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.

REPLY BRIEF OF APPELLANT

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

APPEARANCES:

CHAD WRIGHT
Appellate Defender
KRISTEN L. PETERSON
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
krpeterson@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

AUSTIN KNUDSEN
Montana Attorney General
JONATHAN M. KRAUSS
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

EILEEN JOYCE
Butte-Silver Bow County Attorney
SAM COXX
Deputy County Attorney
Courthouse, Room 104
155 West Granite
Butte, MT 59701

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

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"[W]arrantless searches and seizures are constitutionally unreasonable *per se*, except when conducted in strict accordance with certain recognized and narrowly limited exceptions to the warrant requirement." *State v. Zeimer*, 2022 MT 96, ¶ 26, ___ Mont. ___, ___ P.3d ___. When the State seeks to search a cell phone without a warrant, heightened constitutional protections apply because cell phone searches "implicate privacy concerns far beyond those implicated" by any other object. *Riley v. California*, 573 U.S. 373, 393, 134 S.Ct. 2473, 2488-89 (2014).

The State argues P.O. Miller's warrantless scrolling through Brad's photo gallery application on his cell phone was justified by the consent and probation/parole search exceptions to the warrant requirement. (Appellee's Br. at 17-18.[1]) To the State, searching a cell phone is like "looking in a cupboard." (*See* Appellee's Br. at 31.) Unless this cupboard can store the content of "1,300 physical filing cabinets," the State's analogy falls flat. (Amicus Br. at 7.) The State's arguments

[1] Though the district court also concluded the exigent circumstances exception applied (D.C. Doc. 36 at 4; Appellant's Br. at 41-42 (challenging that conclusion)), the State does not defend that conclusion on appeal and thus implicitly concedes the exigent circumstances exception did not justify the warrantless search.

ignore *Riley* and that P.O. Miller's rifling through Brad's photo gallery violated Brad's constitutional rights.

Alternatively, the State's arguments to deny Brad credit for 558 additional days spent incarcerated conflict with this Court's precedent and should be rejected.

I. The State's arguments under the consent exception ignore the district court's findings and order.

The State argues the "issue of Mefford's consent in this case is a fairly simple matter of fact" that Brad consented to a "search of the phone as a whole." (Appellee's Br. at 20, 22.) Under the State's argument, P.O. Miller had consent to search any area of Brad's phone he wanted to. (*See* Appellee's Br. at 21, 23 (arguing Brad "consented to the search of the phone without limitation").) According to the State, P.O. Miller could search Brad's photo gallery application, Brad's location data from any point in time, read emails, and view what political apps Brad possessed. (*See* Appellee's Br. at 21, 23.) But that is not what the district court found in this case, and the State's consent argument contradicts the district court's findings.

The district court found that P.O. Miller's authorization to search was impliedly limited by the context of the conversation between Brad and P.O. Miller to verifying Brad's story that he was merely on his phone in his parking lot after curfew communicating with his daughter. (*See* D.C. Doc. 36 at 5.) "The scope of a search is generally defined by its expressed object." *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S.Ct. 1801, 1804 (1991). The district court found P.O. Miller had consent to look at Brad's phone "to verify the information Mefford had given." (D.C. Doc. 36 at 5.) Although the district court found consent was to look "at the phone as a whole" as opposed to just Facebook Messenger, the district court found the only areas of the phone P.O. Miller was authorized to search were the areas of the phone "*needed to verify the information Mefford had given*." (D.C. Doc. 36 at 5 (emphasis added).) The district court did not find, as the State argues, that Brad consented to P.O. Miller searching any area of the phone without limitation.

On appeal, Brad does not challenge the district court's factual findings as to the historical facts underlying Brad and P.O. Miller's exchange. As the district court found, Brad did not have to expressly limit his consent in order for the conversation, in context, to limit where

P.O. Miller could search on his phone. *See*, *e.g.*, *Commonwealth v. Jennings*, 490 S.W.3d 339, 347 (Ky. 2016) (consent to search a phone for a phone number would not include consent to click on photos). There is no dispute that after P.O. Miller viewed the messenger application on Brad's phone and saw the corresponding messages, he did not ask for further consent before he started silently scrolling through Brad's personal photo gallery application. (*See* 1/7/19 Tr. at 11.)

