warrantless intrusion into Brad's photo gallery application was not authorized by Mont. Admin. R. 20.7.1101(7) for two independent reasons that the "reasonable suspicion" requirement was not met, and a "cell phone" is not authorized to be searched under the rule. Even if P.O. Miller's intrusion into the photo gallery was authorized by Mont. Admin. R. 20.7.1101(7), the federal and Montana constitutions prohibited P.O. Miller's warrantless intrusion.

1. P.O. Miller lacked authority under Mont. Admin. R. 20.7.1101(7) for the search of Brad's phone.

In Montana, a probation and parole officer's warrantless search authority is set forth in Mont. Admin. R. 20.7.1101(7): "Upon reasonable suspicion that the offender has violated the conditions of supervision, a probation and parole officer may search the person, vehicle, and residence of the offender, and the offender must submit to such search."

a. The search of the photo gallery application was not supported by "reasonable suspicion" that Brad had violated the honesty condition of supervision.

At the outset, the district court applied the wrong standard in determining whether P.O. Miller's warrantless foray into Brad's phone was justified as a probation or parole search. The district court concluded that P.O. Miller's actions were justified because Brad's "behavior, being outside his home after curfew hours, raised reasonable suspicion that he was engaged in suspicious activity giving the officer reasonable cause to search his phone." (D.C. Doc. 36 at 3.) But a reasonable suspicion of "suspicious activity" does not satisfy Mont.

Admin. R. 20.7.1101(7), which requires a "reasonable suspicion that the offender has violated the conditions of supervision."

If a supervisee was subject to search on a reasonable suspicion of "suspicious activity," the reasonable suspicion requirement would be swallowed entirely. Any "suspicious activity" like the supervisee dating a known drug user or having two phones could justify a warrantless search, when courts have recognized those observations alone do not form a reasonable suspicion of supervision noncompliance. *See*, *e.g.*, *People v. Lampitok*, 798 N.E.2d 91, 107 (Ill. 2003) (holding a reasonable suspicion of drug activity did not arise from the mere fact that probationer was dating a suspected drug user); *United States v. Fletcher*, 978 F.3d 1009, 1015-18 (6th Cir. 2020) (holding a reasonable suspicion of criminal activity was not present where the supervisee was a registered sex offender, had two cell phones, and acted nervous after he was improperly told the phones would be searched).

Nor could the district court have found a reasonable suspicion of a condition violation here.

Just as when it is assessed for an investigatory stop, the reasonable suspicion standard for a probation search is "substantially

less than probable cause" but is "not a 'toothless' standard." *Pridgen v. United States*, 134 A.3d 297, 301 (D.C. 2016); *see State v. Beaudry*, 282 Mont. 225, 228, 937 P.2d 459, 461 (1997). Just as with an investigatory stop, the State must demonstrate objective, articulable facts sufficient to create a particularized suspicion of a condition violation. *See State v. Reeves*, 2019 MT 151, ¶¶ 8, 11, 396 Mont. 230, 444 P.3d 394; *Hoover*, ¶¶ 17-18; *see also*, 5 LaFave, § 10.10(d) (explaining the "prevailing view" that reasonable suspicion for a probation search is "the same 'standard as defined in investigatory stop cases'" (citation omitted)). A "generalized suspicion" or "an undeveloped hunch" is not enough. *Hoover*, ¶ 18. Basing inferences of supervision noncompliance on only inarticulable hunches are "not the building blocks of particularized suspicion," *Reeves*, ¶ 13, and subject parolees and probationers to impermissible motives for supervision searches that the Court has forbidden. *See State v. Burke*, 235 Mont. 165, 171, 766 P.2d 254, 257 (1988) (explaining probation searches "should not be used as an instrument of harassment or intimidation").

