DA 18-0028

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 24

STATE OF MONTANA,

Plaintiff and Appellee,

v.

GALE LEE RUNNING WOLF, JR.,

Defendant and Appellant.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DC 15-0439
Honorable Gregory R. Todd, 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 Ployhar, Assistant Attorney General, Helena, Montana

Scott Twito, Yellowstone County Attorney, Victoria Callender, Deputy County Attorney, Billings, Montana

Submitted on Briefs: August 28, 2019

Decided: February 4, 2020

Filed:

Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Gale Lee Running Wolf, Jr. appeals his designation as a Persistent Felony Offender (PFO) and corresponding enhanced sentence imposed by the Thirteenth Judicial District Court, Yellowstone County. We address the following issues on appeal:

1. *Does the 2015 PFO statute apply to Running Wolf who was sentenced in 2017 for offenses committed in 2015?*

2. *Does the PFO statute require the predicate felony conviction upon which the PFO designation is based to precede commission of the principal offense?*

¶2 We affirm in part, reverse in part, and remand with instructions to strike Running Wolf's designation as a persistent felony offender and impose a new sentence in accordance with § 61-8-731, MCA.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 On January 28, 2015, Running Wolf was arrested and charged with his fourth Driving Under the Influence (DUI) offense. While the January 28, 2015 charge was still pending, Running Wolf was arrested and charged with a fifth DUI offense and separate misdemeanor offense on May 1, 2015. Running Wolf had three prior misdemeanor DUI or DUI per se convictions from 2005, 2009, and 2011. Because a fourth or subsequent DUI constitutes a felony under Montana law, the State charged the January and May 2015 DUI offenses as felonies. Following the May 2015 charge, but before Running Wolf was convicted of either felony offense, the State gave notice of its intent to seek PFO designation for Running Wolf pursuant to §§ 46-18-501 and -502, MCA (2015).

¶4 Running Wolf pleaded guilty to both felony DUIs on July 14, 2017, approximately two weeks after a new law took effect changing the definition of a PFO. 2017 Mont. Laws ch. 321, § 40, at 1013 (HB 133). In a sentencing memorandum filed prior to sentencing, Running Wolf argued that the 2015 PFO statute no longer applied. He argued that he did not satisfy the requirements necessary to trigger PFO status under the new definition because it increased the number of predicate felony offenses necessary for PFO designation from two to three and required that at least one of the three offenses be sexual or violent. Section 46-1-202(18), MCA (2017) (enacted under 2017 Mont. Laws ch. 321, § 23, at 996-97).

¶5 At his sentencing hearing on October 30, 2017, the District Court rejected Running Wolf's argument and concluded that the 2015 PFO statute applied because that version was in effect at the time Running Wolf committed his underlying offenses. HB 133 expressly provided that the act would take effect July 1, 2017, and would apply to offenses committed after June 30, 2017. 2017 Mont. Laws ch. 321, §§ 43-44, at 1013. Next, the District Court contemporaneously sentenced Running Wolf for two felony DUI offenses: (1) his fourth DUI offense from January 28, 2015; and (2) his fifth DUI offense from May 1, 2015. The January 28, 2015 DUI conviction was used as the predicate offense to enhance Running Wolf's punishment for the May 1, 2015 DUI offense under §§ 46-18-501 and -502, MCA (2015). At the time of sentencing, Running Wolf was forty-two-years old and had no prior felonies. Running Wolf testified that he was twenty-one-months sober, actively attending Alcoholics Anonymous meetings and church, helping to care for his aging parents, and operating a thriving business with his

girlfriend/business partner. He intimated a desire to be given his first ever opportunity to participate in the Warm Springs Addiction, Treatment, & Change (WATCh) Program to assist in maintaining his sobriety. The District Court sentenced Running Wolf simultaneously for two felonies—one of which was used to enhance the sentence imposed on the other—and Running Wolf received a straight ten-year sentence without ever having the opportunity, as a fourth DUI offender would have had, to participate in WATCh or to receive other alcohol abuse treatment. *See State v. Ballard*, 202 Mont. 81, 87, 655 P.2d 986, 989 (1982) (providing that Montana's PFO statutes are "founded on the principles of prevention and reformation").

¶6 Running Wolf timely appealed, contending that the District Court lacked authority to designate him a PFO pursuant to the 2015 PFO statute because the 2017 version applied on the date he was sentenced. We issued an order for supplemental briefs to address an additional issue: Does the persistent felony offender statute require the predicate felony conviction upon which the PFO designation is based to precede commission of the principal offense?

STANDARD OF REVIEW

¶7 Where a defendant is sentenced to more than one year of actual incarceration, we review his sentence for legality. *State v. Johnson*, 2010 MT 288, ¶ 7, 359 Mont. 15, 245 P.3d 1113. "Our review is confined to determining whether the sentencing court had statutory authority to impose the sentence, whether the sentence falls within the parameters set by the applicable sentencing statutes, and whether the court adhered to the affirmative mandates of the applicable sentencing statutes." *State v. Anderson*, 2009 MT 39, ¶ 7,

349 Mont. 245, 203 P.3d 764. This determination presents a question of law that we review de novo. *Anderson*, ¶ 7 (citing *State v. Rosling*, 2008 MT 62, ¶ 59, 342 Mont. 1, 180 P.3d 1102).

