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 APPELLEE

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE ISSUES

1. Was the district court's denial of Mefford's motion to suppress based on not clearly erroneous findings and substantial evidence that Mefford consented to the search of his cell phone and that the parole officers had reasonable cause and suspicion for a search under the probation and parole search exception to the warrant requirement?

2. Is Mefford entitled to additional credit against his already reduced sentence for time he served in Montana State Prison on an unrelated criminal conviction and sentence?

STATEMENT OF THE CASE

Appellant Bradley Mefford (Mefford) appeals from his judgment of conviction and sentence for sexual abuse of children, under Mont. Code Ann. § 45-5-625(1)(e) (2015), for possessing photographic images on his cell phone depicting children engaged in sexual conduct, actual or simulated—committed on or around November 29, 2016, while Mefford was on parole. (D.C. Docs. 98, 111, 115; Tr. at 341-42; *see* D.C. Doc. 95-96 (photographs admitted as trial exhibits filed under seal in manilla envelope).) Under the sentencing law applicable at the time, Mefford was subject to a maximum punishment of a fine not to exceed

$10,000 or imprisonment in the state prison for a term not to exceed 10 years, or both. (*See* D.C. Doc. 4 at 2.) Mont. Code Ann. § 45-5-625(2)(c).

The district court sentenced Mefford to five years in Montana State Prison (MSP), no time suspended; designated him as a level 1 (low risk to reoffend) sexual offender; waived all fines and surcharges; and granted credit for 163 days for "time served." (D.C. Doc. 111 at 2; 4/16/20 Tr. at 11 (no fine), 12 (no fine), 13-14.) By operation of law, Mefford's sentence was required to be served consecutively with Mefford's other sentences. *See* Mont. Code Ann. § 46-18-401(4) ("Separate sentences for two or more offenses must run consecutively unless the court otherwise orders.").

The district court stated its reasons for the sentence in the judgment:

> The Defendant was sentence[d] to Montana [State] Prison based upon the serious nature of the offense and his lack of accountability. The Court was also concerned with the Defendant's lengthy criminal history having been convicted of four (4) previous felony offenses. The Court notes that the professional persons reported that the Defendant may be amendable to treatment but that fact weighed against the continued criminal behavior dictates incarceration. **The Court had considered sentencing the Defendant to the maximum allowable but given the Defendant's lengthy incarceration after this incident believes this sentence to be a more appropriate option especially given the Court's understanding that after the expiration of this sentence, he still faces ten (10) more years of probation under the Flathead Judgments**.

(D.C. Doc. 111 at 3 (emphasis added).)

Acknowledgement of Mefford's "lengthy incarceration" resulting in the reduction in his sentence was consistent with the prosecutor's sentencing recommendation: "I would be asking, you know, anywhere from 5 years to the full 10 years, your Honor. We think that is commensurate with the fact that he was serving a sentence when this offense occurred." (4/16/20 Tr. at 9.) Given that Mefford was given a 5-year discount on his prison sentence, plus an additional 163 days of credit against that, he fared far better than counsel's "equitable argument" at sentencing for 1,234 days—about 3 years and 4 months—of credit. (*Id*. at 5-7, 11-12.)

Mefford concedes on appeal that: "After the images were discovered on November 29, 2016, [Mefford] was arrested that date for a parole violation arising from that conduct. . . . His parole was later revoked and he remained incarcerated at MSP until sentencing in this case. (4/16/20 Tr. at 6.)" (Appellant's Br. at 43.) Those facts are undisputed and clearly shown on the record. (*See* 1/7/19 Tr. at 12-13; D.C. Doc. 2 (arrest warrant in this case served on Mefford in prison on April 26, 2018); D.C. Doc. 5 (order to transport from prison for arraignment); D.C. Docs. 26-27 (motion and order to transport from and back to prison for suppression hearing); D.C. Doc. 40 (motion to vacate COP hearing—no need to transport from prison); D.C. Docs. 43-44 (motion and order to transport from and back to prison for pretrial conference); D.C. Docs. 55, 58 (motion and order to transport from and

back to prison for rescheduled pretrial conference and trial); D.C. Doc. 62 (minute entry of pretrial conference—Mefford remanded to custody of the sheriff for return to prison); D.C. Docs. 74-75 (record discussion and order to transport from prison three days before scheduled trial date); D.C. Docs. 84, 87 (orders to transport from prison for rescheduled pretrial conference and final trial setting of November 4, 2019); D.C. Doc. 89 (minute entry of October 21, 2019 pretrial conference—confirmed the November 4 trial setting, and remanded Mefford to the custody of the sheriff pending trial); D.C. Doc. 94 (minute entry—at the conclusion of trial, Mefford remanded for transport back to prison); D.C. Docs. 102, 105-06 (motions and order for Mefford to appear by Vision Net for sentencing as he is currently incarcerated at MSP); D.C. Doc. 108 (minute entry—Mefford appeared at sentencing by videoconference from MSP); D.C. Doc. 114 (filed waiver of personal appearance at sentencing; "Defendant acknowledges that it was his choice to appear at sentencing remotely from the Montana State Prison[.]").) There is no evidence in the record that Mefford was ever released from prison on parole, or any documentation of any parole or release order.

STATEMENT OF THE FACTS

On appeal, Mefford does not challenge the truth or sufficiency of the evidence presented at trial proving beyond a reasonable doubt that he committed sexual abuse of children by "knowingly possess[ing] any visual or print medium, including a medium by use of electronic communication in which a child is engaged in sexual conduct, actual or simulated[.]" Mont. Code Ann. § 45-5-625(1)(e) (2015). (*See* D.C. Doc. 97 (Instrs. 12-18).) In regard to the photographs discovered on Mefford's phone that were introduced at trial, Mefford admitted in his typed verbatim statement in the PSI: "It was my phone, I put these images on it. And I[']m responsible for it." (D.C. Doc. 109 at 4.)

Prior to trial, the district court denied Mefford's motion to suppress evidence obtained from a consensual search of his smart phone during a lawful investigation of parole violations by two probation and parole officers, Jerry Finley and Jacob Miller. (*See* D.C. Docs. 17-18, 29-30, 36; 1/7/19 Tr.) Officer Miller testified at the suppression hearing. (1/7/19 Tr. at 7-15.) Mefford also testified. (*Id*. at 16-31.)

