FILED
07/09/2019
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 17-0602

DA 17-0602

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 155

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MICHAEL JOE THOMAS,

Defendant and Appellant.

FILED
JUL 09 2019
Bowen Greenwood
Clerk of Supreme Court
State of Montana

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DC 16-0760
Honorable Mary Jane Knisely, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Moses Okeyo, Assistant Appellate Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Mardell Lynn Ployhar, Assistant Attorney General, Helena, Montana

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Submitted on Briefs: May 30, 2019

Decided: July 9, 2019

Filed:

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Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Michael Joe Thomas appeals his designation as a Persistent Felony Offender (PFO) for purposes of sentencing by the Thirteenth Judicial District Court, Yellowstone County, arguing the District Court lacked authority to sentence him under the 2015 PFO statute in effect at the time he committed his offense, and that he should have been sentenced under the 2017 amendments to the PFO statute. We affirm, and consider the following issue:

> *Did the District Court err by designating Thomas a PFO for sentencing purposes pursuant to § 46-18-501, MCA (2015)?*

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The State charged Thomas with felony driving under the influence of alcohol and other offenses alleged to have been committed on July 23, 2016. Based on a prior conviction for felony escape, the State filed a notice seeking designation of Thomas as a PFO under § 46-18-502, MCA (2015). In January 2017, a jury convicted Thomas of driving with a blood alcohol content above 0.08, fourth or subsequent offense, in violation of § 61-8-406(1)(a), MCA (2015), and acquitted him of an alternative charge. Thomas sought and was granted multiple continuances of his sentencing hearing, which was not conducted by the District Court until July 27, 2017.

¶3 Between the time of Thomas' offense and his sentencing, the 2017 Montana Legislature passed HB 133, which prospectively amended thirty-eight sections of the Montana Code Annotated and repealed three others. *See* 2017 Mont. Laws ch. 321. Most of HB 133's forty-four provisions addressed elements, definitions, or penalties of specific

offenses. *See* 2017 Mont. Laws ch. 321, §§ 3-4, 6-22, 26-28, 31-39. Additionally, HB 133 changed the definition of a PFO. *See* 2017 Mont. Laws ch. 321, § 23. Under existing law, the State could seek a PFO designation if an offender had one prior felony conviction within five years of the commission of the present offense, or had been released from a commitment imposed for the prior felony conviction within the last five years. *See* § 46-18-501, MCA (2015). The Legislature repealed one of the two PFO definitional sections, § 46-18-501, MCA, and revised the other definition within § 46-1-202(18), MCA. *See* 2017 Mont. Laws ch. 321, §§ 23, 40. The new definition requires two predicate felony convictions before the State may seek a PFO designation, upon a third felony conviction. Further, one of the three felonies must be a sexual or violent offense. *See* § 46-1-202(18), MCA (2017). Regarding timing, the Act was made effective on July 1, 2017. Consistent therewith, the Act included a separate applicability provision, which provided the Act would apply "to offenses committed after June 30, 2017."

¶4 At Thomas' July 27, 2017 sentencing hearing, his counsel acknowledged there had been a legislative revision to the PFO statute, but did not argue the change applied to Thomas. The District Court sentenced Thomas as a PFO under § 46-18-501, MCA (2015), imposing a ten-year prison sentence with no time suspended.

STANDARDS OF REVIEW

¶5 We review a criminal sentence imposing over one year of incarceration for legality. *State v. Moore*, 2012 MT 95, ¶ 10, 365 Mont. 13, 277 P.3d 1212. The District Court's

designation of Thomas as a persistent felony offender is a question of law that we review for correctness. *State v. Wilson*, 279 Mont. 34, 37, 926 P.2d 712, 714 (1996).