DISCUSSION

¶8 *1. Does the 2015 PFO statute apply to Running Wolf who was sentenced in 2017 for offenses committed in 2015?*

¶9 Running Wolf's first argument—that he was entitled to be sentenced under the 2017 amendments to the PFO statute—is resolved by our recent decision in *State v. Thomas*, 2019 MT 155, 396 Mont. 284, 445 P.3d 777. There, the State charged Thomas with felony DUI arising from an incident that allegedly occurred on July 23, 2016. Based on a prior felony escape conviction, the State sought PFO status for Thomas under the 2015 PFO statute. A jury convicted Thomas of DUI, fourth or subsequent offense, in January 2017. *Thomas*, ¶ 2. HB 133 took effect during the time that elapsed between his trial and sentencing. *Thomas*, ¶ 3. At Thomas's sentencing hearing, the District Court sentenced Thomas as a PFO under the 2015 statute and imposed a ten-year prison sentence with no time suspended. *Thomas*, ¶ 4. Thomas appealed, raising the identical issue presented here.

¶10 We held that "[t]he plain language of HB 133 clearly expresses the Legislature's intent regarding the timing of the Act's application." *Thomas*, ¶ 9. We further held that the provisions setting forth the effective and applicability dates, taken together, made clear that "the revisions enacted by the Act would not apply to offenses committed prior to July 1, 2017." *Thomas*, ¶ 9. Distinguishing our holding in *State v. Wilson*, 279 Mont. 34, 926 P.2d 712 (1996), we explained, "Unlike HB 133, the bill [at issue in *Wilson*] contained

no provisions whatsoever governing the timing of its application, but simply repealed the former law outright." *Thomas*, ¶ 12. Therefore, that bill had no savings clause, and Wilson was entitled to benefit from the repeal of the statute. *Thomas*, ¶ 12. In contrast, "the [2017] 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." *Thomas*, ¶ 13. We concluded that HB 133 expressly preserved application of the 2015 PFO statute to offenses committed before July 1, 2017, and therefore that the legislature's intent was clear, eliminating the need for a separate savings clause. *Thomas*, ¶ 13.

¶11 Running Wolf presents the same issue and arguments raised in *Thomas*, which we rejected. *Thomas* thus compels the conclusion that the District Court correctly applied the 2015 PFO statute at Running Wolf's October 30, 2017 sentencing hearing.

¶12 *2. Does the PFO statute require the predicate felony conviction upon which the PFO designation is based to precede commission of the principal offense?*

¶13 This Court must decide whether the procedure used in designating Running Wolf a PFO comports with the language of the statute, which reads: "A 'persistent felony offender' is an offender who has *previously been convicted* of a felony and who is presently being sentenced for a second felony . . . ." Section 46-18-501, MCA (2015) (emphasis added). "An offender is considered to have been previously convicted of a felony if . . . (2) less than 5 years have elapsed between the commission of the present offense and either: (a) the previous felony conviction; or (b) the offender's release on parole or otherwise from prison

or other commitment imposed as a result of the previous felony conviction." Section 46-18-501(2), MCA (2015).

¶14 Running Wolf argues that the District Court lacked authority to impose an enhanced PFO sentence because the PFO statute requires an offender to have a felony conviction before committing the offense for which the PFO designation is sought. He asserts that because the District Court simultaneously entered judgment on both felony DUI offenses in one sentencing hearing, Running Wolf had no "previous felony conviction" upon which to base his PFO designation. The State directs this Court to our prior decision in *Williamson*, wherein we held that the statutory language at issue—"previously been convicted"—simply requires a second felony committed on a different occasion than, and within five years of, the first. *State v. Williamson*, 218 Mont. 242, 246, 707 P.2d 530, 532-33 (1985). The State notes this Court thereafter affirmed the *Williamson* interpretation on two occasions, in *State v. Hamm*, 250 Mont. 123, 818 P.2d 830 (1991), and in *State v. Anderson*, 2009 MT 39, 349 Mont. 245, 203 P.3d 764. Running Wolf asserts our decisions in *Williamson*, *Hamm*, and *Anderson* are inconsistent with the majority of jurisdictions that hold the felony conviction upon which a PFO designation is based must precede commission of the principal offense. He argues that the plain language of the statute, along with other indicia of legislative intent and rules of statutory construction, demonstrate the legislature's intent that a PFO designation is available only when the defendant has a felony conviction that existed prior to commission of the offense for which the PFO sentence is sought. Running Wolf asks this Court to overrule *Williamson* and its progeny.