Mefford's motion to suppress was based solely on the argument that the search of his cell phone was illegal because it exceeded the scope of his consent to search, and therefore all of the evidence obtained should be suppressed, including what was obtained by a subsequent, valid search warrant. (D.C. Doc. 17 at 4-11.) While Mefford acknowledged the rule that warrantless probationary searches

require "reasonable cause," he did not argue that the parole officers in this case lacked reasonable cause for the search of his phone—relying instead on his challenge to the scope of consent. As he argued, first:

> Probationers and parolees have a diminished expectation of privacy. A probation or parole officer may search a probationer's or a parolee's residence, person, or vehicle without a warrant only if the officer has reasonable cause to do so. *State v. Moody*, 2006 MT 305, ¶ 12, 334 Mont. 517, 148 P.3d 662; Mont. Admin. R. 20.7.1101(7). Absent reasonable cause to search a parolee's residence, person, or vehicle, as determined by the offender's parole officer, law enforcement must have a warrant or exception thereto to search anything else. *Id*. Consent is one of the recognized exceptions to the warrant requirement.

(*Id*. at 5.) Mefford clarified that the consent exception to the warrant requirement "was at play here." (*Id*. at 6.) Mefford argued not that the officers lacked reasonable cause, but that a cell phone was not a permissible object of a probation search:

> While parolees admittedly have a diminished right to privacy, the administrative rule that provides when law enforcement may conduct warrantless searches of parolees is clear that the only things the officer can search without a warrant or warrant exception are "the person, vehicle, and residence of the offender." Mont. Admin. R. 20.7.1101(7). Cellular phones, such as Mr. Mefford's, are notably absent from this list. Therefore, in order to search a parolee's phone, absent his consent, the PO must get a warrant.

(*Id*. at 7.) Mefford rehashed these arguments in his reply, again without any claim or argument that the parole officers in this case were without reasonable cause to search his cell phone. (D.C. Doc. 29 at 2-3, 6-7.)

In its response, the State argued that the "entire search was premised upon the Defendant's supervision and is as such a probationary search. The officer had reasonable cause to believe the Defendant was engaged in dishonest and suspicious activity and as it was discovered, he was right." (D.C. Doc. 18 at 1-3.)

Officer Miller testified that, "On November 29, 2016 we [he and Officer Finley] conducted a home check. And the purpose of the home check was because of the violations from the weekend prior. There were curfew violations." (1/7/19 Tr. at 7-8.) A few nights before the home check, Officer Miller was on call and observed GPS monitor points showing that Mefford was out in a parking lot outside of his residence between the hours of midnight and 3:00 a.m.—"So him being out of his residence was a curfew violation." (*Id*. at 8.) When the officers arrived at Mefford's residence, there was a conversation about why he had been out in the parking lot and Mefford said that he was on the phone with his daughter at the time. (*Id*. at 8-9.) Officer Miller explained that Officer Finley, who was Mefford's supervising officer, was the "contact officer and [Miller] was the cover officer. So he would have had the primary conversation with the defendant." (*Id*. at 10.) The conversation had to do with Mefford's violation of curfew by being out in his car that night. (*Id*.)

Based on what Officer Miller heard from the conversation between Mefford and Officer Finley, Miller asked Mefford if he "could view the phone to confirm

his story of being on the phone." (1/7/19 Tr. at 10.) Officer Miller had reason to look at Mefford's phone because, "besides trying to contact the defendant that prior weekend about him being in the parking lot, I tried to call the cell phone number that he had provided and it said it was disconnected." (*Id*.) In response to Officer Miller's request, Mefford "gave me consent to view the phone. And I did confirm there were messages at that time frame like the defendant said." (*Id*. at 10-11.)

However, the photo of the person associated with the messages on the Facebook Messenger app did not appear "to be his daughter; didn't appear to be a younger female like he had described." (1/7/19 Tr. at 11.) Because Officer Miller believed that the Messenger profile photo was not consistent with being Mefford's teenaged daughter, he "then viewed photos in [Mefford's] gallery to confirm that his daughter was the person sending these messages." (*Id*.)

As Officer Miller was going through the photos, he "observed photos that I knew, you know, not to be right." (1/7/19 Tr. at 11-12.) Specifically, Officer Miller "observed photos of young females who were nude, or young children that were in sexual acts with animals." (*Id*. at 12.) Officer Miller knew that Officer Finley intended to collect a urine sample from Mefford; because of the photos he had viewed, Officer Miller suggested that they do that back at the probation and parole office. (*Id*.) Officer Miller "told Officer Finley that we needed to do his urinary

analysis at the office and place him in the handcuffs to transport him back to our office." (*Id*.)

The officers detained Mefford and took him back to the office. (1/7/19 Tr. at 12.) Once back at the office, "[l]aw enforcement was then contacted and the phone was placed on airplane mode and turned over to law enforcement." (*Id*. at 12-13.)

On cross-examination, counsel confirmed that Officer Miller had asked Mefford if he could view Mefford's phone and that he was "requesting his consent." (1/7/19 Tr. at 14.) Counsel also confirmed that Officer Miller did not say "give me your phone because I have reasonable suspicion to do a probationary search." (*Id*.) Officer Miller agreed that he did not say that: "That is correct. I requested permission to search the phone." (*Id*. at 14-15.) Notably, Officer Miller did not agree that he did not have reasonable suspicion to do a probationary search—counsel did not ask that question. Counsel reiterated that Mefford "consented to that request" to search the phone—to which Officer Miller stated, "That's correct." (*Id*. at 15.)

Mefford testified at the suppression hearing and admitted that he was on "ISP," that there was a "list" of rules he had to follow, and that he wore a GPS ankle monitor. (1/7/19 Tr. at 26-27.) Mefford was well aware that he was subject to the conditions of supervision and that he had less expectation of rights—"Yeah, yeah, on certain things as far as to my knowledge, person, residence, vehicle,

correct?" (*Id*. at 28.) He admitted that this was not the first time that he been searched pursuant to the rules—"I think they came to my house and did a . . . a search, yeah." (Id.)

Mefford basically admitted to consenting to letting Officer Miller look at the phone to verify that he was messaging with his daughter. (1/7/19 Tr. at 20-21.) However, prompted by counsel, Mefford believed the ultimate search of his phone exceeded the scope of his consent. (*Id*. at 31.) Regarding his consent, Mefford testified that he told his girlfriend, Brandy:

> [H]ey, can you go upstairs and grab the phone for me so I can show him the messages from the time and date that was of concern.
>
> She did. She went and got the phone. She handed it to him.
>
> I told him, just go to the Messenger app; her name is Faith; and, you should be able to see the conversation and the time.