Brad disputes and disagrees with the district court's implicit legal determination that a reasonable person would have understood Brad's consent to include the photo gallery application as an area of the phone "needed to verify" the information provided by Brad to P.O. Miller. *See State v. Kaufman*, 2002 MT 294, ¶ 12, 313 Mont. 1, 59 P.3d 1166 (explaining the Court's bifurcated standard of review on denials of motions to suppress "affords appropriate deference to the trial court's fact-finding role and responsibility, while providing this Court with the opportunity to review legal conclusions and the application of legal standards *de novo*"); *see also*, *United States v. Albrektsen*, 151 F.3d 951, 953 (9th Cir. 1998) ("[W]e review determinations that specific actions are sufficient to give rise to implied consent de novo."). The question in

this context is one of objective reasonableness. *Jimeno*, 500 U.S. at 251, 111 S.Ct. at 1803-04; *see also*, *Zeimer*, ¶ 32 (explaining that whether particularized suspicion for an investigative stop "was objectively reasonable, is a question of law subject to de novo review").

In *Jimeno*, the United States Supreme Court concluded a person's consent to search a car for narcotics authorized police to search a closed paper bag lying on the floor of the car's interior. *Jimeno*, 500 U.S. at 251, 111 S.Ct. at 1804. The dispositive question was "whether it is reasonable for an officer to consider a suspect's general consent to a search of his car to include consent to examine a paper bag lying on the floor of the car." *Jimeno*, 500 U.S. at 251, 111 S.Ct. at 1804. The Court concluded it was objectively reasonable to conclude that consent to search a car for narcotics included the paper bag because a reasonable person knows narcotics are generally carried in a container rather than "'strewn across the trunk or floor'" and it was reasonable to believe the paper bag lying on the floor was a possible container for the drugs. *Jimeno*, 500 U.S. at 251, 111 S.Ct. at 1804.

A reasonable person would have understood that Brad's consent to search his phone to confirm his story of using his phone after curfew to

message with his daughter would include scrolling through Facebook Messenger for the specific conversation at the specific time and looking at the content of the messages that Brad was referencing, which P.O. Miller in fact did. But a reasonable person would not have understood Brad's consent included searching the photo gallery application—a separate application on the phone with a different purpose from Facebook Messenger and an application P.O. Miller and Brad never discussed. Unlike the paper bag in *Jimeno*, no reasonable person would believe that scrolling through the photo gallery application would be "needed to verify" the person sending the messages in Facebook Messenger was Brad's daughter. The conversation history itself in Facebook Messenger would largely speak to that question. Nor would a similar photo in the photo gallery confirm the nature of the person's relationship with Brad, as a photo gallery contains photos and possibly videos, nothing more. The district court erred in concluding P.O. Miller's search of the photo gallery application was "needed to verify" the information Brad had given about being on his phone after curfew. (*See* D.C. Doc. 36 at 5.) Searching the photo gallery application was not necessary to fulfill the purpose of the search Brad consented to here.

In this regard, the State's brief attempts no analysis or argument that it was objectively reasonable for P.O. Miller to consider Brad's consent to view his phone to verify Brad's account that he was messaging on his phone after curfew to include scrolling through the photo gallery application. The State offers no argument explaining how viewing Brad's personal photos was necessary to the intended purpose of P.O. Miller's search and thereby satisfied the district court's standard for the lawful scope of Brad's consent. The State's silence is telling. The district court erred in concluding the consent exception applied.

II. The State fails to show P.O. Miller's warrantless search of the photo gallery application was a valid probation/parole search.