¶15 Before addressing *Williamson*, we first look to the express language of § 46-18-501, MCA (2015). Our cardinal first step in statutory construction is clear: "we are 'to ascertain and declare what is in terms or in substance contained [in the statute], not to insert what has been omitted or to omit what has been inserted.'" *State v. Gatts*, 279 Mont. 42, 47, 928 P.2d 114, 117 (1996) (quoting § 1-2-101, MCA). In pursuit of the intention of the legislature, "[w]here we can determine that intent from the plain meaning of the words used in a statute, we may not go further and apply any other means of interpretation." *Gatts*, 279 Mont. at 47, 928 P.2d at 117 (citing *Clarke v. Massey*, 271 Mont. 412, 416, 897 P.2d 1085, 1088 (1995)). "In the search for plain meaning, we must reasonably and logically interpret that language, giving words their usual and ordinary meaning." *Gatts*, 279 Mont. at 47, 928 P.2d at 117 (citing *Werre v. David*, 275 Mont. 376, 385, 913 P.2d 625, 631 (1996)). "Where the statutory language is 'plain, unambiguous, direct and certain, the statute speaks for itself and there is nothing left for the court to construe.'" *Swearingen v. State*, 2001 MT 10, ¶ 5, 304 Mont. 97, 18 P.3d 998 (quoting *Curtis v. 21st Judicial Dist. Court*, 266 Mont. 231, 235, 879 P.2d 1164, 1166 (1994)).

¶16 At the outset it should be noted that, "[i]n Montana, a 'conviction' requires a judgment or sentence entered upon a guilty or nolo contendere plea." *State v. Stone*, 2017 MT 189, ¶ 21, 388 Mont. 239, 400 P.3d 692 (citing § 46-1-202(7), MCA; *Peterson v. State*, 2017 MT 165, ¶ 9, 388 Mont. 122, 398 P.3d 259); *see also Ballard*, 202 Mont. at 86, 655 P.2d at 988 ("Under Montana law an offense is not classified as a misdemeanor or felony until the sentence is imposed."). "In order for there to be a conviction based on a guilty plea, a judgment or sentence must be imposed." *Stone*, ¶ 21

(citing *State v. Tomaskie*, 2007 MT 103, ¶ 12, 337 Mont. 130, 157 P.3d 691). Running Wolf was not convicted of either felony offense until he was sentenced at the hearing on October 30, 2017.

¶17 In § 46-18-501, MCA (2015), the first interplay between the word "offender" and the phrase "previously been convicted" occurs in the statute's opening clause: "A 'persistent felony offender' is an offender who has previously been convicted of a felony and who is presently being sentenced for a second felony committed on a different occasion than the first." Use of the root word "previous" connotes a temporal relationship to being "an offender." This plain language provides that, in order to be designated a PFO, an "offender," i.e., the defendant, must have "previously been convicted"; that is, to be a PFO a defendant must have been convicted before becoming an "offender" for purposes of the statute. *See* § 46-18-501, MCA (2015). Subpart (2) of § 46-18-501, MCA (2015), uses the term "previous felony conviction" to express that the felony conviction for which you become an "offender" must occur prior to some circumstance—here, the "commission of the present offense." Thus, the plain language of § 46-18-501, MCA (2015) expressly requires the existence of a felony conviction before the commission of the principal offense, i.e., the next felony offense, upon which a valid PFO designation is based.

¶18 *Williamson* holds otherwise. In *Williamson*, the defendant argued that he could not be designated as a PFO because his two felony offenses were committed at approximately the same time and his pleas were entered at the same time. *See Williamson*, 218 Mont. at 245, 707 P.2d at 532. The Court, disagreeing with the defendant, characterized his argument as creating a "window of opportunity" during which he could

"commit all manner of felonies between the time he commits his first felony and his conviction therefore and be immune from persistent felony designation . . . ." *Williamson*, 218 Mont. at 246, 707 P.2d at 532-33. Under the guise of ascertaining legislative intent, the *Williamson* Court painted an alarming portrait of criminals running amok due to their freedom from PFO designation if the defendant's reading of the statute were accepted, providing that "[t]here is no evidence in the statute, or any place else, that the legislature intended to provide such an open season." *Williamson*, 218 Mont. at 246, 707 P.2d at 533. This analysis of the statute's language, although shudder-inducing, seems to imply that a certain lawlessness would ensue if § 46-18-501, MCA (2015), was given to its plain meaning, and overlooks the remainder of Montana's criminal code, which still proscribes and makes punishable illegal criminal acts regardless of an offender's PFO status.

¶19 Our essential rationale in *Williamson* for disregarding plain, clear, and unambiguous statutory language was grounded in a fear that to hold otherwise would provide criminals unfettered license to "commit all manner of felonies" without adequate consequence in the period between the commission of a first felony and the subsequent conviction on that felony. *See Williamson*, 218 Mont. at 246, 707 P.2d at 532-33. However, this essential premise in *Williamson* was falsely exaggerated. A defendant who commits a felony, and then perpetrates a second or subsequent felony prior to sentencing and conviction on the earlier offense, remains subject to the maximum penalty prescribed by the legislature for the second or subsequent felony. The only consequence of giving effect to the plain language of § 46-18-501, MCA (2015), is that the maximum penalty for the second or subsequent felony cannot be enhanced by designating the offender as a PFO. Given the

clear and unambiguous plain language of § 46-18-501, MCA (2015), it would exceed this Court's domain to expound upon whether or not that consequence reflects the legislature's intent. Our role is not to insert what has been omitted or omit what has been inserted by the legislature; rather, when met with such clear and unambiguous statutory language, this Court's function is to interpret the statute in accordance with its plain meaning. In retrospect, by resorting to what the legislature could *not* have intended, we disregarded the plain language of § 46-18-501, MCA (2015), and based our holding in *Williamson* on a falsely exaggerated scenario that the legislature did not draft the statute to provide for. *See Williamson*, 218 Mont. at 246, 707 P.2d at 533.