(*Id*. at 21.) Mefford himself did not have the phone in his possession or control and did not hand over the phone himself, but he said that he "gave Brandy permission to hand [Miller] the phone." (*Id*.) Mefford testified that he gave Officer Miller permission and the information "to go to verify my excuse." (*Id*. at 21-22.)

Mefford said that, while Officer Miller had his cell phone, he did not say that Officer Miller had "permission to look through everything in my phone, including my picture app or my diary app or my notes app and you can read my

e-mails" and he did not "consent to him or tell him it was okay for him to look through [his] phone ad nauseam." (1/7/19 Tr. at 22-23.) Mefford said that he "consented to [Miller] opening the Messenger app for Faith, my daughter, to view the conversation I was having." (*Id*. at 23.) Mefford went so far as to testify that if Officer Miller had asked him to see a picture of Faith, he "would have said, sure, no problem." (*Id*. at 23-24.) In Mefford's opinion, there was no reason for Officer Miller "to go rifling through the phone when [he] would have shown him the picture willingly." (*Id*. at 24.)

On cross-examination and redirect, Mefford reiterated his testimony that he gave Officer Miller "permission to look through the messages. I gave him permission to go into Messenger, the Messenger app, and look at the conversation I had with Faith." (1/7/19 Tr. at 30-31.)

Mefford presented no evidence that the parole officers lacked reasonable cause. On the contrary, Mefford effectively acknowledged that the parole officers did have a sufficient basis to search his phone, so he handed it over so the officers could verify that he was messaging with his daughter, in order to explain why he had inadvertently violated his curfew and had "overlooked the fact that, you know, I had a curfew and I was in violation by being outside of my front door sitting in my car using the wifi." (1/7/19 Tr. at 18, 20-21.) Mefford himself testified that the

reasonable cause for searching his phone was to explain the curfew violations that the officers were asking him about:

> [Officer Finley] thought I was lying to him. I got the kind of feeling that he thought I was lying to him or just blowing smoke up his tail.
>
> I said, look, I can verify why I was out past curfew, okay? I mean, I was talking to my daughter through Messenger on my phone, and I had to go a little bit outside my house and sit in my car to pick up wifi, you know, to use the Messenger app. I said, look, I can verify the time and the date, and I don't have a problem with that, you know.

(*Id*. at 20-21.) He proposed that the officers could verify his story "[t]hrough my phone." (*Id*. at 21.) As Mefford said, "I thought that . . . he wanted to know what I was doing out past curfew. And my only first instinct was to be honest with him and to try to show him . . . what I was doing." (*Id*. at 23.)

In argument, Mefford "absolutely concede[d]" that he had a diminished right to privacy based on his capacity as a person on parole and ISP. (1/7/19 Tr. at 33.) While acknowledging that consent was "obviously an exception to the warrant requirement," Mefford argued that the search of his phone exceeded the scope of his consent. (*Id*.) Mefford argued that the search of the phone was not a valid probation or parole search, under the administrative rules, because Mefford's cell phone was not his "person, a vehicle, or . . . residence." (*Id*. at 33-34.) As in his motion, Mefford did not argue Officers Miller and Finley lacked reasonable cause or suspicion to search the phone. *See supra* at 5-6. Mefford further asserted that a United States Supreme Court case provided that "the search [of] a cell phone . . . is

illegal"—although counsel acknowledged that the case "actually dealt with searches incident to arrest. So it's a little bit different in that here we are dealing with a probationary search and/or consent exception." (*Id*. at 34-35.)

The State argued that it was necessary to view this issue "from the reasonable expectation of the officer in this case." (1/7/19 Tr. at 40.) Accordingly, "at the time [the officers] responded to conduct the probationary search, . . . they went to [Mefford's] residence to confirm the known violations of the terms and conditions of his probation that were verified through the GPS." (*Id*.) As the investigation progressed, Mefford "provided this explanation to them and wanted to make verification to them as far as, oh, I was talking with my daughter." (*Id*.) Following up on that information resulted in additional suspicion on Officer Miller's part because, as he said, "the image that was associated with Messenger did not comport with what they would expect to be the daughter." (*Id*.) Based on that suspicion, "merely looking into one folder to see his pictures, to see whether there was a picture of his daughter corresponding with that, is reasonable expectation of him." (*Id*.)

Thus, the State argued, at that particular time, Officer Miller had the authority to search the phone without consent. (1/7/19 Tr. at 41.) The officers had the ability to go into the phone and follow exactly what Mefford told them, to "verify what I said, make sure this is what I said." (*Id*.) Thus, the officers "were

doing exactly what he told them to do: Look at my phone; see that I was texting my daughter. And when they went to verify that it was his daughter they found something that was not obviously his daughter, which was subject to further violations." (*Id*.) At that time, the phone was turned over to law enforcement and search warrants were made based upon what occurred at that particular time. (*Id*.) Therefore, the State argued that this "was a probationary search and totally authorized. We also believe . . . based on the testimony today, that he consented to the search." (*Id*.)

Based on the evidence presented at the suppression hearing and findings of fact in the order, the district court concluded: 1) that the search of Mefford's phone was clearly a probation/parole search as it was conducted as part of Mefford's probation/parole supervision; 2) there was reasonable cause to search Mefford's phone under a probationary search and therefore no warrant was required; and 3) the search of Mefford's cell phone did not exceed his consent as it pertained to the entire phone and not just one app. (D.C. Doc. 36 at 3-5.) The order sets forth the court's detailed findings of fact establishing the lawful extent of the probation search, the officers' reasonable cause and suspicion to search the phone, and Mefford's consent to search the phone. (*Id*. at 1-2.)

As to the first conclusion, the district court explained that the entire search was premised upon Mefford's supervision and therefore was a probationary search.

(D.C. Doc. 36 at 3.) Moreover, "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." (*Id*.)