The State relies on *State v. Peoples*, 2022 MT 4, 407 Mont. 84, 502 P.3d 129, to uphold its warrantless search as a valid parole/probation search. (*See* Appellee's Br. at 24-29.) In *Peoples*, ¶ 17, the Court held a valid parole/probation search in Montana depends upon the presence of three separate criteria. Although the State cites the *Peoples* criteria, the State makes no attempt to apply them to the facts of this case.

Peoples applied here demonstrates the unlawfulness of the search of Brad's photo gallery application.[2]

A. *Peoples* applied here demonstrates the unlawfulness of the warrantless search of the photo gallery application.

In *Peoples*, the Court held a warrantless probation/parole search is only valid where the following three criteria are present: (1) the search is "generally authorized by an established state law regulatory scheme that furthers the special government interests in rehabilitating probationers and protecting the public"; (2) "the probation officer has reasonable cause to suspect, based on awareness of articulable facts, under the totality of the circumstances that the probationer may be in violation of his or her probation conditions or the criminal law"; and, (3) the warrantless search must be "limited in scope to the reasonable suspicion that justified it in the first instance except to the extent that new or additional cause may arise within the lawful scope of the initial search." *Peoples*, ¶ 17.

[2] *Peoples* was decided after the opening brief was filed but patterns arguments from the opening brief. (*See* Appellant's Br. at 24-32.)

1. The warrantless search of Brad's cell phone is not generally authorized by Montana's established state law regulatory system.

Montana's "established state law regulatory scheme" does not authorize a search of a cell phone. Montana Administrative Rule 20.7.1101(7) authorizes a probation/parole officer to search a probationer/parolee's "person, vehicle, [or] residence" upon reasonable suspicion of a condition violation. The rule does not authorize officers to search anywhere else. The rule plainly does not authorize searching a cell phone. (Appellant's Br. at 31-32.)

The State makes no argument on appeal that a "cell phone" is encompassed by the plain language of Mont. Admin. R. 20.7.1101(7). Rather, the State asserts it is irrelevant whether the searched item—here, a cell phone—"fall[s] within the ambit of the parolee's person, vehicle, or home according to [the] administrative rule." (Appellee's Br. at 29.) The State echoes the district court's conclusions that a probation/parole officer may search "anything" they have "reasonable cause" to search. (*See* D.C. Doc. 36 at 3.)

The State is wrong. Whether a searched object or area falls within a probationer or parolee's "person, vehicle, [or] residence" as

expressly stated in a search condition or Mont. Admin. R. 20.7.1101(7), is part of assessing whether an "established state law regulatory scheme" authorized the search. *See United States v. Fletcher*, 978 F.3d 1009, 1018 (6th Cir. 2020) (assessing the terms of the probation agreement to determine whether the search of a cell phone satisfied the framework set forth in *Griffin v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164 (1987)). The State acknowledges the constitutional justification for dispensing with the warrant requirement is based on a diminished expectation of privacy that arises, in part, on the supervised person's "'awareness and expectation that they will thus be subject to extraordinary government scrutiny while on probation.'" (Appellee's Br. at 25 (quoting *Peoples*, ¶ 17).) The text of a search condition notifies probationers/parolees what areas or objects are subject to search upon reasonable suspicion and informs their resulting expectation of privacy in those areas or objects. *See State v. Moody*, 2006 MT 305, ¶ 26, 334 Mont. 517, 148 P.3d 662 (explaining that under *Samson v. California*, 547 U.S. 843, 126 S.Ct. 2193 (2006) and *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587 (2001), "the condition of probation (or parole) is not only meaningful but, in the words of the Court, 'salient' . . . and can

be dispositive of the issue of whether a probationer has an expectation of privacy that society would recognize as legitimate"); *see also*, *United States v. Lara*, 815 F.3d 605, 610-12 (9th Cir. 2016). To adhere to the notice the State has given a probationer or parolee as to where the person's privacy rights are diminished and what it can searched, the State must abide by the plain terms of the notice.