¶20 We subsequently reaffirmed *Williamson* by applying its holding in *Hamm* and *Anderson*, thereby perpetuating our initial error. To the extent we erred in *Williamson*, we similarly erred in *Hamm* and *Anderson*.

¶21 We are mindful of the fact that principles of law should be positively and definitively settled so that courts, lawyers, and, above all, citizens may have some assurance that important legal principles involving their highest interests shall not be changed from day to day. *See State ex rel. Sparling v. Hitsman*, 99 Mont. 521, 525, 44 P.2d 747, 749 (1935). Stare decisis is a fundamental doctrine that reflects this Court's concerns for stability, predictability, and equal treatment. *Formicove, Inc. v. Burlington N., Inc.*, 207 Mont. 189, 194, 673 P.2d 469, 472 (1983). However, court decisions are not sacrosanct and stare decisis should not be used as a "mechanical formula of adherence to the latest decision." *State v. Gatts*, 279 Mont. at 51, 928 P.2d at 119 (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172, 109 S. Ct. 2363, 2370 (1989)).

¶22 This Court has made clear that "[t]he rule of stare decisis will not prevail where it is demonstrably made to appear that the construction placed upon [a statute] in [a] former decision is manifestly wrong." *Hitsman*, 99 Mont. at 525, 44 P.2d at 749. "Principles of law should be definitively settled if that is possible." *State v. Long*, 216 Mont. 65, 84, 700 P.2d 153, 166 (1985) (Weber, J., concurring). Even so, just as Justice Brandeis suggested and Justice Weber reiterated, "the search for truth involves a slow progress of inclusion and exclusion, involving both trial and error." *Long*, 216 Mont. at 84, 700 P.2d at 166 (Weber, J., concurring).[1] "Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved . . . ; the opposite is true in cases . . . involving procedural and evidentiary rules," like those at play here in § 46-18-501, MCA (2015). *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S. Ct. 2597, 2610 (1991) (internal citations omitted). This Court in *Mont. Horse Prods. Co. v. Great N. Ry. Co.*, 91 Mont. 194, 7 P.2d 919 (1932), best characterized the propriety of following a manifestly wrong decision:

> Where vital and important public or private rights are concerned, and the decisions regarding them are to have a direct and permanent influence on all future time, it becomes the duty, as well as the right of the court to consider them carefully and to allow no previous error to continue if it can be corrected. The foundation of the rule of stare decisis was promulgated on

[1] *See also Di Santo v. Pennsylvania*, 273 U.S. 34, 42-43, 47 S. Ct. 267, 270-71 (1927) (Brandeis, J., dissenting) ("In the search for truth through the slow process of inclusion and exclusion, involving trial and error, it behooves us to reject, as guides, the decisions upon such questions which prove to have been mistaken. . . . [T]he logic of words should yield to the logic of realities."); Robert Von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 414 (1923-1924) ("But if, after thorough examination and deep thought, a prior judicial decision seems wrong in principle or manifestly out of accord with modern conditions of life, it should not be followed as a controlling precedent, where departure therefrom can be made without unduly affecting contract rights or other interests calling for consideration.").

> the ground of public policy, and it would be an egregious mistake to allow more harm than good from it.

Mont. Horse Prods. Co., 91 Mont. at 216, 7 P.2d at 927 (quoting 26 American and English Encyclopedia of Law, at 184 (2d ed. 1904); *Mason v. Nelson*, 148 N.C. 492, 510, 62 S.E. 625, 631 (1908)). Here, Running Wolf's fundamental interest in liberty is at stake and is distinguishable from private rights in contract or property. Moreover, in *Gatts*, we expressly declined to impede the scope of our reasoning when deciding whether to overrule a point of statutory construction because "the doctrine [of stare decisis]'s strength is not dependent on the creation of artificial differences in burdens of proof or persuasion." *Gatts*, 279 Mont. at 51, 928 P.2d at 119. The *Gatts* Court observed that we are not bound to follow a manifestly wrong decision—even one made in the context of statutory interpretation. Here, correcting an erroneous construction of § 46-18-501, MCA (2015), will have no effect on vested contract or property rights protected under the due process guarantees of the Montana and United States Constitutions.

¶23 Our recourse in *Williamson* to what the legislature could *not* have intended exceeded our limited role in statutory construction considering the plain meaning of the statutory text of § 46-18-501, MCA (2015). It is true that we generally presume that if the legislature disagreed with our historical interpretation of a statute it would have exercised its prerogative to revise the statute to override our interpretation and effect the proper legislative intent. *Musselshell Ranch Co. v. Seidel-Joukova*, 2011 MT 217, ¶ 14, 362 Mont. 1, 261 P.3d 570 (citation omitted). However, in the context of the present statute, the legislature has not remained wholly silent on this Court's past interpretations.