As to the second conclusion, the district court reasoned that absent reasonable cause, law enforcement must have a warrant exception to search anything else beyond the probationer's person, residence, or vehicle. (D.C. Doc. 36 at 3 (emphasis removed).) The court noted that, while law enforcement may need a warrant to search "anything else," that is only if they lack reasonable cause. (*Id*.) Whether there was reasonable cause "is to be ascertained by the probation/parole officer and they are granted a degree of flexibility in that decision." (*Id*.) Here, the court concluded, "Mefford had violated the terms of his probation by being outside his apartment in the early morning, and was engaging in suspicious activity giving the officer reasonable cause to search his phone." (*Id*. at 3-4.) Therefore, a warrant was not needed. The district court also distinguished and discounted Mefford's reliance on *Riley v. California*, 573 U.S. 373 (2014), because this search was a probationary/parole search, not a search incident to arrest. (D.C. Doc. 36 at 4.)

Finally, as to the third conclusion, the court found on the record that Mefford's consent was not limited to one app on the phone, but constituted consent to look at the phone as a whole, and therefore law enforcement did not exceed its consent in searching the phone. (D.C. Doc. 36 at 5.) As the court explained:

"Mefford's behavior raised reasonable suspicion that he was engaged in suspicious activity giving the officer reasonable cause to search his phone. Mefford willingly gave over his phone to the officer with the understanding the consent was to allow the officer to verify the information Mefford had given." (*Id*.) Therefore, the court reasoned, consent applied to all areas of the phone needed to verify this information, not just the messaging app. (*Id*.)

The district court reiterated its two primary holdings—consent and reasonable cause for a probation search—stating its basis for denying the motion to suppress:

> Mefford was on parole when his phone was searched on November 29, 2016 and was subject to all the conditions of his parole. This included submitting to the search of his phone when his parole officer had reasonable cause. Additionally, when Mefford gave consent to his parole officer to look at his phone this consent included all areas needed to verify the information Mefford had given and therefore was not limited on only one part of the phone.

(D.C. Doc. 36 at 5.)

Testimony presented at trial, without objection and elicited by Mefford, was consistent with the district court's finding of fact that Mefford consented to the search of the phone. Officer Finley testified on cross-examination by Mefford that Mefford gave Officer Miller his phone "with his consent." (Tr. at 168.) Officer Miller testified on direct that he "requested permission from the defendant to view his phone to confirm his story about being on the phone, and the defendant gave me permission to look through his phone." (*Id*. at 173.) On cross-examination, Officer Miller

testified that when he went to Mefford's house to visit him and to check out his story, Mefford gave Miller his phone, and Mefford said that he gave Miller "permission to search his phone." (*Id*. at 177.) Mefford's girlfriend, Brandy, testified on direct examination by Mefford that Mefford asked her to give his phone to the officer and she was the one who, in fact, gave the officer the phone. (*Id*. at 307.)

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's denial of Mefford's motion to suppress, based as it was on the sole theory that Officer Miller's consensual search of the phone exceeded the scope of Mefford's consent. It was the district court's obligation to weigh the conflicting evidence and the credibility of witnesses. Having had the opportunity to hear the evidence and observe the witnesses live and in person, the court resolved these issues, and found and concluded that the search did not exceed the scope of Mefford's consent to search his phone. Because substantial evidence supports the court's findings, they are not clearly erroneous. This Court must defer to that determination and affirm, rather than reweigh the evidence and substitute its judgment based on the bare record.

Based on Mefford's consent to the search of the phone, this Court should affirm the denial of Mefford's motion to dismiss and need not reach Mefford's other arguments related to the propriety of the probation search. Moreover, the

proper application of the probation search exception was never a basis for Mefford's motion to suppress, his testimony, or his argument at the hearing. This Court should, therefore, disregard his claims stated for the first time on appeal that the parole officers lacked reasonable cause or suspicion for the search. Of course, this Court may affirm the district court's order in this regard because the district court properly applied the law authorizing probation searches based on reasonable cause and suspicion and made findings of fact supported by substantial evidence in the record.

This Court should also affirm Mefford's legal sentence which, in the discretion of the district court, already took into account credit for the time he was in prison on his prior conviction while this case proceeded to trial and sentencing.

ARGUMENT

I. The district court correctly denied Mefford's motion to suppress based on not clearly erroneous findings that Mefford consented to the search of Mefford's phone and that officers had reasonable cause and suspicion to search the phone pursuant to a lawful probation search.

A. Standard of review and applicable law

This Court reviews denials of motions to suppress evidence for whether the lower court's findings of fact are clearly erroneous. *State v. Peoples*, 2022 MT 4, ¶ 10, 407 Mont. 84, 502 P.3d 129. Findings of fact are clearly erroneous only if not supported by substantial evidence or the Court's review of the evidence leaves it

with a definite and firm conviction that the lower court misapprehended the evidence or was otherwise mistaken. *Id*. The lower court's interpretations and applications of law are reviewed de novo for correctness. *Id*.

It is not this Court's function, on appeal, to reweigh conflicting evidence or to substitute its own evaluation of the evidence for that of the district court. *State v. Wetzel*, 2005 MT 154, ¶ 11, 327 Mont. 413, 114 P.3d 269. In cases in which the district court must resolve conflicting testimony, if substantial evidence supports the district court's factual findings, then such findings are not clearly erroneous. *Id*. This Court defers to the district court in cases in which conflicting testimony is presented in recognition that the court had the benefit of observing the demeanor of witnesses and rendering a determination of the credibility of those witnesses. *Id*.

The Fourth Amendment of the United States Constitution and Article II, Section 11, of the Montana Constitution guarantee people the right to be free from unreasonable government searches and seizures "of their persons, homes, and other areas or things in which they have a reasonable expectation of privacy." *Peoples*, ¶ 12 (citations omitted). Warrantless searches and seizures, however, are per se unreasonable except under certain recognized and narrowly delineated exceptions to the warrant requirement. *Peoples*, ¶ 15.

One of the recognized exceptions to the warrant requirement arises when a citizen has knowingly and voluntarily consented to a search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). The Court looks to the totality of the circumstances to determine whether consent was voluntarily given. *Wetzel*, ¶ 16. Another exception is the probation search exception. *Peoples*, ¶ 17.