In addition, this Court has recognized that "the facts justifying [a probationary] search must bear some relationship to the place

searched." *Beaudry*, 282 Mont. at 230, 937 P.2d at 462; *see also*, *State v. Laster*, 2021 MT 269, ¶ 13, ___ Mont. ___, ___ P.3d ___ (explaining the duration and scope of an investigatory stop must be "'reasonably related in scope to the circumstances which justified the interference in the first place'" (citation omitted)). This principle was also applied in *Lampitok*. The Supreme Court of Illinois held that officers possessed reasonable suspicion that the probationer had changed residences without notice based on corroborated reports that she had moved to a hotel. *Lampitok*, 798 N.E.2d at 109. This reasonable suspicion allowed officers to search the hotel room to verify the probationer had changed residences in violation of probation. *Lampitok*, 798 N.E.2d at 109. However, the officers' reasonable suspicion of the change-of-address violation did not extend to allowing a search of the areas of the room not in plain view. *Lampitok*, 798 N.E.2d at 109.

Here, Brad was initially suspected of a curfew violation for being in his parking lot in the late evening. He admitted he was in the parking lot outside his residence after curfew. After his admission there was nothing more to investigate with regards to whether Brad had violated curfew.

In the course of discussing the curfew violation, the State offered no evidence the officers suspected Brad of committing a crime. Rather, the State would later argue the condition of being "honest in all communications and dealings with the officer" was implicated. (D.C. Doc. 18 at 3.) P.O. Miller apparently did not believe that Brad was on his phone that evening, as Brad had said, since P.O. Miller had called Brad's phone and it was disconnected. Though Brad explained he was messaging over Wifi, he allowed P.O. Miller to view his phone to confirm he was indeed on the phone.

P.O. Miller confirmed from the particular application, at the particular time, and with the particular person that Brad had directed him to that Brad was truly on his phone as he said. (D.C. Doc. 36 at 2.) No suspicion grew from the content of the messages, which had not struck P.O. Miller as criminal or inconsistent with Brad's account that he was messaging with his daughter. But P.O. Miller exited Facebook Messenger and went into Brad's personal photo gallery on the sole basis that the Facebook profile picture for Brad's daughter had appeared older than he expected. The State again did not argue that P.O. Miller

suspected any crime at this point, only that there was a "reasonable suspicion" that Brad was not being honest with P.O. Miller.

P.O. Miller's suspicion was merely "general unease" or an "undeveloped hunch" but not a reasonable suspicion of an honesty violation. *See Hoover*, ¶ 18; *Fletcher*, 978 F.3d at 1015-18; *see also*, *State v. Downing*, 407 P.3d 1285, 1289 (Idaho 2017) ("*Terry* and its progeny require more than general unease . . . ."). P.O. Miller had confirmed the essential details of Brad being on his phone at the time, in the manner, and with the named person Brad had identified. P.O. Miller did not possess specific, articulable, and objective data from the alleged picture discrepancy alone—without accompanying facts such as inconsistent content in the messages themselves—establishing a reasonable suspicion that Brad was not being honest with the officers.

Nor did P.O. Miller have a reasonable suspicion that further searching on the phone—particularly searching the photo gallery—would dispel or confirm any new concerns he had regarding Brad's explanation. *See Laster*, ¶ 13; *Lampitok*, 798 N.E.2d at 109. How would P.O. Miller know when he had found a picture of Brad's daughter in the photo gallery? The purely visual images in a photo gallery would

not identify the relationship between Brad and those in the photos. It would not be reasonable to expect Brad to have created a folder or album entitled "Daughter." P.O. Miller was free to investigate more and could have asked Brad more about his daughter or asked Brad to locate and show him a picture. But P.O. Miller's fishing expedition through Brad's personal photo gallery was not justified on the premise that he would find a picture to dispel or confirm his suspicions about whether Brad's daughter's Facebook profile picture actually depicted Brad's daughter.

b. Montana Administrative Rule 20.7.1101(7) plainly does not authorize the search of a "cell phone."

The plain language of Mont. Admin. R. 20.7.1101(7) authorizes a probation or parole officer to search "the person, vehicle, and residence of the offender." A cell phone is not a "person," "vehicle," or a "residence" authorized to be searched by Mont. Admin. R. 20.7.1101(7).