DISCUSSION

¶6 *Did the District Court err by designating Thomas a PFO for sentencing purposes pursuant to § 46-18-501, MCA (2015)?*

¶7 Thomas challenges the District Court's application of the PFO definition under the 2015 statute to his sentence, arguing he was entitled to the ameliorative amendment of the PFO definition within the 2017 Act that became effective before he was sentenced. The State concedes Thomas would not qualify for designation as a PFO as defined under the 2017 Act, but argues that, because Thomas committed his felony DUI offense on July 23, 2016, "the ameliorative effects of 2017 Mont. Laws, ch. 321 did not apply to him."[1]

¶8 In applying a statute, our purpose is to "ascertain the legislative intent and give effect to the legislative will[,]" *S.L.H. v. State Comp. Mut. Ins. Fund*, 2000 MT 362, ¶ 16, 303 Mont. 364, 15 P.3d 948, and our role "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." *Diaz v. Blue Cross & Blue Shield*, 2011 MT 322, ¶ 14, 363 Mont. 151, 267 P.3d 756 (internal quotations and citations omitted). Thus, legislative intent, in the first instance, is to be ascertained "from the plain meaning of the words used." *Mont. Vending, Inc. v. Coca-Cola Bottling Co. of Mont.*, 2003 MT 282, ¶ 21, 318 Mont. 1, 78

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[1] Although Thomas did not object to the application of the 2015 PFO statutes at his sentencing, we will review a criminal sentence on appeal despite a defendant's failure to object at sentencing if the defendant alleges the sentence is illegal or exceeds statutory mandates. *See State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979). We therefore address Thomas' claimed error.

P.3d 499. "Where the plain language of the statute is clear and unambiguous, no further statutory interpretation is necessary." *Diaz*, ¶ 14 (internal citation omitted); *State v. Stiffarm*, 2011 MT 9, ¶ 12, 359 Mont. 116, 250 P.3d 300 ("a statute is to be construed according to its plain meaning, and if the language is clear and unambiguous, no further interpretation is required.").

¶9 The plain language of HB 133 clearly expresses the Legislature's intent regarding the timing of the Act's application. The sections at issue, 2017 Mont. Laws, ch. 321, §§ 43-44, state:

> **Section 43. Effective date.** [This act] is effective July 1, 2017.
> **Section 44. Applicability.** [This act] applies to offenses committed after June 30, 2017.

Section 43 provides a special effective date making the Act effective on July 1, 2017. 2017 Mont. Laws, ch. 321, § 43. Consistent therewith, Section 44 provides that the Act, in its entirety, will apply "to offenses committed *after* June 30, 2017." 2017 Mont. Laws, ch. 321, § 44 (emphasis added). Taken together, Sections 43 and 44 unquestionably provide that the revisions enacted by the Act would not apply to offenses committed prior to July 1, 2017.

¶10 The Legislature further ensured that offenses committed prior to July 1, 2017 would continue to be governed under existing law by expressly making all of the Act's provisions, including the provision *repealing* the existing PFO definition, applicable only to offenses that occurred after June 30, 2017 ("[This act] applies to offenses committed after June 30, 2017."). In other words, the repealer, as part of the Act, has no application or effect on

statutes that govern offenses committed prior to July 1, 2017; rather, it operates to repeal those provisions only for offenses committed thereafter. Consequently, prior law remains effective for prior offenses. This contradicts Thomas' argument that "[n]othing in HB 133 expressly says to apply the old PFO designation when presently sentencing an offender for an offense committed before its effective date." To the contrary, the Legislature deliberately retained prior law for prior offenses by limiting the repeal of prior law to post-June 30, 2017 offenses. By doing so, the Legislature conformed HB 133 to the longstanding and often constitutionally necessary principle that "the law in effect at the time of the commission of the crime controls as to the possible sentence." *State v. Finley*, 276 Mont. 126, 147, 915 P.2d 208, 221 (1996) (*overruled in part by State v. Gallagher*, 2001 MT 39, ¶ 21, 304 Mont. 215, 19 P.3d 817).

¶11 Consequently, because Thomas committed felony DUI on July 23, 2016, well before the amendments enacted under HB 133 were made applicable to offenses, the ameliorative effects of the Act's revision of the PFO definition did not apply to him. Instead, the law in effect at the time of Thomas' offense—specifically here, the 2015 PFO definition—remained applicable, even though his sentencing occurred after the effective date of the Act itself. This is the plain and unambiguous "meaning of the words used." *Mont. Vending, Inc.*, ¶ 21.