B. The district court's finding that Mefford consented to the search of his phone is not clearly erroneous.

The issue of Mefford's consent in this case is a fairly simple matter of fact and is dispositive of the ultimate issue that the district court properly denied Mefford's motion to suppress the fruits of the search of his cell phone based on his consent. The testimony of Officer Miller at the suppression hearing was that Officer Miller asked Mefford if he "could view the phone to confirm his story of being on the phone" during his curfew violations; that Mefford "gave [Officer Miller] consent to view the phone;" and that when Officer Miller asked Mefford if he could view his phone, he was requesting consent and "permission to search the phone," and Mefford "consented to that request." (1/7/19 Tr. at 10-11, 14-15.) Both officers' testimony at trial was consistent with Officer Miller's testimony at the suppression hearing: that the search was "with [Mefford's] consent" and that he gave permission to "look through his phone" and "to search his phone." (Tr. at 168, 173, 177.) *See Peoples*, ¶ 53 (Gustafson, J., dissenting; on appeal from an order granting or denying a motion to suppress, a reviewing court may consider

evidence subsequently received during trial) (citing *State v. Sharp*, 217 Mont. 40, 43, 702 P.2d 959, 961 (1985)).

Mefford, for his part, did not dispute the fact that he consented to Officer Miller's search of his phone—he sent Brandy to go get the phone from upstairs and gave her permission to hand it to Officer Miller—but he testified that his permission was limited to looking at the Facebook Messenger app on the phone to verify he was communicating with his daughter at the time of his curfew violations. (1/7/19 Tr. at 20-24.) After that limited purpose of the search was completed, Mefford said, Officer Miller's viewing anything else on the phone exceeded the scope of his consent. (*Id*. at 31.)

Obviously, Mefford's testimony conflicts with Officer Miller's testimony, which did not indicate any such limitation on the scope of Mefford's consent to search. Officer Miller "requested permission to search the phone," and Mefford "consented to that request." As the district court found: "Parole Officer Miller asked if he could look at Mefford's phone to confirm this. The testimony of both Parole Officer Miller and Mefford state that Mefford gave permission for Parole Officer Miller to look at the phone." (D.C. Doc. 36 at 2.) The court found that Mefford's consent was not limited to a single app on the phone, but constituted consent to look at the phone as a whole. (*Id.* at 5.)

Based on the applicable standard of review in this case, *Wetzel*, ¶¶ 10-11, the district court's findings were not clearly erroneous based on Officer Miller's testimony: Mefford consented to the search of the phone as a whole, and his consent was not limited to a single app or a limited search. It bears repeating that it is not this Court's function on appeal to reweigh conflicting evidence, make credibility determinations within the purview of the district court, or substitute its evaluation of the evidence for that of the district court. *Wetzel*, ¶ 11. In cases like this, where a district court must resolve conflicting testimony—consent to search the phone or limited consent to search one app on the phone—then the court's findings are not clearly erroneous if substantial evidence supports them. *Id*.

Substantial evidence supports the district court's findings here, despite Mefford's conflicting testimony. The district court could discount or disbelieve Mefford's self-interested version of events. It is basic jurisprudence that the district court had the benefit of observing the demeanor of both Officer Miller and Mefford, and was the sole judge of their credibility. *Wetzel*, ¶ 11. This Court is not in the position now to substitute its judgment on appeal and must defer to the district court's determination of the weight to be given the conflicting testimony and the witnesses' credibility. Thus, the district court's findings are amply supported by Officer Miller's testimony and are not clearly erroneous. *See Wetzel*, ¶ 20.

C. The district court's findings that officers had reasonable cause to search Mefford's phone under the purview of a lawful probation/parole search was not clearly erroneous.

Because the basis for Mefford's motion to suppress was solely that the search of his cell phone exceeded the scope of Mefford's consent (s*ee* D.C. Doc. 17 at 4-7; 1/7/19 Tr. at 33-35), and the record clearly supports the district court's determination that Mefford consented to the search of the phone without limitation, *supra*, this Court need not consider Mefford's challenge now raised on appeal that the search of the phone was an invalid probation or parole search. As was argued above and is clear on the record, the search here was legal based on Mefford's consent, therefore it is unnecessary and irrelevant to also consider whether the search was also lawful as a probationary search.

Moreover, Mefford provided no evidence or argument at the suppression hearing that the parole officers lacked reasonable cause or suspicion that Mefford had violated the conditions of supervision and that a search of the cell phone was therefore necessary. It is well established that this Court will not address an issue raised for the first time on appeal, or a party's change in legal theory. *See*, *e.g.*, *State v. Buck*, 2006 MT 81, ¶ 109, 331 Mont. 517, 134 P.3d 53.

Mefford did not argue that the evidence found on his phone should be suppressed because the parole officers did not have a sufficient legal basis to search the phone under the probation search exception to the warrant requirement.

Regardless, the record shows that the district court's findings of fact were not clearly erroneous as applied to the established law relating to probation searches.

Under the probation search exception to the warrant requirement, a probation officer may search a probationer's "residence and property," or cause them to be searched by another officer, without a warrant or probable cause "for evidence of violation of a probation condition or the criminal law" under the following circumstances:

> (1) such searches are generally authorized by an established state law regulatory scheme that furthers the special government interests in rehabilitating probationers and protecting the public from further criminal activity by ensuring compliance with related conditions of probation and the criminal law; (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 is 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 (citations omitted). This Court has explained that:

> The constitutional justification for dispensing with the more stringent warrant and accompanying probable cause requirements under the over-arching reasonableness requirements of the Fourth Amendment and Article II, Section 11 are that, **unlike ordinary citizens who are entitled to the full breadth of constitutional privacy protection, probationers have significantly diminished subjective and objective expectations of privacy**.

Id. (emphasis added). As he must, Mefford conceded in district court and concedes on appeal that his expectations of privacy as a parolee are significantly diminished.

The undeniably diminished expectation of privacy of parolees and probationers is based on:

> (1) the nature of probation as criminal punishment in the form of conditional liberty granted as a matter of sentencing grace; (2) their resulting awareness and expectation that they will thus be subject to extraordinary government scrutiny while on probation; (3) the government's offsetting special needs and compelling interests in probationer rehabilitation and public safety through close monitoring and enforcement of compliance with conditions of probation and the criminal law; and (4) recognition that probationers are more likely than ordinary citizens to violate the law and have greater incentive to attempt to conceal such violations and immediately dispose of incriminating evidence.

Id.