In *Fletcher*, the court concluded it was not "objectively reasonable" for a probation officer to conclude that a probation agreement allowing the search of Fletcher's "person," "motor vehicle," or "place of residence" authorized a search of a cell phone. *Fletcher*, 978 F.3d at 1018. A more

expansive condition was also not held to encompass a cell phone in *United States v. Lara*, 815 F.3d 605, 610-11 (9th Cir. 2016). The court held that Lara's condition of release to submit "[his] person and property, including any residence, premises, container or vehicle under [his] control to search and seizure" did not "clearly or unambiguously" encompass his cell phone and the information inside. *Lara*, 815 P.3d at 610. Likewise, here, a "person, vehicle, and residence" that may be searched upon reasonable suspicion of a condition violation in Mont. Admin. R. 20.7.1101(7) plainly does not encompass a search of a "cell phone."

P.O. Miller lacked authority under Mont. Admin. R. 20.7.1101(7) for the search of Brad's phone.

2. Even if the search was authorized under Mont. Admin. R. 20.7.1101(7), the federal and Montana constitutions prohibited P.O. Miller's warrantless intrusion into Brad's cell phone.

If the Court concludes that the search of Brad's phone was authorized by Mont. Admin. R. 20.7.1101(7), then the Court must assess the constitutionality of this rule's application to Brad's modern cell phone. The United State Supreme Court has never upheld a State law authorizing a search of a probationer's or parolee's cell phone

without a warrant and a showing of probable cause when it is applied as it was in this case. *Riley* strongly suggests it would not do so. In any event, Montanans have a heightened right to privacy under the Montana Constitution, and not all searches that would pass constitutional muster under the Fourth Amendment are lawful here. *Thomas*, ¶ 13. Montana's privacy guarantee under the Montana Constitution "encompasses not only 'autonomy privacy' but confidential 'informational privacy' as well." *State v. Nelson*, 283 Mont. 231, 242, 941 P.2d 441, 448 (1997).

In Montana, when determining whether there has been an unlawful governmental intrusion into one's privacy, this Court assesses whether the defendant has an actual expectation of privacy that society is willing to recognize as objectively reasonable and looks at the nature of the State's intrusion. *E.g. State v. Elison*, 2000 MT 288, ¶ 48, 302 Mont. 228, 14 P.3d 456. Under the federal constitution, similar considerations are assessed in balancing the degree a warrantless search intrudes upon an individual's privacy and the degree the search is needed for the promotion of legitimate government interests. *See Fletcher*, 978 F.3d at 1018.

a. Brad had an actual expectation of privacy in his cell phone that society is willing to accept as objectively reasonable despite his release status.

The Court has recognized that probationers and parolees like Brad have a reduced expectation of privacy. *E.g.*, *State v. Boston*, 269 Mont. 300, 305, 889 P.2d 814, 817 (1994). Their expectation of privacy is not nonexistent, but it is reduced due to the need to supervise. *See Boston*, 269 Mont. at 305, 889 P.2d at 817.

In *Riley*, the United States Supreme Court determined that even when one has a diminished right to privacy—in that case the subject was an arrestee—not every search is acceptable solely because of the person's diminished rights. *Riley*, 573 U.S. at 392, 134 S.Ct. at 2488. "To the contrary, when 'privacy related concerns are weighty enough' a 'search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee.'" *Riley*, 573 U.S. at 392, 134 S.Ct. at 2488 (citation omitted).

Privacy concerns with Brad's modern cell phone are weighty. A search of a cell phone permits the State to see "[t]he sum of an individual's private life." *Riley*, 573 U.S. at 394, 134 S.Ct. at 2489. As to a photo application in particular, a "pre-digital era" search of a wallet

would show "a photograph or two," but a modern search of a cell phone searches "thousands of photos in a digital gallery." *Riley*, 573 U.S. at 400, 134 S.Ct. at 2493. In general, society treats cell phones as highly private. Security mechanisms block non-owner access. These passwords, pins, or even facial recognition software "lock" the phone from theft and block access to the treasure trove of personal data contained inside without the owner's consent.

The privacy concerns recognized in *Riley* applied to Brad and the contents of his personal cell phone. Brad was on parole for non-sexual offenses. Brad was subject to Mont. R. Admin. 20.7.1101(7), which did not provide that his cell phone was subject to search. The absence of a "cell phone" from Mont. Admin. R. 20.7.1101(7) demonstrates that Brad did not expressly waive his right to privacy in his phone. *See also*, *State v. Moody*, 2006 MT 305, ¶ 26, 334 Mont. 517, 148 P.3d 662 (explaining the dispositive nature of parole conditions in determining a parolee's expectation of privacy). In addition, P.O. Miller did not order Brad to give P.O. Miller his phone but requested Brad's consent, which further demonstrated Brad held an actual expectation of privacy in his phone.