¶12 Thomas nonetheless argues that because the Act "became effective" before he was sentenced, and the Act contained no savings clause, he is entitled to the benefit of the ameliorative PFO definition pursuant to our decision in *Wilson*, 279 Mont. 34, 926 P.2d

712. However, first, although HB 133 itself went into effect on July 1, 2017, the revisions therein never "became effective" upon Thomas' case because they were expressly limited to future cases, while prior law was retained for prior cases, as discussed above. Moreover, *Wilson* offers no support for Thomas because, unlike here, the Court there was presented with a legislative failure to "indicate under what law a defendant who committed a criminal offense prior to the repeal should be punished." *Wilson*, 279 Mont. at 40, 926 P.2d at 716. After Wilson's offense but prior to his sentencing, the Legislature repealed the statute permitting sentencing courts to designate a defendant a dangerous offender. *Wilson*, 279 Mont. at 41, 926 P.2d at 716. Unlike HB 133, the bill contained no provisions whatsoever governing the timing of its application, but simply repealed the former law outright. Relying on *In re Estrada*, 408 P.2d 948, 953 (Cal. 1966), we held that, lacking any direction from the Legislature about application of the repealed statute to current cases, a savings clause would have been necessary to preserve the former law's application to Wilson and, thus, Wilson was entitled to the benefit of the outright repeal of the statute. *Wilson*, 279 Mont. at 40, 926 P.2d at 716. *Estrada* had likewise involved an amendment to a statute that, as in *Wilson*, "did not directly or indirectly indicate whether [a defendant] should be punished under the old law or the new one." *Wilson*, 279 Mont. at 40, 926 P.2d at 716 (quoting *Estrada*, 408 P.2d at 953). In such situations, defendants are entitled to the ameliorative effects of the new legislation. *See State v. Reams*, 284 Mont. 448, 457, 945 P.2d 52, 58 (1997); *State v. Kebble*, 2015 MT 195, ¶¶ 49, 53, 380 Mont. 69, 353 P.3d 1175

(stating defendants entitled to the ameliorative effect of legislation absent legislative direction).

¶13 Significantly, here, the Legislature did not outright repeal the 2015 PFO designation, and did not fail to address the timing of the new Act's application. Rather, it limited the repeal of former law to post-June 30, 2017 cases, and coordinated the new provisions to apply only to those future cases. HB 133 did not suffer from the deficits for which we said in *Wilson* required a savings clause to preserve application of prior law to prior cases. While an explicit "savings clause" as an additional section of the bill would have been appropriate, the Legislature nonetheless provided the same content and direction by the manner it drafted the bill, clearly preserving application of the law then in effect to prior offenses. *Contra Wilson*, 279 Mont. at 40-41, 926 P.2d at 716 (vacating the dangerous offender designation because the statute authorizing that designation had been repealed, leaving "a clear absence of statutory authority to impose the dangerous offender designation."). Further, we have held that legislative drafting errors will not thwart the Legislature's clearly expressed intent. *See State v. Heath*, 2004 MT 126, ¶ 37, 321 Mont. 280, 90 P.3d 426.

¶14 By applying HB 133 to offenses according to the date of occurrence, rather than to the date of sentencing, the Legislature carefully avoided case processing pitfalls. If a more favorable PFO status had been made dependent upon a defendant's sentencing date, he would be incentivized to hinder and delay the process until the new law took effect. The Legislature avoided such difficulties by requiring application of the law in effect at the time

the offense was committed, both before and after the Act went into effect. The District Court properly sentenced Thomas as a PFO pursuant to § 46-18-501 (2015), MCA.

¶15 Affirmed.

/S/ JIM RICE
Justice

We concur:

Chief Justice

/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR
Justices

/S/ KAREN S. TOWNSEND
District Court Judge Karen S. Townsend
Sitting in for Justice Ingrid Gustafson

Justice Beth Baker, dissenting.

¶16 We have not addressed the precise question Thomas raises on appeal. *Wilson* is the closest we have come. Unlike the Court, however, I would conclude that the rule we articulated in *Wilson* and reaffirmed in *Reams* and *Kebble* is not satisfied by the language of HB 133. Consequently, Thomas is entitled to the benefit of the ameliorative changes in the PFO statute.