The Court has held that the reasonable cause standard is substantially lower than the probable cause standard required by the Fourth Amendment because of the probationer's diminished expectation of privacy. *State v. Moody*, 2006 MT 305, ¶ 12, 334 Mont. 517, 148 P.3d 662. Although it remains unsettled whether the reasonable suspicion standard for the probation search exception is the substantial equivalent of the articulable particularized suspicion standard for the investigative stop exception, this Court has said that principles of constitutional reasonableness "at least require some specific and articulable factual basis known to the probation officer upon which to reasonably suspect" that the probationer may be in violation of his or her probation or the criminal law. *Peoples*, ¶ 18. The record in this case is undisputed that the officers had such a specific and articulable factual basis to

reasonably suspect that Mefford was in violation of his parole—that is why they did a home check, that is why they requested consent to search Mefford's phone, that is why Mefford let them search his phone.

In applying that standard, this Court has determined that a probation officer is granted a "degree of flexibility" to determine how to exercise his or her supervisory powers. *State v. Burke*, 235 Mont. 165, 169, 766 P.2d 254, 256 (1988). Further, whether a probation search was justified by reasonable suspicion of violation of a probation condition or the criminal law "is a factual inquiry" under "the totality of the circumstances" in each case. *Peoples*, ¶ 18 (quoting *State v. Fischer*, 2014 MT 112, ¶ 11, 374 Mont. 533, 323 P.3d 891; *State v. Fritz*, 2006 MT 202, ¶ 10, 333 Mont. 215, 142 P.3d 806).

As found by the district court, the search of Mefford's cell phone was a valid probationary search supported by reasonable cause based on the following facts:

> The criminal charges and the pending motion arise out of a search of Defendant Bradley Mefford's cellphone by his parole officer, Jake Miller. This occurred on November 29, 2016 at Mefford's home . . . in Butte, Montana. Mefford was on parole at the time[.]
>
> Three days prior, on November 26, 2016, Parole Officer Miller had observed that Mefford was outside his apartment in the parking lot from midnight to around 3:00 a.m. according to his GPS unit. Parole Officer Miller attempted to contact Mefford around 2:30 a.m., but his phone was disconnected.
>
> On November 29, 2016, Parole Officer Miller, accompanied by Parole Officer Jerry Finley, went to Mefford's apartment to conduct a

> home check. Parole Officer Finley asked Mefford why he had been in the parking lot, a violation of curfew, on November 26, 2016. Mefford stated he had been on the phone talking on a messaging app to his daughter in California. Parole Officer Miller asked if he could look at Mefford's phone to confirm this. The testimony of both Parole Officer Miller and Mefford state that Mefford gave permission for Parole Officer Miller to look at the phone. Parole Officer Miller states that he saw messages between Mefford and his daughter during the hours of concern.

(D.C. Doc. 36 at 1-2.) But that was not the end of the story and the court found that the initial look at the phone raised additional suspicions:

> However, Parole Officer Miller states that the cover photo of the person sending the messages did not look like a young girl, so Parole Officer Miller went to the photos app and began scrolling through the photos to see if there was a picture of his daughter that corresponded. While scrolling through the photos, Parole Officer Miller observed several pornographic photos of young girls engaged in sexual acts, some with a dog. Mefford was then placed in handcuffs and taken to the parole office for a UA. The officers then went back to the house to collect any electronic device that could potentially contain child pornography. Law enforcement later obtained two search warrants and Mefford was charged with approximately 30 images of children engaged in sexual conduct, actual or simulated, a felony, in violation of MCA § 45-5-625 (2015).

(*Id*. at 2.)

Based on these facts constituting the totality of the circumstances, the district court concluded both that the search of Mefford's phone was clearly a probation/parole search as it was conducted as part of Mefford's supervision and that there was reasonable cause to search Mefford's phone under a probationary search—therefore no warrant was required. (D.C. Doc. 36 at 3-4.) Consistent with

Mefford's own undisputed testimony and understanding about the rules of his supervision and the curfew violations, *see supra* at 9-12, the court concluded that "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." (*Id*. at 3.) Clearly, the entire search was premised upon Mefford's supervision and therefore was a probationary search. (*Id*.)

The district court reasoned that, absent reasonable cause, law enforcement must have a warrant exception to search anything else beyond the probationer's person, residence, or vehicle. (D.C. Doc. 36 at 3.) The court noted that, while probation officers may need a warrant to search "anything else," that is only if they lack reasonable cause. (*Id*.) Whether there was reasonable cause "is to be ascertained by the probation/parole officer and they are granted a degree of flexibility in that decision." (*Id*.) Here, the court concluded, "Mefford had violated the terms of his probation by being outside his apartment in the early morning, and was engaging in suspicious activity giving the officer reasonable cause to search his phone." (*Id*. at 3-4.) Therefore, a warrant was not needed.

The district court also distinguished and discounted Mefford's reliance on *Riley*, *supra*, because the search here was a probationary/parole search, not a search incident to arrest. (D.C. Doc. 36 at 4.) The district court reiterated that Mefford was on parole when his phone was searched on November 29, 2016, and

he was subject to all the conditions of his parole—which included submitting to the search of his phone when his parole officer had reasonable cause. (*Id*. at 5.)

The district court's denial of Mefford's motion to suppress was based on not clearly erroneous findings of fact supported by substantial evidence in the record. Furthermore, the court's order was directly in line with the Court's analysis of the basis and standards for parole and probation searches in Montana, most recently and thoroughly discussed in *Peoples*, *supra*. The district court correctly applied the law to the facts of this case as they were established by substantial evidence in the record.

Mefford argues that a parole officer cannot search a parolee's cell phone—apparently even with reasonable cause or reasonable suspicion—because a phone does not fall within the ambit of the parolee's person, vehicle, or home according to administrative rule. But the ambit of a probation search is broad and flexible: officers may search a probationer's "residence and property." *Peoples,* ¶¶ 17-18; *Burke,* 766 P.2d at 256. Other things—as ruled by the district court—such as "the enclosed areas of a probationer's residence (closets, cabinets, drawers and the like)"—may be searched as long as the parole officers have reasonable cause. *Moody*, ¶ 27. Parole searches with reasonable cause have not been limited to such narrow constraints as Mefford would have this Court impose in this case. The ability of parole officers to conduct searches of the person and belongings of a

parolee should not be dictated by the object to be searched so much as by the reasonableness of the cause or suspicion of the parole violations at issue.