The absence of a "cell phone" from Mont. Admin. R. 20.7.1101(7) and Mont. Code Ann. § 45-6-311's criminal punishment for unauthorized access to another's phone demonstrate that society is willing to accept as reasonable that a parolee like Brad maintains a privacy interest in the contents of his cell phone. *See Moody*, ¶ 26. While society expects probationers and parolees to comply with their conditions of supervision, society recognizes that a phone itself will not contain drugs and weapons that often demonstrate noncompliance. *See State v. Oropeza*, 2020 MT 16, ¶ 3, 398 Mont. 379, 456 P.3d 1023 (citing the growing impact of substance abuse on parole and probation revocations); *cf. Riley*, 573 U.S. at 387, 134 S.Ct. at 2485 (explaining that digital data on a phone cannot itself be a weapon and that therefore searching such data is inconsistent with the purpose of the search incident to arrest exception).

Moreover, a parolee or probationer having a cell phone can be an essential step in rehabilitation. "Computers and Internet access have become virtually indispensable in the modern world of communications and information gathering." *United States v. Peterson*, 248 F.3d 79, 83 (2d Cir. 2001). Internet and phone use is often expected by members of

society in the course of applying, interviewing, and keeping a job. *Cf. State v. Lodahl*, 2021 MT 156, ¶ 27, 404 Mont. 362, 491 P.3d 661 (explaining that a phone and internet where "not merely discretionary luxuries, but minimal requirements" to adequately care and provide for school-age children). Internet use can assist in paying bills, filing taxes, or paying court-ordered fines and fees. Society does not wish to disincentive a parolee or probationer from getting a phone and participating in the same benefits of cell phones that most Americans have and expect other productive members of society to have, too.

b. P.O. Miller's searching beyond Brad's Facebook Messenger application was a significant intrusion.

This Court has repeatedly recognized that "the physical invasion of the home is the chief evil to which the 4th Amendment and Montana's Article II, § 11, are directed." *State v. Therriault*, 2000 MT 286, ¶ 53, 302 Mont. 189, 14 P.3d 444. However, "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house." *Riley*, 573 U.S. at 396, 134 S.Ct. at 2491. "A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private

information never found in a home in any form—unless the phone is." *Riley*, 573 U.S. at 396-97, 134 S.Ct. at 2491.

"Probationary searches advance at least two related government interests—combating recidivism and helping probationers integrate back into the community." *Lara*, 815 F.3d at 612; *see Beaudry*, 282 Mont. at 228, 937 P.2d at 461 (explaining a probation officer's supervisory goal is "to provide both rehabilitation of the probationer and safety for society"). The need to supervise Brad did not go so far as the need to confirm every minutia of every non-criminal statement he made to a supervising officer by allowing a fishing expedition through his phone into places highly unlikely to confirm or discredit the statement, as P.O. Miller did. *See also*, *Riley*, 573 U.S. at 395, 134 S.Ct. at 2490 (distinguishing searching "a personal item or two in the occasional case" from "[a]llowing the police to scrutinize" the contents of a phone "on a routine basis").

It appears that P.O. Miller believed he effectively had "'unbridled discretion to rummage at will'" among Brad's cell phone. *Riley*, 573 U.S. at 399, 134 S.Ct. at 2492 (citation omitted). "It would be a particularly inexperienced or unimaginative law enforcement officer

who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone." *Riley*, 573 U.S. at 399, 134 S.Ct. at 2492. An admitted curfew violation arising from Brad being in his own parking lot and the fear of dishonesty led to P.O. Miller fishing through the contents of Brad's cell phone—rather than simply talking to Brad—in a misguided attempt to confirm whether a Facebook profile picture was actually Brad's daughter. Having been given an "inch" to look at Brad's phone, he "took a mile" and delved well past Facebook Messenger into the photo gallery that can contain "thousands of photos" of a wide variety of images. *Riley*, 573 U.S. at 400, 134 S.Ct. at 2493. It took a second, if that, for P.O. Miller to switch from Facebook Messenger to Brad's photo gallery, despite the huge privacy consequences between the different applications.