The legislature amended the PFO statutes in 2017. This amendment repealed § 46-18-501, MCA (2015), and incorporated a new definition of "persistent felony offender" by reference to § 46-1-202(18), MCA. Section 46-1-202(18), MCA, defines "persistent felony offender" as:

> [A]n offender who has previously been convicted of two separate felonies and who is presently being sentenced for a third felony committed on a different occasion than either of the first two felonies. At least one of the three felonies must be a sexual offense or a violent offense as those terms are defined in [§] 46-23-502. An offender is considered to have previously been convicted of two separate felonies if: . . . (b) less than 5 years have elapsed between the commission of the present offense and . . . the most recent of the two felony convictions.

¶24 Applied here, had Running Wolf committed his offenses after July 1, 2017, he would not qualify for PFO designation because he had not been convicted of two felonies prior to the commission of a third, and none of his offenses were sexual or violent as required by the amended statute. This amendment, in fact, clarifies the legislature's intent and responds to this Court's jurisprudence by setting forth the timing of previous convictions and their relationship to the commission of the principal offense. By requiring less than five years to have elapsed between the *most recent* of the *two* predicate felony *convictions* and the *commission* of the present offense, the legislature places an even more specific chronological structure to the statute than that previously contained in § 46-18-501, MCA (2015).

¶25 Given this Court's previous manifestly wrong interpretation of § 46-18-501, MCA (2015), we cannot rely upon the legislature's silence as condoning our past erroneous decisions because "not every silence is pregnant." *Burns v. United States*, 501 U.S. 129,

136, 111 S. Ct. 2182, 2186 (1991) (citing *Illinois Dep't of Pub. Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983)). "An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent." *Burns*, 501 U.S. at 136, 111 S. Ct. at 2186. Here, following a proper plain language analysis, it is clear the statute requires—and the legislature so intended—that a felony conviction occur prior to the commission of the principal offense before designating an offender as a PFO. Any inference we are asked to draw from the legislature's silence in this matter is inconsistent with the plain language of the statute and cannot serve as a justification to perpetuate a manifestly wrong interpretation of § 46-18-501, MCA (2015).

¶26 We observe that the plain language of § 46-18-501, MCA (2015), also effectuates the fundamental purposes of reform and fair warning upon which enhanced penalty statutes are premised. *See* Mont. Const. art. II, § 28. PFO designation and accompanying enhanced sentences are reserved for those recidivists who fail to take advantage of the opportunity to reform their behavior and are deserving of the consequences of engaging in persistent criminal conduct. *See State v. Shults*, 2006 MT 100, ¶ 31, 332 Mont. 130, 136 P.3d 507 (rejecting a cruel and unusual punishment challenge to Montana's PFO statute in part on the grounds that the defendant "has an eighteen-year criminal record and has repeatedly failed to conform his behavior to societal norms, despite having been provided numerous opportunities by the criminal justice system"). As noted long ago by the United States Supreme Court, enhanced penalty statutes "impose[] a higher punishment for the same offense upon one who proves, by a second or third conviction, that the former punishment

has been inefficacious in doing the work of reform for which it was designed." *Moore v. Missouri*, 159 U.S. 673, 677, 16 S. Ct. 179, 181 (1895). Accordingly, the fundamental purpose of enhanced penalty statutes is to identify defendants who have not reformed their behavior after prior convictions and to incarcerate those defendants for a longer period of time than would otherwise be applicable in order to protect the community and deter others from similar behavior. The enhanced penalty statutes therefore provide *fair warning* to offenders that if they continue to commit criminal acts after having the opportunity to reform following one or more prior contacts with the criminal justice system, they will be imprisoned for a longer period of time. Where, as here, Running Wolf has not been warned about enhanced consequences of future criminal conduct prior to the commission of the principal offense, the enhanced penalty should not be imposed.

¶27 The *Williamson* construction of § 46-18-501, MCA (2015), evades the penological purpose of the PFO statute—to punish more severely those offenders who have again committed a crime after having been previously given the opportunity for rehabilitation and reintegration as part of a prior conviction and sentence. Accordingly, aside from employing an improper statutory analysis, *Williamson*, *Hamm*, and *Anderson* are "manifestly wrong" because they contravene the statute's aims to fulfill "the constitutional mandate that laws for the punishment of crime shall be founded on the principles of prevention and reformation." *Ballard*, 202 Mont. at 87, 655 P.2d at 989 (citing Mont. Const. art. II, § 28; *State v. Maldonado*, 176 Mont. 322, 578 P.2d 296 (1978)).

¶28 Although we remain committed to the "very weighty considerations [which] underlie the principle that courts should not lightly overrule past decisions," *Gatts*, 279 Mont. at 51, 928 P.2d at 119, we have previously chosen to depart from stare decisis in the context of Montana's PFO statutes. In *State v. Gunderson*, 2010 MT 166, 357 Mont. 142, 237 P.3d 74 (hereinafter, *Gunderson II*), we renounced prior rulings in order to clarify the proper procedures for enhanced sentencing of persistent felony offenders. *Gunderson II*, ¶¶ 49-50. There, "[b]ased on a clear reading of § 46-18-502, MCA," *Gunderson II*, ¶ 54, and other case law, we overruled our own decisions in *State v. Gaither*, 2009 MT 391, 353 Mont. 344, 220 P.3d 640; *State v. Gunderson*, 282 Mont. 183, 936 P.2d 804 (1997); and *State v. Robinson*, 2008 MT 34, 341 Mont. 300, 177 P.3d 488. *See Gunderson II*, ¶¶ 49-50.