The illogic of Mefford's argument is especially evident in a case like this, where Mefford himself knew what the problem was—his supposedly unwitting curfew violations—and he helped to facilitate the means for officers to verify or dispel their stated concerns by handing over the property to be searched, his phone. Whether the Court calls that consent, as above, or a probation search based on reasonable cause and suspicion matters little in the end. But to exclude a single kind of property, object, or thing from the rule that allows reasonable searches of parolees and their things so long as reasonable cause exists goes beyond the bounds of the law and the facts and circumstances of this case—especially where Mefford essentially acknowledged and acquiesced in the reasonable cause to search that thing in the first place.

To say, in effect, that a parole officer can never have reasonable cause to search a parolee's cell phone is unsupported by this Court's established interpretation of the law. Any restraint on the ability of parole officers to investigate articulable suspicions of parole or criminal violations by parolees, based on their concededly diminished expectations of privacy, should not be based on the "what" of the object to be searched, but on the "why." That is the purpose of

the reasonable cause standard. That is the flexibility granted to probation and parole officers under the law as applied by this Court.

As long as the cause and suspicion to search is reasonable—as the district court found in this case based on substantial evidence—it should not matter whether officers are looking in a cupboard or a cell phone. Neither the law nor the facts in this case warrant suppression of the evidence found on Mefford's phone.

II. Mefford is not entitled to more credit for time served while he was incarcerated at MSP on an unrelated conviction.

A. Standard of review

This Court reviews a district court's sentence for legality. *State v. Parks*, 2019 MT 252, ¶ 7, 397 Mont. 408, 450 P.3d 889. 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. *Id*. Legality is a question of law that this Court reviews de novo. *Id*.

B. Because Mefford's offense was committed in 2016, neither Mont. Code Ann. § 46-18-201(9) (2017) nor this Court's decisions in Killam and Mendoza apply or control Mefford's statutory claim for credit against his sentence.

On appeal, Mefford claims additional credit against his sentence in this case for the time he concedes was spent incarcerated in MSP. Mefford asserts that his "case is controlled by" *State v. Mendoza*, 2021 MT 197, 405 Mont. 154,

492 P.3d 509. (Appellant's Br. at 44.) Mefford also relies on *Killam v. Salmonsen*, 2021 MT 196, 405 Mont. 143, 492 P.3d 512, which was a companion case to, and orally argued at the same time as, *Mendoza*.

Montana sentencing law has long provided that people "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[.]" Mont. Code Ann. § 46-18-403(1) (credit for incarceration prior to conviction); *see Killam*, ¶ 15 ("Some version of this statute has existed since 1947. Rev. Codes Mont. 1947, § 95-2215.")[1].

In 2017, the Montana Legislature enacted Mont. Code Ann. § 46-18-201(9) (2017), which provides: "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." Both *Killam* and *Mendoza* interpreted and applied Mont. Code Ann. § 46-18-201(9) for the purposes of granting sentencing credit. *See Mendoza*, ¶ 11 ("Our holding in *Killam* is controlling and discusses application of

[1] By way of clarification, the predecessor statute to Mont. Code Ann. § 46-18-403—R.C.M. 1947, § 95-2215—was enacted in 1967. *See* Sec. 1, ch. 196, L. 1967 (an act creating the Montana Code of Criminal Procedure, Title 95 of the Revised Codes of Montana, 1947.)

§ 46-18-201(9), MCA, in determining what credit must be given for pre-sentence incarceration. *Killam*, ¶¶16-17".).

However, as a matter of law, Mont. Code Ann. § 46-18-201(9) has no bearing on sentencing Mefford for his 2016 criminal offense because that statute applies only to criminal offenses committed after June 30, 2017. *See* 2017 Mont. Laws, ch. 321, §§ 24, 44 (the bill enacting § 46-18-201(9), H.B. 133, applied only to "offenses committed after June 30, 2017"); *State v. Thomas*, 2019 MT 155, ¶¶ 3, 9, 14, 396 Mont. 284, 445 P.3d 777 (same); *State v. Wolf*, 2020 MT 24, ¶ 10, 398 Mont. 403, 457 P.3d 218 (same); *Linwood v. Salmonsen*, 405 Mont. 537, 495 P.3d 421 (2021) (same). This Court has consistently declared that the law in effect at the time an offense is committed controls the possible sentence for the offense. *State v. Tirey*, 2010 MT 283, ¶ 26, 358 Mont. 510, 247 P.3d 701.

Since Mefford committed his offense in 2016, he cannot rely on the provisions of Mont. Code Ann. § 46-18-201(9) because those provisions did not yet apply. Consequently, Mefford's claim for credit against his sentence cannot be "controlled by *Mendoza*," or *Killam* for that matter, because the new credit for time served rule adopted in *Killam* and applied in *Mendoza* was based solely on the provisions of Mont. Code Ann. § 46-18-201(9)—a statute that does not apply to Mefford's case.

Furthermore, because Mont. Code Ann. § 46-18-201(9) does not apply to sentencing for offenses committed prior to July 1, 2017, the decision in *Mendoza* appears to have been wrongly decided, because the sentence imposed there was for a 2015 offense, to which § 46-18-201(9) (2017) did not apply. *See Mendoza*, ¶ 4 ("Mendoza was charged by citation in Lake County, Montana, for felony Driving Under the Influence of Alcohol or Drugs (DUI) on September 3, 2015."). (*See* Appellant's Br. at 44 ("Mendoza was charged in September 2015 with driving under the influence occurring in September 2015. *See Mendoza*, ¶ 4.").) This 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 quotations omitted). Whatever the merits of *Killam* based on Mont. Code Ann. § 46-18-201(9), the application of a statute to a case to which it expressly does not apply is "manifestly wrong."

Whether or not this Court takes this opportunity to correct its manifest error in *Mendoza*, the fact remains that neither the terms of Mont. Code Ann. § 46-18-201(9), nor its interpretation in *Killam* and *Mendoza*, are applicable in this case. Thus, Mefford's case is governed by the parameters and affirmative mandates of Mont. Code Ann. § 46-18-403(1) as the applicable sentencing statute, along with the cases interpreting that statute since 1967.

C. Under Mont. Code Ann. § 46-18-403(1), Mefford received a windfall of 163 days credit to which he was not legally entitled, therefore this Court should affirm his legal sentence as imposed.