The State cites the Court's statement in *Peoples*, ¶ 17, that a probation/parole officer can search a person's "residence or property" (Appellee's Br. at 29), but *Peoples* involved the search of a residence and not the search of a cell phone, and none of the cases *Peoples* relied upon involved the search of a cell phone. *Riley* in particular makes clear a cell phone is unlike other property, and the privacy interests in its contents are particularly acute. *See Riley*, 573 U.S. at 393, 134 S.Ct. at 2488-89. Unlike the enclosed areas within a residence that fall within a probationer/parolee's "residence," *see Moody*, ¶ 27, a cell phone can be anywhere and is expected to be taken everywhere. A cell phone plainly does not constitute a person's "person, vehicle, or residence" under Mont. Admin. R. 20.7.1101(7), nor is it close to being "established" that it does. *See Peoples*, ¶ 17.

Since a "cell phone" is not authorized to be searched under Mont. Admin. R. 20.7.1101(7), the search here fails under the first *Peoples* criteria. *See Peoples*, ¶ 17; *Moody*, ¶ 26; *Fletcher*, 978 F.3d at 1018 ("Because the search of Fletcher's phones does not 'satisfy the regulation or statute at issue,' the Government does not meet the *Griffin* test.").)

2. The search of the photo gallery application was not supported by specific and articulable facts to reasonably suspect Brad was in violation of his parole and that evidence of this violation would be found in the photo gallery application.

The second and third *Peoples* criteria also are not present here. Again, *Peoples* explains a probation/parole officer may conduct a search if he has "reasonable cause to suspect, based on awareness of articulable facts, under the totality of the circumstances that the probationer may be in violation of his or her probation conditions or the criminal law." *Peoples*, ¶ 17. However, the resulting "warrantless search [must be] limited in scope to the reasonable suspicion that justified it in the first instance except to the extent that new or additional cause may arise within the lawful scope of the initial search." *Peoples*, ¶ 17; *see also*, *Peoples*, ¶ 22 (explaining a search must be "based

on reasonable suspicion of a probation/parole violation and the search [must] remain[] within the scope of that reasonable suspicion"). Any warrantless search that exceeds this scope is unconstitutional absent a different exception to the warrant requirement. *See Peoples*, ¶ 17.

The State acknowledges a warrantless probation/parole search must be based on a "'violation of a probation condition or the criminal law.'" (Appellee's Br. at 24.) Yet, the State has never put into evidence any express condition of parole Brad supposedly violated.[3] Nor did P.O. Miller ever identify what parole conditions he allegedly suspected Brad had violated when P.O. Miller opened the photo gallery application. The district court erroneously based its ruling on its conclusion that P.O. Miller reasonably suspected Brad was engaged in "suspicious activity." (*See* D.C. Doc. 36 at 3 (concluding only there was a "reasonable suspicion" of "suspicious activity" arising from Brad being in his parking lot after curfew).) But that is not the standard for a probation/parole search. *See Peoples*, ¶ 17. Indeed, even on appeal, the

[3] The State does not dispute that Mont. Admin. R. 20.7.1101(7), provides the controlling search condition in this case: "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."

State still fails to identify what parole conditions it contends P.O. Miller reasonably suspected Brad to be violating that justified obtaining Brad's phone, let alone when he chose to expand his search beyond what Brad consented to in order to fish around the photo gallery.

The State does not dispute that the time, manner, and content of the actual messages P.O. Miller viewed in Facebook Messenger did not arouse *any* suspicion regarding the communications being consistent with Brad's account that he was messaging on his cell phone in a non-criminal capacity with a family member in his parking lot on the night in question. (*See* D.C. Doc. 36 at 2 ("Parole Officer Miller states that he saw messages between Mefford and his daughter during the hours of concern.").) The State nonetheless argues P.O. Miller was justified in expanding the search by scrolling through Brad's photo gallery due to his concern that Brad's daughter's Facebook profile picture appeared older than he expected. (*See* Appellee's Br. at 27-28.) The State offers no explanation how this fact, and this fact alone, constituted "specific and articulable facts" to support a "reasonable suspicion" that Brad violated a parole condition—or what condition that might be. Even if it did, the State offers no explanation of how scrolling through the photo

gallery would either confirm or refute that the profile picture in Facebook Messenger was Brad's daughter, to thus demonstrate that the expanded search was reasonably within the scope of the reasonable suspicion that allegedly justified it. The search of the photo gallery application was not reasonably likely to reveal any evidence to satisfy P.O. Miller's curiosity as to why the person who was responding as Brad's daughter in Facebook Messenger appeared older than he expected, let alone provide evidence of a parole violation.