If the State suspected Brad's phone contained evidence of noncompliance with conditions of supervision, the State had avenues available to it. If the officers possessed data demonstrating an emergency that required a prompt search of the phone, a warrantless search could be justified under the exigent circumstances exception. *Riley*, 573 U.S. at 402, 134 S.Ct. at 2494; *see State v. McBride*, 1999 MT

127, ¶ 16, 294 Mont. 461, 982 P.2d 453. The State could seek consent, as they sought here but then exceeded, for a limited review of the phone for pertinent information. Or, the State could seek a warrant if it possessed probable cause that evidence of a crime would be contained within the phone. *See Riley*, 573 U.S. at 403, 134 S. Ct. at 2494-95.

The district court erred because it overlooked the weighty privacy rights implicated by a cell phone, which exist regardless of Brad's status of a parolee. (*See* D.C. Doc. 36 at 3-4.) The district court addressed *Riley* for the sole purpose of the district court's erroneous application of the exigent circumstances exception and overlooked its holding regarding the privacy rights implicated by cell phones even where the owner has a diminished expectation of privacy. (D.C. Doc. 36 at 4.)

Thus, even if P.O. Miller's warrantless intrusion into Brad's photo gallery was authorized under Mont. Admin. R. 20.7.1101(7), P.O. Miller's intrusion into unauthorized areas of Brad's phone was unconstitutional upon considering the enhanced privacy implications of the contents of a modern cell phone, the extent of Brad's diminished privacy rights as a supervisee in his phone, and significant intrusion into his private life that occurred by P.O. Miller's warrantless foray.

C. The district court was wrong to apply the exigent circumstances exception.

In district court, the State did not argue that exigent circumstances justified the intrusion into Brad's photo gallery application or offer any evidence in support of that theory. But the district court *sua sponte* concluded that "the fact that Mefford was on probation and was acting suspiciously was an exigent circumstance that allowed the search of his phone." (D.C. Doc. 36 at 4.)

"The State bears a heavy burden of showing the existence of exigent circumstances by demonstrating specific and articulable facts in support thereof." *McBride*, ¶ 13. Exigent circumstances are those circumstances demonstrating an emergency which cause a reasonable person to believe immediate action must be taken to prevent consequences such as physical harm to officers or victims, destruction of relevant evidence, or the escape of a suspect. *See McBride*, ¶ 16; *see also*, *Riley*, 573 U.S. at 402, 134 S.Ct. at 2494.

The district court's exigent circumstances conclusion was unsupported by the evidence and is clearly erroneous. P.O. Finley and P.O. Miller were at Brad's home on a home visit. They asked about a possible curfew violation three days prior. Brad's response was that he

had been messaging, three days ago, with his daughter. P.O. Miller confirmed through Brad's Facebook Messenger application that "there were messages at that time frame like the defendant said." (1/7/19 Tr. at 11.) P.O. Miller's unease from the sole fact that the profile picture of Brad's daughter was older than he expected did not demonstrate any imminent danger of physical harm, destruction of evidence, or escape. *See McBride*, ¶ 16. *Riley* speaks of possible exigent circumstances being an "imminent remote-wipe attempt" or a child abductor with information about the child's location on his phone. *Riley*, 573 U.S. at 391, 402, 134 S.Ct. at 2487, 2494. There were no facts supporting that any "emergency" justified the warrantless intrusion into the photo gallery application on Brad's phone.

The State did not demonstrate that P.O. Miller's warrantless search into unauthorized areas of Brad's phone was supported by an exception to the warrant requirement. The State relied solely upon a description of the pictures seen during P.O. Miller's viewing of the photo gallery application to later apply for and obtain search warrants to forensically examine Brad's phone. (*See* D.C. Doc. 17 at 10-11; 1/7/19 Tr. at 41 (the State agreeing that subsequent search warrants were

applied for based upon the pictures seen on Brad's phone).) Upon excising the information obtained during the illegal initial search of Brad's phone, *see State v. Kuneff*, 1998 MT 287, ¶ 19, 291 Mont. 474, 970 P.2d 556, it is undisputed that the later search warrant applications were insufficient to support a finding of probable cause and the resulting search warrants were thus illegal.