This Court has consistently read the plain language of § 46-18-403(1)—"incarcerated on a bailable offense [for which] a judgment of imprisonment is rendered"—to mean that each day of incarceration must be credited to a defendant's sentence, but "only if that incarceration was directly related to the offense for which the sentence [was] imposed." *State v. Kime*, 2002 MT 38, ¶ 16, 308 Mont. 341, 43 P.3d 290, overruled in part on other grounds by *State v. Herman*, 2008 MT 187, ¶ 12, 343 Mont. 494, 188 P.3d 978. Conversely, "[a] defendant is not entitled to receive credit for pre-conviction time served on an offense if he is not incarcerated for that particular offense." *State v. Henderson*, 2008 MT 230, ¶ 9, 344 Mont. 371, 188 P.3d 1011 (citing *State v. Erickson*, 2005 MT 276, ¶ 25, 329 Mont. 192, 124 P.3d 119 (no credit where defendant "not incarcerated on that charge")). The Court's plain reading of the statute only makes sense as there would be no logical or penological basis to grant credit against a prison sentence for pretrial incarceration that has little or nothing to do with the offense at issue. Put another way, this Court has recently said that "[t]he sentencing court must determine **for what charge the defendant was being detained** and **if the charge is bailable**." *Parks*, ¶ 13 (emphasis added) (citing *State v. Hornstein*, 2010 MT 75, ¶ 17, 356 Mont. 14, 229 P.3d 1206; *Kime*, ¶¶ 13, 16).

Once a judgment of imprisonment has been entered for a "bailable offense"—plainly any non-death-penalty offense, Mont. Code Ann. § 46-9-102(1), *State v. Race*, 285 Mont. 177, 181-82, 946 P.2d 641, 643-44 (1997)—a person is entitled to credit for each day of incarceration prior to and after the conviction. *State v. McDowell*, 2011 MT 75, ¶ 27, 360 Mont. 83, 253 P.3d 812; *Hornstein*, ¶¶ 12-13. The Court has stated a number of rationales for the rule, including that:

> It is not within the contemplation of the statutes which provide credit for incarceration prior to conviction that a defendant should receive credit for incarceration time served by the defendant on the conviction of another offense. Otherwise, a second offender would be entitled to receive credit on a basis not available to a first offender.

In re Davis, 1979 Mont. LEXIS 800, at *1, *4-5 (No. 14240, Apr. 23, 1979) (opinion and order on original proceeding/amended petition for postconviction relief). The Court has also declared that:

> [T]he general purpose of § 46-18-403(1), MCA, is to eliminate the disparity of treatment between indigent and nonindigent defendants. In other words, credit for time served is given so as not to penalize indigent defendants who are unable to post bail and must remain in custody until they are sentenced when nonindigent defendants may secure their release and remain free during that time period. That purpose is not served by crediting a defendant's sentence 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.

Kime, ¶ 15; *see Parks*, ¶ 10; *Hornstein*, ¶ 13. Furthermore, the Ninth Circuit has said: "The origin of the modern concept of pre-conviction jail time credit upon the term of the ultimate sentence of imprisonment is of legislative grace and not a

constitutional guarantee." *Gray v. Warden of Montana State Prison*, 523 F.2d 989, 990 (9th Cir. 1975).

In this case, the State does not dispute that Mefford was arrested on the "bailable offense" of sexual abuse of children on April 26, 2018, a bond was imposed, Mefford never made bail, the bond was never revoked, and he was never released from the warrant on his own recognizance. That is the date from which Mefford seeks credit on appeal and for all those reasons.

But this Court's prior rulings applying Mont. Code Ann. § 46-18-403(1)—before Mont. Code Ann. § 46-18-201(9) was enacted—are clear, have been consistently applied, and have not been overruled: 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, and the statute does not contemplate that a defendant should receive credit for incarceration time served by the defendant on the conviction of another offense. *See In re Davis*, *Kime*, *Parks*, *Hornstein*, *supra*. That is the situation here. From the time Mefford was charged with the instant offense and arrested on that charge to the time he was sentenced here, Mefford was incarcerated at MSP on a conviction and sentence for another offense.

The Court's consistent holdings provide that Mont. Code Ann. § 46-18-403(1) will not be applied to give credit for time incarcerated serving another

sentence. The rule makes sense given the statute's stated purpose to equalize treatment between indigent defendants and those who can afford to make bail and between serial offenders and first offenders. Imagine if Mefford had made bail in this case or had been released on his own recognizance from the warrant holding him. The "free Mefford" would still be incarcerated in MSP on his prior offense and he would have no right to claim sentencing credit for that prison time serving that other sentence. But if this Court were to grant Mefford the credit he requests now—because he was incarcerated at MSP—then he would receive a windfall in the form of a reduction in sentence because of credit for prison time which the "free Mefford" would not get. That is why this Court does not grant credit under Mont. Code Ann. § 46-18-403(1) for time defendants serve for unrelated prior sentences, even if they are technically held on bailable offenses—they would not be released even if they made bail and it would be unfair to give such a person credit where a person who made bail in the pending case would get none.

Accordingly, in this case, Mefford was not legally entitled to any credit for the time he concededly served in MSP for another crime, conviction, and sentence while his trial and sentencing were pending. Having been granted 163 days of credit anyway, Mefford has no further claim for any more credit. The Court should affirm Mefford's legal sentence, which is within statutory parameters, and then some.

Moreover, this Court will not reverse a judgment for alleged error "that does not violate a defendant's substantial rights." *See, e.g., State v. Wilson*, 2022 MT 11, ¶ 34, 407 Mont. 225, ___ P.3d ___ (citing Mont. Code Ann. § 46-20-701(1)). "Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Mont. Code Ann. § 46-20-701(2). Mefford has a right to be sentenced to a legal sentence, including credit for time served, within statutory parameters and affirmative mandates. That would mean, in this case, that he could not be sentenced to more than 10 years, minus any credit that would be due. Here, the district court considered imposing the maximum sentence of 10 years, but exercised its discretion to impose a reduced sentence of only 5 years in consideration of Mefford's "lengthy incarceration after this incident." (D.C. Doc. 111 at 3.) The district court further reduced Mefford's sentence by 163 days with credit to which he was not due under any applicable legal authority. Mefford has no claim that his sentence was illegal, outside statutory parameters, or violative of his substantial rights.

/ / /

CONCLUSION

This Court should affirm Mefford's judgment of conviction and sentence for sexual abuse of children, upholding the district court's denial of Mefford's motion to suppress and its legal sentence.

Respectfully submitted this 15th day of April, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,981 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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