P.O. Miller's warrantless scrolling through the photo gallery was based on a hunch rather than specific and articulable facts demonstrating reasonable suspicion of a specific parole condition. Moreover, it was nothing more than a fishing expedition that far exceeded the scope of any reasonable suspicion that even arguably may have justified it. Thus, the State failed to show the photo gallery search satisfied the second and third criteria from *Peoples*.

Before moving on, Brad notes the Court should reject the State's procedural argument on appeal asking the Court to disregard Brad's arguments on appeal that P.O. Miller lacked reasonable suspicion under the probation/parole search exception. (Appellee's Br. at 18.)

The State bears the burden of demonstrating that a warrantless search falls within the narrow range of exceptions to the warrant requirement. *Zeimer*, ¶ 26. The State primarily relied upon the probation/parole search exception in district court (D.C. Doc. 18 at 2-3), which Brad disputed. (D.C. Doc. 29 at 2-7; 1/7/19 Tr. at 33-34; *see also*, D.C. Doc. 29 at 3 ("[T]he parole officer's suggestion that Brad, sitting in the warmth of his car to use the free, unprotected Wi-Fi that was not available from his apartment to talk to his daughter, is somehow suspicious or nefarious does not hold water.").) The district court understood that Brad's arguments included challenging reasonable cause and the scope of a proper probationary search (D.C. Doc. 36 at 2), but nonetheless accepted the State's argument and ruled the search was a valid probation/parole search supported by reasonable cause. (D.C. Doc. 36 at 3.) Brad's arguments are properly before the Court. *See*, *e.g.*, *Zeimer*, ¶ 53 (concluding the duration of an investigatory stop was properly before the Court as it was litigated by the parties and adjudicated by the district court); *see also*, *Becker v. Rosebud Operating*

Servs., 2008 MT 285, ¶ 18, 345 Mont. 368, 191 P.3d 435 (reasoning Becker's "overall theory or claim" had not "significantly changed").[4]

Under application of the three criteria of *Peoples* here, the warrantless search of the photo gallery application was invalid under the probation/parole search exception in Montana.

B. *Riley* must be considered.

If the Court concludes the search of Brad's personal photo gallery application was not authorized by Montana's established regulatory scheme or was unsupported by reasonable suspicion or exceeded the lawful scope of a warrantless probation/parole search, then the search fails under the probationary/parole exception and Court does not need to reach the overall constitutionality of this system.

But the State ignores Brad's final argument that, assuming the State has shown Montana's state law regulatory system does authorize the search of Brad's cell phone here, the Court must assess the

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[4] The State's related assertion is unavailing that Brad "acquiesced" in reasonable cause to search the phone as a probation/parole search when he consented to a limited search of his phone. (Appellee's Br. at 30.) A person who consents to a search is not conceding to sufficient legal cause for a search *outside* the person's consent. Moreover, Brad did not consent to a fishing expedition on his phone.

constitutionality of such a system in light of *Riley*. (Appellant's Br. at 32-40; *see* D.C. Doc. 29 at 2-7.) The U.S. Supreme Court in *Griffin* and *Knights* upheld state laws authorizing warrantless searches of probationers' residences upon a showing of particularized suspicion or reasonable grounds, and in *Samson* even upheld a state law authorizing a warrantless, suspicionless search of a parolee's person where the parolee was explicitly informed that such a condition was imposed. But the United States Supreme Court has never upheld a state law authorizing a search of a probationer's or parolee's cell phone without a warrant or a showing of probable cause.