¶29 We conclude that § 46-18-501, MCA (2015), clearly and unambiguously requires the existence of a felony conviction before the commission of the principal offense to effectuate a valid PFO designation. When dealing with fundamental liberty interests, it is never too late to backup and correctly apply the law, as clearly and unambiguously set forth by the legislature. To the extent our decisions in *Williamson*, *Hamm*, and *Anderson* hold otherwise, they are overruled.

CONCLUSION

¶30 We affirm the District Court's decision to apply the 2015 version of the PFO statute at Running Wolf's October 30, 2017 sentencing hearing, given our decision in *Thomas*. However, we reverse the District Court's sentencing of Running Wolf as a PFO. We conclude that the legislature, through § 46-18-501, MCA (2015), expressly requires the

existence of a felony conviction before the commission of the principal offense to effectuate a valid PFO designation. The District Court's judgment is affirmed in part, reversed in part, and remanded with instructions to strike Running Wolf's designation as a persistent felony offender and impose a new sentence in accordance with § 61-8-731, MCA.

/S/ LAURIE McKINNON

We concur:

/S/ MIKE McGRATH
/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON

Justice Beth Baker, concurring and dissenting.

¶31 I concur with the Court's disposition of the first issue, which is resolved by our decision in *Thomas*. I would, however, affirm Running Wolf's PFO designation based on our well-settled precedent.

¶32 In construing § 46-18-501, MCA (2015), we do not write on a clean slate. As the Court observes, we have interpreted this statute on three separate occasions over more than thirty years. "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions." *Allstate Ins. Co. v. Wagner-Ellsworth*, 2008 MT 240, ¶ 39, 344 Mont. 445, 188 P.3d 1042 (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403, 90 S. Ct. 1772, 1789 (1970)). Considerations of stare decisis "have special force in the area of statutory interpretation, for here, unlike in the context of

constitutional interpretation, the legislative power is implicated. And [the Legislature] remains free to alter what we have done." *Patterson*, 491 U.S. at 172-73, 109 S. Ct. at 2370. We long have embraced a presumption that if the Legislature disagreed with our historical interpretation of a statute it would have exercised its prerogative to revise the statute to override our interpretation and effect the proper legislative intent. *Musselshell Ranch Co.*, ¶ 14 (citing Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* vol. 2B, § 49:5, 32-34 (7th ed., Thomson-Reuters/West 2008)). *See also Certain v. Tonn*, 2009 MT 330, ¶¶ 17-19, 353 Mont. 21, 220 P.3d 384 ("presum[ing]" the Legislature's approval of a prior decision "because it did not amend the statute in response to our interpretation."); *State ex rel. Rankin v. Madison State Bank*, 68 Mont. 342, 349, 218 P. 652, 655 (1923) (noting that, when the Legislature had met three times since the Court's decision interpreting a particular statute, "it is fair to assume that, if this court misinterpreted the public policy of the state . . ., some effort would have been made to correct the error and to express in no uncertain terms the [Legislature's contrary] intention . . .; but no such effort was made, and we may indulge the presumption that the rule announced in that case expresses the policy of this state[.]"). We thus generally will not disturb a longstanding interpretation of a Montana statute. *See, e.g.*, *State v. Cline*, 2013 MT 188, ¶ 22, 371 Mont. 18, 305 P.3d 55; *State v. Kirkbride*, 2008 MT 178, ¶ 21, 343 Mont. 409, 185 P.3d 340; *Sampson v. Nat'l Farmers Union Prop. & Cas. Co.*, 2006 MT 241, ¶ 20, 333 Mont. 541, 144 P.3d 797; *Baitis v. Dep't of Revenue*, 2004 MT 17, ¶ 24, 319 Mont. 292, 83 P.3d 1278.

¶33 Starting with *Williamson* over thirty years ago, we have rejected the Court's purported plain-language interpretation of "previously been convicted." Williamson was sentenced as a PFO even though he committed his second felony offense prior to his first felony conviction. *Williamson*, 218 Mont. at 243, 707 P.2d at 530-31. We agreed with the district court and rejected a construction of the statute under which an offender would have "a sort of 'window of opportunity'" to commit additional crimes before being sentenced on his first felony "and be immune from persistent felony designation because the [five-year] clock doesn't start running until after the first conviction." *Williamson*, 218 Mont. at 246, 707 P.2d at 532-33. We affirmed the district court's conclusion that "[t]here is no evidence in the statute, or any place else, that the legislature intended to provide such an open season." *Williamson*, 218 Mont. at 246, 707 P.2d at 533.

¶34 We revisited and reaffirmed this holding in *Hamm*, 250 Mont. at 131, 818 P.2d at 835, observing:

> [T]he [PFO] statute requires that the commission of the present offense be within five years of the previous felony conviction. In this case Hamm committed the present offense on March 19, 1989. On August 17, 1989[,] he was convicted for the prior felony. March 19, 1989 to August 17, 1989 is clearly within the [five-year] statutory period.