The evidence unlawfully obtained from Brad's phone must be suppressed. *Thomas*, ¶ 14. As the record contains no remaining evidence to sustain a conviction, the case must be dismissed. *See*, *e.g.*, *Thomas*, ¶ 20.

II. Alternatively, Brad received an illegal sentence when 558 days of mandatory credit for time served was omitted from his sentence.

At sentencing, Brad requested additional credit for time served. (4/16/20 Tr. at 5-7.) After the images were discovered on November 29, 2016, Brad was arrested that date for a parole violation arising from that conduct. (4/16/ Tr. at 6.) His parole was later revoked and he remained incarcerated at MSP until sentencing in this case. (4/16/20 Tr. at 6.) Brad requested credit from November 29, 2016, until the date of sentencing, or 1234 days. (4/16/20 Tr. at 7.) Although Brad tailors

his argument on appeal to requesting a total of 721 days, his argument is properly before the Court. *See State v. Tome*, 2021 MT 229, ¶ 21, ___ Mont. ___, 495 P.3d 54 (explaining an appellant may make arguments within the scope of the legal theory in district court); *see also*, *State v. Erickson*, 2005 MT 276, ¶ 27, 329 Mont. 192, 124 P.3d 119 (holding that receiving less credit than the amount to which a defendant is statutorily entitled can be raised for the first time on appeal).

Under Mont. Code Ann. § 46-18-403(1)(a), "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 . . . ." Under Mont. Code Ann. § 46-18-201(9), "When imposing a sentence under this section that includes incarceration in a detention facility or the state prison, as defined in 53-30-101, the court shall provide credit for time served by the offender before trial or sentencing." The Court recently interpreted these statutes in *Killam v. Salmonsen*, 2021 MT 196, 405 Mont. 143, 492 P.3d 512, and *Mendoza*.

Brad's case is controlled by *Mendoza*. Mendoza was charged in September 2015 with driving under the influence occurring in September 2015. *See Mendoza*, ¶ 4. He was served with an arrest

warrant two years later on December 5, 2017. *Mendoza*, ¶ 4. He never posted bond and remained incarcerated until his sentencing on July 18, 2019. *Mendoza*, ¶ 12. The Court held Mendoza was entitled to credit for each day of incarceration between December 5, 2017, to July 18, 2019 "regardless of whether he was also being held in connection with another matter in a different county." *Mendoza*, ¶ 12.

Brad was charged in April 2018 in justice court with sexual abuse against children allegedly occurring in November 2016. (D.C. Doc. 2, Compliant). Brad was served with an arrest warrant on April 26, 2018, that set bail at $100,000. (D.C. Doc. 2, Compliant.) He never posted bond and was incarcerated until 721 days later when he was sentenced on April 16, 2020. (4/16/20 Tr. at 6.)

Under *Mendoza*, Brad is entitled to credit for each day of incarceration from April 26, 2018, to April 16, 2020 (721 days), regardless of whether he was also being held in connection with another matter. *See also*, *Killam*, ¶¶ 18-19 (applying the *Mendoza* analysis to a parolee). Since the district court only credited Brad with 163 days from the date of his trial verdict to sentencing (D.C. Doc. 111 at 2), the omission of 558 days of credit from his sentence is illegal.

Though *Killam* and *Mendoza* most often reference Mont. Code Ann. § 46-18-201(9), the Court's analyses also conformed to the plain language of § 46-18-403(1). *See Killam*, ¶ 13 (explaining § 46-18-403(1)'s plain language "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* and *Mendoza* read together demonstrate that this Court interpreted the 2017 Legislature's enactment of § 46-18-201(9) as clarifying the Legislature's intent for awarding credit for time served, including time awarded under § 46-18-403(1). *See*, *e.g.*, *Killam*, ¶¶ 13-15 (explaining § 46-18-403(1)'s plain language and the confusion and difficulties that had arisen from determining credit based on factual relationships to other proceedings); *Mendoza*, ¶ 12 (granting Mendoza credit based on the record in his case). Rather than create a separate analysis under Mont. Code Ann. § 46-18-201(9) distinct from § 46-18-403(1), the Court concluded that the Legislature's intent for the application of credit sentencing statutes is that credit should be determined solely based on the record of the offense for which the defendant is being sentenced. *See Killam*, ¶¶ 13-16; *Mendoza*, ¶¶ 7 n.2,

11-12. Though the Court stopped short of expressly overruling its previous precedent under § 46-18-403(1) that a defendant's incarceration be factually primarily related to the instant case, *e.g.*, *State v. Pavey*, 2010 MT 104, ¶ 22, 356 Mont. 248, 231 P.3d 1104, the Court implicitly did so.