The most relevant U.S. Supreme Court precedent is therefore *Riley*. *Riley* involved the search of a modern cell phone and shows that well-established exceptions to the warrant requirement, such as the search incident to arrest exception, do not necessarily and mechanically apply to a modern cell phone which contains "[t]he sum of an individual's private life." *Riley*, 573 U.S. at 394, 134 S.Ct. at 2489.

Here, the State's position is breathtakingly invasive. It would allow a search of any area on a cell phone —whether it pertain to personal photos, text messages, emails, location data, financial

information, political news, or health information—based on suspicion of what is, at most, now a compliance violation that would not authorize revocation on its own. *See* Mont. Code Ann. §§ 46-23-1001(3), -1025(2)-(3). The State effectively argues P.O. Miller had "'unbridled discretion to rummage at will'" in Brad's cell phone, *see Riley*, 573 U.S. at 399, 134 S.Ct. at 2492, based on the thin fact of a question or curiosity arising from Brad's daughter's profile picture. It would be unreasonable to hold that an admitted curfew violation by a few feet and the subsequent possible concern a parolee could be lying about non-criminal activity would justify a parole officer scrolling through the personal photo gallery application of the person's cell phone.

The State has not shown either the consent or the probation/parole search exceptions support the denial of the motion to suppress. The Court should reverse and dismiss the case.

III. Despite the State's arguments, Brad remains legally entitled to 558 more days of credit for time served.

As the State concedes, Brad's case is on all fours with *State v. Mendoza*, 2021 MT 197, 405 Mont. 154, 492 P.3d 509. (*See* Appellee's Br. at 34, 37.) In *Mendoza*, ¶¶ 4, 12, the Court concluded Mendoza was

entitled to credit for time served from the date in 2017 he was served with his arrest warrant on his 2015 offense until he was sentenced, as he remained incarcerated during that time. Likewise, as the State concedes, Brad was arrested for this charge on April 26, 2018, "bond was imposed, Mefford never made bail, the bond was never revoked, and he was never released from the warrant on his own recognizance." (Appellee's Br. at 37.) Brad is similarly situated to the defendant in *Mendoza* and its holding applies to Brad, too.

The State faults the holding in *Mendoza*, since Mendoza's 2015 offense, like Brad's 2016 offense, was committed prior to the 2017 effective date of Mont. Code Ann. § 46-18-201(9). (Appellee's Br. at 33-34.) *Mendoza* relied on *Killam v. Salmonsen*, 2021 MT 196, 405 Mont. 143, 492 P.3d 512. The State ignores that in *Killam*, ¶¶ 13-15, the Court discussed § 46-18-403(1) in addition to § 46-18-201(9). *Killam*'s application to a pre-2017 defendant in *Mendoza* shows that its holding that credit for time served is determined solely based on the record of the charge for which the defendant is being sentenced, applies under § 46-18-403(1) as well as § 46-18-201(9). *See also*, *Selage v. Green*, OP 21-0558 (January 18, 2022) (explaining for a 2016 defendant that "the

better practice" in light of *Killam* and *Mendoza* "is to award credit for time served based solely on the record in the case of the offense for which the defendant is being sentenced").

But the State entirely disregards *Killam*'s discussion of Mont. Code Ann. § 46-18-403(1), as well as Brad's opening brief arguments, and asks the Court to apply pre-*Killam*/*Mendoza* precedent under § 46-18-403(1). (Appellee's Br. at 35-39.) According to the State, the Court's earlier precedent in cases such as *State v. Kime*, 2002 MT 38, 308 Mont. 341, 43 P.3d 290 "makes sense." (Appellee's Br. at 37-38.) But, as the Court in *Killam* explained, this precedent was confusing and unwieldy.