And in *Anderson*, ¶ 14, we stated, "*Hamm* and *Williamson* unequivocally stand for the rule that the PFO statute can be used to enhance a sentence when the second felony was committed before conviction of the first felony." Indeed, in *Anderson*, ¶ 15, we declined Anderson's invitation to overrule *Williamson* and *Hamm*. Though recognizing Anderson's argument "that allowing PFO sentence enhancement based on a second felony committed

before conviction of the first felony is the minority rule," we remained unpersuaded. We explained:

> Had the Legislature intended to restrict the application of the statute in the manner suggested by Anderson, it certainly could have done so at the time it passed the legislation, or it could have amended the statute after *Williamson* or *Hamm* were decided. It did neither. . . . [A] legislature may choose to unequivocally convey that a second or subsequent felony must follow a conviction of a prior felony for the PFO statute to apply. Montana did not adopt such limiting language. [Instead, it] clearly defines a PFO as an offender who has previously been convicted of a felony and who is presently being sentenced to a second felony committed on a different occasion than the first. *We interpret such plain language to allow PFO status for an offender who commits her second felony before being convicted of her first.*

Anderson, ¶ 15 (emphasis added).

¶35 We pointed out distinguishable language in other states' statutes illustrating "that a legislature may choose to unequivocally convey that a second or subsequent felony must follow a conviction of a prior felony for the PFO statute to apply." *Anderson*, ¶ 15. We quoted several examples of such language in the Opinion and allowed that the Legislature could have used similar language had that been its intent. *Anderson*, ¶ 15. As the Legislature had not chosen to do so, we maintained our construction of the "plain language" in Montana's statute "to allow PFO status for an offender who commits her second felony before being convicted of her first." *Anderson*, ¶ 15.

¶36 Though "[n]othing can be gained by engaging in a semantic fencing contest" with the Court over the words chosen by the Legislature, *see In re McCabe*, 168 Mont. 334, 338, 544 P.2d 825, 828 (1975), it is inadvisable to jettison our longstanding construction of the statute simply because members of a different Court believe the same language means something different. Since our interpretation of the PFO statute that began

with *Williamson* and continued in *Anderson,* the Legislature has met numerous times—including in 2017, when it passed a major overhaul of the PFO statute but left the pertinent provisions intact. Save for revisions to the number and nature of prior qualifying offenses, the definition of a "persistent felony offender" remains unchanged. *Compare* § 46-1-202(18), MCA (2017), *with* § 46-18-501, MCA (2015). The Legislature thus has "remained wholly silent," Opinion, ¶ 23, on the provisions we construed in *Williamson*, *Hamm,* and *Anderson*. "We [] presume the Legislature is aware of existing law when it enacts or revises statutes, including our decisions interpreting individual statutes." *Exxon Mobil Corp. v. Mont. Dep't of Revenue*, 2019 MT 156, ¶ 20, 396 Mont. 298, 444 P.3d 407 (citing *Musselshell Ranch Co.*, ¶ 14). *See also Sampson*, ¶ 20. Once again, if the Legislature decides we misconstrued the PFO statutes in *Williamson*, *Hamm*, and *Anderson*, it is that body's prerogative to cure our mistake. Given the extensive history of the statute, our longstanding examination of it, and the Legislature's silence, I am unpersuaded that we should disturb the meaning of the PFO statute.

¶37 Stare decisis reflects the rooted doctrine that "principles of law should be positively and definitely settled in order that courts, lawyers, and, above all, citizens may have some assurance that important legal principles involving their highest interests shall not be changed from day to day [or from Justice to Justice], with the resultant disorders that of necessity must accrue from such changes." *State v. Thompson*, 2015 MT 279, ¶ 16, 381 Mont. 156, 364 P.3d 1229 (internal quotations and citations omitted). "Faced with viable alternatives, *stare decisis* provides the 'preferred course.'" *Certain*, ¶ 19 (quoting *Kirkbride*, ¶ 13; *see also Payne*, 501 U.S. at 827, 111 S. Ct. at 2609); *State v. Demontiney*,

2014 MT 66, ¶ 17, 374 Mont. 211, 324 P.3d 344 (declining to "overrule a decision that has been in effect for over twenty years and has provided a bright line rule for law enforcement.").

¶38 Our consistent interpretation of the PFO statute in three separate cases spanning more than three decades certainly represents a "viable alternative" to the Court's interpretation today. In my view, our much-articulated "concerns for stability, predictability and equal treatment" in the law, *Formicove, Inc.*, 207 Mont. at 194, 673 P.2d at 472, are ill-served by its decision, which injects unequal treatment into the classification of PFOs by happenstance of the Court's timing. An offender whose PFO sentence was imposed and became final under the same statute prior to this decision will remain subject to a much longer sentence than an offender with identical circumstances sentenced after today. Although new policy choices make "fortuitous results inevitable," *Thomas*, ¶ 30 (Baker, J., dissenting) (quoting *State v. Stafford*, 129 P.3d 927, 933 (Alaska Ct. App. 2006)), a decision to effect that kind of differential treatment in the law should be made by the Legislature.

¶39 I would conclude that the District Court's designation of Running Wolf as a PFO under §§ 46-18-501 and -502, MCA (2015), was correct and affirm the judgment.

/S/ BETH BAKER

Justice Jim Rice and Justice James Jeremiah Shea join in the Concurrence and Dissent of Justice Baker.