¶17 Based on ex post facto protections, we have explained that "the law in effect *at the time of the commission of the crime controls* as to the possible sentence." *Finley*, 276 Mont. at 147, 915 P.2d at 221 (emphasis in original).[1] Despite this broad statement, however, the Ex Post Facto Clause has no application when an amendment *mitigates* a punishment. *See State v. Coleman*, 185 Mont. 299, 318-19, 605 P.2d 1000, 1012 (1979) (holding that amendments that ameliorate punishment do not violate the Ex Post Facto Clause and suggesting that "the District Court may well have been *obligated* to apply the [amended] statutes as their changes benefited the accused").[2] *See also Rooney v.*

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[1] We have held that the Ex Post Facto Clause (*see* U.S. Const. art. I, § 10; Mont. Const. art. II, § 31) prohibits the application of *enhanced* penalties that become effective after the commission of the crime but before sentencing. *See, e.g.*, *Finley*, 276 Mont. at 147, 915 P.2d at 221-22 (discussing the Ex Post Facto Clause and holding that a district court may not defer its determination of an offender as dangerous or nondangerous until a later revocation hearing when the statute in place at the time of the crime did not authorize the district court to defer such a determination); *State v. Azure*, 179 Mont. 281, 282, 587 P.2d 1297, 1298 (1978) (holding that "[a] law which eliminates or delays a defendant's parole eligibility after the criminal offense has been committed is *ex post facto* as applied to that defendant"); *State v. Gone*, 179 Mont. 271, 280, 587 P.2d 1291, 1297 (1978) (same).

[2] This quote from *Coleman* is not binding precedent because the Court did not resolve on this basis the issue before it—whether the Court's prior declaration that Montana's death penalty statute was unconstitutional rendered the penalty unavailable in Coleman's case.

North Dakota, 196 U.S. 319, 325, 25 S. Ct. 264, 266 (1905) ("[A] statute which mitigates the rigor of the law in force at the time a crime was committed cannot be regarded as ex post facto with reference to that crime.").

¶18 We also have made clear that amendments to sentencing statutes have no application to sentences that already are final when the amendments come into effect. At later revocation proceedings, a defendant may not receive the benefits of an ameliorative statute that came into effect after his original sentencing. *See Rose v. McCormick*, 253 Mont. 347, 349, 834 P.2d 1377, 1378 (1992) (holding that a prisoner was not entitled to be designated as nondangerous under amendments that came into effect after his sentencing). Nor may a court apply in later proceedings amendments that would enhance the original sentence. *State v. Suiste*, 261 Mont. 251, 255, 862 P.2d 399, 401-02 (1993).

¶19 In *Wilson* we considered the Legislature's repeal of the dangerous offender enhancement statute, which occurred after Wilson committed the offense but before he was sentenced. We distinguished *Finley* because "the dangerous offender statute was repealed and could result in a mitigated punishment." *Wilson*, 279 Mont. at 39, 926 P.2d at 715. Finding no Montana case law on point, we relied on a California Supreme Court case, *In re Estrada*, 408 P.2d 948 (Cal. 1966). The *Estrada* court held that a defendant was entitled to be sentenced according to the ameliorative terms of amendments that became effective after the defendant had committed his underlying offense but before the defendant's trial, conviction, and sentencing. We explained that *Estrada*'s holding had two foundations. First, the amendments mitigating sentencing demonstrated legislative intent to decrease a

prior punishment that was too severe. Second, the general savings statute for criminal laws did not apply to sentencing statutes. We explained that "[a]lthough *Estrada* discusses the effects of an amended statute which mitigates punishment, its reasoning also applies to a repealed statute." *Wilson,* 279 Mont. at 40, 926 P.2d at 716. Like the statutory savings clause in California, Montana's general savings statute, § 1-2-205, MCA, "refers only to the 'law creating a criminal [offense],' and does not apply to sentencing statutes." *Wilson,* 279 Mont. at 40, 926 P.2d at 716 (quoting § 1-2-205, MCA). Without an express savings clause in the bill, the Legislature had not indicated clearly whether a defendant should be punished under the old law or the new one. We concluded:

> [(1)] that when a sentencing statute . . . is repealed between the date a defendant commits the underlying offenses and is sentenced; and
> (2) where the effect of the repeal lessens or ameliorates the defendant's punishment; and
> (3) where the repealer contains no savings clause;
> the defendant is entitled to be sentenced according to the sentencing statute in effect on the date of sentencing.