As the State acknowledges, pre-conviction jail time credit is a matter of "legislative grace." (Appellee's Br. at 36-37.) The plain language of Mont. Code Ann. § 46-18-403(1) leaves no discretion in a district court to determine if "incarceration was directly related to the offense for which the sentence [was] imposed" as *Kime*, ¶ 16, requires. *See Killam*, ¶ 13. Nor does the statute contain by its plain terms what the State claims is its "stated purpose" to eliminate disparity between indigent and non-indigent defendants. (Appellee's Br. at 38.) The plain language of § 46-18-403(1) does not mandate, as the State argues, that

a defendant is not entitled to credit for time served "where the defendant would not have been released from custody had he or she been able to post bail in any event as a result of being held on a sentence related to an earlier offense." (Appellee's Br. at 37.)

The Court in *Killam*, ¶ 14, further explained the *Kime* analysis "has proven confusing and difficult for sentencing courts" who have inconsistently applied it. *E.g.*, *Mendoza*, ¶ 10 (noting the district court's remark at sentencing when determining credit that, "You know what? We're going to let the supreme court sort this out"). *Kime* depends on the factual impact of convictions not regularly documented in the current record of the sentenced-upon offense, *see Kime*, ¶¶ 14-16, and thus "allow[s] courts to ignore the clear documentation" existing in the record as to what credit is due. *See Killam*, ¶ 15.

This case is a perfect illustration of the problems with the old analysis under *Kime*. In arguing for the application of *Kime*, the State claims Brad "would still be incarcerated in MSP on his prior offense" if he had posted bond in this matter. (Appellee's Br. at 38.) The State's factual assertion is contrary to the record in this case. The State ignores that the record shows Brad was granted parole on his prior

conviction *two years* before his sentencing in this case, and he remained at Montana State Prison while this matter remained pending with its unposted bond. (*See* Appellant's Br. at 47-48 (citing 1/7/19 Tr. at 4; D.C. Doc. 53, Ex. B; 4/16/20 Tr. at 3 (noting Brad's appearance at sentencing from MSP).[5]) Contrary to the State's unsupported speculation and the district court's implicit conclusion, the record shows this pending criminal matter was the reason for Brad's incarceration after he was granted parole on his prior case.

The omission of a substantial amount of mandatory credit from Brad's sentence violates Brad's substantial rights. *See Killam*, ¶ 18 ("Pre-conviction jail time credit toward a sentence granted by statute is a 'matter of right.'" (citation omitted)). The State cannot have it both ways. Either Brad is entitled to additional credit of 558 days under *Mendoza*, or the State must follow its arguments under *Kime* to their logical end, whereupon Brad is entitled to remand for a determination

[5] Though the State makes the careful assertion "[t]here is no evidence in the record that Mefford was ever released from prison on parole, or any documentation of any parole or release order" (Appellee's Br. at 4), neither does the State dispute Brad "was paroled in June of [2018]." (1/7/19 Tr. at 4; D.C. Doc. 53, Ex. B (explaining, per an MSP official, that Brad had a parole disposition of "[p]arole to ISP . . .").)

of the date he was granted parole and was thus incarcerated due to this matter. (Appellant's Br. at 48-49.)

Respectfully submitted this 31st day of May, 2022.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Kristen L. Peterson
KRISTEN L. PETERSON
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced 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 4,840, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Kristen L. Peterson
KRISTEN L. PETERSON

CERTIFICATE OF SERVICE

I, Kristen Lorraine Peterson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 05-31-2022:

Eileen Joyce (Attorney)
155 W. Granite Street
Butte MT 59701
Representing: State of Montana
Service Method: eService

Jonathan Mark Krauss (Govt Attorney)
215 N. Sanders
P.O. Box 201401
Helena MT 59620
Representing: State of Montana
Service Method: eService

Alexander H. Rate (Attorney)
713 Loch Leven Drive
Livingston MT 59047
Representing: ACLU of Montana Foundation, Inc., American Civil Liberties Union
Service Method: eService

Electronically signed by Kim Harrison on behalf of Kristen Lorraine Peterson
Dated: 05-31-2022