If the Court did not implicitly overrule prior cases like *Pavey*, then the Court should expressly do so in this case. The Court is "*obligated* to overrule precedent where it appears the construction manifestly is wrong." *City of Kalispell v. Salsgiver*, 2019 MT 126, ¶ 45, 396 Mont. 57, 443 P.3d 504 (citation and quotation marks omitted). Cases like *Pavey* are inconsistent with the plain language of Mont. Code Ann. § 46-18-403(1). *See Killam*, ¶ 13. The prior "direct relationship test" has been "variabl[y]" applied to different results over the past decades, which has created confusion and difficulties for all parties. *Killam*, ¶¶ 14-15. The direct relationship requirement applied in cases like *Pavey* under Mont. Code Ann. § 46-18-403(1) should be expressly overruled.

The record here demonstrates the confusion and difficulties of the *Pavey* analysis. The record suggests this case has kept Brad incarcerated since 2018, despite his active prison sentence. Brad was

granted parole in June 2018 after these charges were filed. (*See* 1/7/19 Tr. at 4 (defense counsel recounting Brad was "paroled in June of last year"); D.C. Doc. 53, Ex. B (email from MSP setting forth Brad's parole disposition).) Yet, two years later, he remained at MSP. (*See* 1/7/19 Tr. at 4 (counsel explaining Brad had been unable to get out despite being granted parole).) Defense counsel attempted to clarify Brad's MSP status in relation to this case but received an unclear response from MSP. (*See* D.C. Doc. 53, Ex. B.[2]) Record ambiguities caused by MSP's unwillingness to explain Brad's MSP status in relation to this pending case should not be construed against Brad. *See Killam*, ¶ 14 (noting difficulties that arise when credit analyses depend upon "how the Board or DOC may respond when a defendant is on probation or parole when arrested on new charges").

Moreover, unlike *Pavey*, ¶ 21, Brad's continued MSP housing for two years despite being granted parole tends to show Brad's continued incarceration was due to this pending charge and its un-posted bond.

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[2] Although Brad's counsel at sentencing misspoke and referenced the parole board being unwilling to "grant Brad another chance at parole" (4/16/20 Tr. at 6), it is apparent from the record that Brad had indeed been granted parole. (*See* 1/7/19 Tr. at 4; D.C. Doc. 53, Ex. B.)

(*See also*, 1/7/19 Tr. at 4 (counsel explaining Brad's continued incarceration after being granted parole was due to this pending charge).) The district court's implicit determination that the prior case bore no relationship to the pending charge is unsupported by substantial evidence and clearly erroneous. As such, if the Court determines Brad is not entitled to 558 additional days of credit based on the arrest warrant issued in this case under *Mendoza*, the Court should remand for a hearing to determine whether the time Brad spent at MSP after being granted parole in June 2018 bore a primary relationship to this case, as the record indicates that it does. *See Pavey*, ¶ 21; *Erickson*, ¶¶ 26, 39 (remanding for a hearing to determine defendant's status for credit purposes).

CONCLUSION

The State violated Brad's privacy rights by P.O. Miller's warrantless intrusion into the photo gallery application of Brad's cell phone. Brad respectfully requests the Court reverse the district court's denial of his motion to suppress and dismiss the charge.

In the alternative, Brad respectfully requests the Court remand the matter to district court for issuance of an amended judgment adding

558 days of credit for time served or a hearing to determine the proper amount of credit for time served.

Respectfully submitted this 29th day of October, 2021.

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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 9,974, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Kristen L. Peterson
KRISTEN L. PETERSON

APPENDIX

CERTIFICATE OF SERVICE

I, Kristen Lorraine Peterson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 10-29-2021:

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