Wilson, 279 Mont. at 40, 926 P.2d at 716. Applying this framework, we held that "there was a clear absence of statutory authority to impose the dangerous offender designation." *Wilson*, 279 Mont. at 41, 926 P.2d at 716.

¶20 We further elaborated on *Wilson*'s holding in *Reams*, 284 Mont. at 454-55, 945 P.2d at 56, and in *Kebble*, ¶ 49. We held in *Reams* that the State could not resurrect a driving under the influence conviction that should have been expunged automatically years earlier under a now-repealed statute. *Reams*, 284 Mont. at 455, 945 P.2d at 57. Reams was convicted of driving under the influence in 1975. In 1981, a new amendment came into

effect that expunged DUI convictions automatically if five years elapsed without another DUI offense. Relying on *Wilson*, we explained that the 1981 bill had no savings clause to limit its application; Reams was entitled to the benefits of the amendment. We rejected the State's attempt to consider Reams's expunged DUI conviction for sentence enhancement purposes after the Legislature repealed the statute providing for automatic expungement after five years. *Reams*, 284 Mont. at 454-57, 945 P.2d at 56-58. *Reams* did not deal with an ameliorative sentencing statute that changed the defendant's sentence for his 1975 DUI convictions, but the 1981 amendments did mitigate the consequences of that prior conviction. We explained that defendants are entitled to the benefit of statutes "other than those creating a criminal offense, . . . absent a clear expression of legislative intent through a savings clause that the former law controls." *Reams*, 284 Mont. at 454-55, 945 P.2d at 56.

¶21 In *Kebble*, the defendant claimed that amendments to the outfitting without a license statute that came into effect after his offense but before his conviction eliminated jail time and made his offenses subject to a fine only. *Kebble*, ¶ 48. Again citing *Wilson*, we explained "that when a sentencing statute is repealed (or amended) between the date a defendant commits the underlying offense and the date of his sentence, the effect of the repeal (or amendment) is to lessen the defendant's punishment, and the new statute contains no savings clause, the defendant is entitled to be sentenced according to the sentencing statute in effect on the date of sentencing." *Kebble*, ¶ 49. We ultimately did not reach the issue in *Kebble*, however, because the Legislature had not repealed or

amended the punishment for the offense at issue but simply moved it to another title. *Kebble*, ¶ 53. Neither *Kebble, Reams,* nor *Wilson* is on all fours with the current case, but the principles they articulate are directly applicable to the facts before us.

¶22 The savings statute, § 1-2-205, MCA, preserves the State's authority to prosecute and punish offenders under "any law creating a criminal offense" in effect when an offender committed the act, even if the Legislature repeals that statute before final judgment, "unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act." The general savings statute provides no guidance for determining whether the Legislature intends to have a sentencing court apply the former PFO statutes or ameliorative amendments to those statutes that come into effect between when an offender committed his offenses and his sentencing for those offenses.

¶23 The Court concludes that HB 133's applicability clause supplies the Legislature's clear direction that the bill not apply to offenders who committed their offenses on or before June 30, 2017. Opinion, ¶ 13. I disagree. As the Court observes, legislative intent, in the first instance, is to be ascertained from the plain meaning of the words used. Opinion, ¶ 8; *Mont. Vending, Inc.*, ¶ 21. It is only when the intent cannot be ascertained from the plain language that we examine legislative history. *Mont. Vending, Inc.*, ¶ 21.

¶24 Relying on *Wilson*, we explained in *Reams*, 284 Mont. at 454-55, 945 P.2d at 56:

> [A]s to statutes, other than those creating a criminal offense, the criminal defendant is entitled to the benefit of the law in effect when the offense is committed, except to the extent that a later repeal or amendment of the law ameliorates or mitigates a sentence or punishment, and, in that case, the criminal defendant is entitled to the benefit of the later law, absent a clear

> expression of legislative intent through a savings clause that the former law controls.

In other words, when a statute changes criminal procedure or sentencing between the time of the commission of an offense and the time of sentencing, the defendant is entitled to the protections of the more lenient statute unless the Legislature makes clear through a savings clause that the former law will control. In this case, the first two prongs of the *Wilson* analysis are met: the Legislature passed an ameliorative sentencing statute that came into effect between the date of Thomas's offense and his sentencing. Thomas argues, however, that HB 133 lacks "a clear expression of legislative intent through a savings clause" that the former PFO definition should continue to control in certain cases after the act's effective date. *See Reams*, 284 Mont. at 454-55, 945 P.2d at 56.

¶25 A savings clause "excepts from the new legislation matters that would otherwise be governed by the new law and preserves the existing law for such excluded matters." *Fisher v. First Citizens Bank*, 2000 MT 314, ¶ 19, 302 Mont. 473, 14 P.3d 1228. The Montana Bill Drafting Manual 2016—written and published by the Montana Legislative Services Division "to provide a uniform standard for bill drafting"—distinguishes between effective dates, applicability dates, and savings clauses. It explains that "[a]n effective date should not be included in a bill unless . . . there is a reason requiring an early effective date." And it warns: "Do not confuse an applicability date with an effective date." According to the Manual, the applicability date serves the purpose of expressly stating whether a bill applies retrospectively or prospectively, noting that "[t]o apply retroactively, a law must expressly state that fact" under § 1-2-109, MCA. The Manual explains that a savings clause, on the

other hand, "preserves rights and duties that already have matured or proceedings already begun."

¶26 These are different but related concepts. The applicability clause explains a bill's prospective or retrospective application, and the savings clause explains what law applies to "duties that already have matured or proceedings [that] already [have] begun" but have not progressed to final judgment at the time the new bill goes into effect. The Manual explains that "[b]ecause it is presumed that changes in the law are in full force beginning on the effective date of the act, new laws could disrupt transactions already in progress." Though it is possible that one clause could serve as both an applicability clause and a savings clause, it would need the requisite language for each. The Legislature recognized this, for example, when it enacted the Criminal Code of 1973. Section 45-1-103, MCA, includes three distinct subsections:

> (1) The provisions of this code apply to any offense defined in this code and committed after January 1, 1974.
> (2) Unless otherwise expressly provided or unless the context otherwise requires, the provisions of this title and Title 46 govern the construction of and punishment for any offense defined outside of this code and committed after January 1, 1974, as well as the construction and application of any defense to a prosecution for such an offense.
> (3) The provisions of this code do not apply to any offense defined outside of this code and committed before January 1, 1974. Such an offense must be construed and punished according to the provisions of law existing at the time of commission thereof in the same manner as if this code had not been enacted.

This statute shows plainly the Legislature's distinction between an applicability clause and a savings clause.[3]

¶27 HB 133 contains nothing labelled as a savings clause. Section 43 states: "**Effective Date.** [This act] is effective July 1, 2017." 2017 Mont. Laws. ch. 321, § 43 (brackets in original). Without this effective date clause, the act would have come into effect on October 1, 2017. *See* § 1-2-201(1), MCA. Section 44 of HB 133 states: "**Applicability.** [This act] applies to offenses committed after June 30, 2017." 2017 Mont. Laws ch. 321, § 44 (brackets in original). The applicability clause states that the changes in the act apply to *offenses* committed after June 30, 2017. 2017 Mont. Laws ch. 321, § 44. Because much of the Act amends the elements, definitions, or sentences for specific offenses, this language clearly applies to those amendments. On the other hand, a PFO "designation is not itself a separate crime carrying a separate sentence, but is a procedural sentence enhancement required by statute." *State v. Johnson*, 2010 MT 288, ¶ 16, 359 Mont. 15, 245 P.3d 1113 (quoting *State v. DeWitt*, 2006 MT 302, ¶ 11, 334 Mont. 474, 149 P.3d 549). The applicability clause clearly addresses amendments to offenses, but provides no clear explanation for which PFO statutes apply to pending prosecutions. Neither the general savings statute nor the applicability date expresses what PFO statute applies to "proceedings already begun." Just as § 1-2-205, MCA, refers to "criminal offenses," and not to sentencing laws, *Wilson*, 279 Mont. at 40, 926 P.2d at 716, HB 133 likewise refers

[3] Both the Bill Drafting Manual and other legislative enactments—including some from the same session that enacted HB 133—demonstrate that the Legislature does not use the two clauses interchangeably. *See* 2017 Mont. Laws ch. 102, §§ 3-4 and ch. 326, §§ 22, 25.

to "offenses," 2017 Mont. Laws ch. 321, § 44, and provides little guidance regarding a broadly applicable "procedural sentence enhancement," *Johnson*, ¶ 16 (quotations omitted).

¶28 The 2017 Legislature could have made clear that the applicability clause acted to preserve the former PFO statute for pending prosecutions. For example, in one measure passed during the same session, the Legislature directly addressed a statute's prospective applicability for sentencing going forward: "**Applicability.** [This act] applies to offenders who are sentenced on or after [the effective date of this act]." 2017 Mont. Laws ch. 62, § 2 (brackets in original). Alternatively, the Legislature could have used the more comprehensive language in the sample savings clause in the Bill Drafting Manual: "[This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act]"—which the Legislature used in at least thirteen bills during the 2017 legislative session. *See*, *e.g.*, 2017 Mont. Laws ch. 44, § 2, ch. 55, § 9, ch. 102, § 3, ch. 244, § 15, ch. 247, § 9, ch. 320, § 15, ch. 326, § 22, ch. 339, § 11, ch. 346, § 12, ch. 367, § 29, ch. 384, § 37, ch. 389, § 11, ch. 446, § 3. HB 133 does not contain a "clear expression of legislative intent" that the ameliorative effects of the amended PFO statute should not apply to all persons sentenced after the act's effective date. *See Reams*, 284 Mont. at 454, 945 P.2d at 56.

¶29 Considering the plain language of HB 133's applicability clause, the ameliorative purpose of the PFO amendments, *Wilson*'s requirement for "a savings clause," and the Montana Legislature's different uses for a savings clause and an applicability clause, I

agree with Thomas that the applicability date clause in HB 133 does not equate to a savings clause for the PFO statutes. If HB 133 had done no more than amend the PFO statute, the Legislature's intent may be clearer. But the bill amended many additional sections of the criminal code that define criminal offenses. The general applicability clause, evidencing an intention for those changes in criminal offenses to be applied prospectively, sheds little light on the application of changes to the PFO definition to pending sentencing proceedings. This is particularly true because HB 133 as introduced repealed the PFO designation in its entirety. Later amendments reinstated the designation without amending the applicability clause. Neither the applicability date nor the savings statute, § 1-2-205, MCA, expressly preserved the 2015 PFO statute for proceedings that already were pending before the effective date. Far from a mere "drafting error," Opinion, ¶ 13, the Legislature's omission of a savings clause affects dramatically the liberty of offenders like Thomas whose sentences were imposed after HB 133 became law. Thomas is entitled to be sentenced under the amended PFO statutes.

¶30 Finally, I am not persuaded by the State's argument that applying the amended PFO statute to Thomas would be unfair and would reward an offender for delaying his sentencing. As the Alaska Court of Appeals explained in reviewing the same issue, "whenever a legislative amendment takes effect on a fortuitous date, fortuitous results are inevitable." *State v. Stafford*, 129 P.3d 927, 933 (Alaska Ct. App. 2006) (quoting *Helton v. State*, 778 P.2d 1156, 1160 (Alaska 1989)). It is not unfair to grant an offender the benefit of an ameliorative sentencing statute that the Legislature has enacted during the

pendency of his case. *See Coleman*, 185 Mont. at 324, 605 P.2d at 1015. I would reverse Thomas's sentence and remand for resentencing under the 2017 PFO statute.

Justice

Chief Justice Mike McGrath and Justice James Jeremiah Shea join in the dissenting Opinion of Justice Baker.

Chief Justice

Justice