/S/ JIM RICE
/S/ JAMES JEREMIAH SHEA

Justice Jim Rice, concurring in part and dissenting in part.

¶40 Like Justice Baker, I concur in the Court's resolution of the first issue, which applies our precedent, and I join her concurrence. From Issue 2, where the Court, in continuation of a disturbing pattern, rejects 30 years' worth of deliberations and work of multiple compositions of this Court, I dissent, and join Justice Baker's proper application of *stare decisis* in her dissent.

¶41 In *ALPS Prop. & Cas. Ins. Co. v. McLean & McLean, PLLP*, 2018 MT 190, 392 Mont. 236, 425 P.3d 651, this Court overturned 50 years of statutory interpretation precedent by concluding our longtime application of § 33-15-403, MCA, had been "manifestly wrong" all along, despite the half-century operation of, and reliance upon, that interpretation of the statute. *ALPS*, ¶¶ 30, 47. In response, the Legislature, acting in strongly bipartisan fashion,[1] promptly passed legislation to reverse our decision, with an immediate effective date, and the Governor signed the bill, restoring the law. 2019 Mont. Laws Ch. 315. One could legitimately ask whether the Court's reversal of long-established precedent in *ALPS* was the truly "manifestly wrong" decision.

[1] The Senate vote on SB 240, titled "An Act Restoring Rescission of Insurance Contracts in the Event of Fraud, Material Misrepresentation, and Other Circumstances," was 50-0. The House vote was 84-13.

¶42 The *ALPS* scenario was a replay of the fallout from the Court's epiphany of statutory plain meaning in *State v. Stiffarm*, 2011 MT 9, 359 Mont. 116, 250 P.3d 300, that led it to conclude that a 34-year line of case authority, and a 16-year history interpreting § 46-18-203(2), MCA, were no longer correct, and needed to be overturned. *Stiffarm*, ¶¶ 16-18. In response, the Legislature, expressing in HB 548 that "the Supreme Court overruled several of its prior decisions," promptly acted to overturn our decision and restore the law to its former status, enacting a bill complete with an immediate effective date and retroactive application, and sending it to the Governor, who signed it. 2011 Mont. Laws Ch. 230.

¶43 Recently, the Court again disregarded *stare decisis* in *State v. Yang*, 2019 MT 266, ¶ 28, 397 Mont. 486, 452 P.3d 897, by declaring § 45-9-130(1), MCA, facially unconstitutional despite our decision two years earlier that had rejected a constitutional challenge to the statute. The Court's decision was not only in contravention to our earlier decision, but also to our longstanding constitutional precedent that a statute could not be facially unconstitutional unless there was "no set of circumstances" the statute could be valid, and thus injected uncertainty into long-settled standards governing our constitutional jurisprudence with regard to facial challenges. Unfortunately, the constitutional dimension of that decision prevents any repair of this error by the Legislature.

¶44 Of course, *stare decisis* is not absolute, and the Court cannot operate by "mechanical formula of adherence to the latest decision." *State v. Gatts*, 279 Mont. 42, 51, 928 P.2d 114, 119 (1996) (internal citation omitted). The Court must have the ability to overrule precedent that is "manifestly wrong," *Formicove, Inc. v. Burlington N.*, 207 Mont. 189, 194-95, 673 P.2d 469, 472 (1983), but that should be the clear exception to the rule, not

merely an option. "What we decide, we can undecide. But *stare dec*isis teaches us that we should exercise that authority sparingly." *Kimble v. Marvel Entm't, LLC*, 576 U.S. ___, ___, 135 S. Ct. 2401, 2415 (2015).[2]

¶45 What must be vigilantly guarded against is using the "manifestly wrong" exception to dispense with precedent that current justices regard as inferior to their own interpretations or opinions, as well as operating in any bubble of self-importance that prompts an assumption that our work is more enlightened than the labors of past generations of justices. *Stare decisis* calls us to respect that prior work. Indeed, it is not a basis for reversal that precedent can be currently viewed as merely "wrong." As Justice Kagan has explained, quoting the Supreme Court:

> 'Respecting *stare decisis* means sticking to some wrong decisions.' *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. ___, ___, 135 S. Ct. 2401, 192 L. Ed. 2d 463, 471 (2015). Any departure from settled precedent (so the Court has often stated) demands a 'special justification—over and above the belief that the precedent was wrongly decided.' *Id.*, at ___, 135 S. Ct. 2401, 192 L. Ed. 2d 463, 472.

Janus v. AFSCME, Council 31, 585 U.S. ___, ___, 138 S. Ct. 2448, 2497 (2018) (Kagan, J., dissenting).

[2] Instances of overturning "manifestly wrong" precedent by this Court in appropriate application of the exception to *stare decisis* include *Allstate v. Wagner-Ellsworth*, 2008 MT 240, ¶¶ 29-40, 344 Mont. 445, 188 P.3d 1042; *State v. Benn*, 2012 MT 33, ¶¶ 6-8, 364 Mont. 153, 274 P.3d 47; and *Pedersen v. Ziehl*, 2013 MT 306, ¶¶ 22-24, 372 Mont. 223, 311 P.3d 765. These decisions overturned clearly incorrectly decided cases with precise analyses that actually preserved years of precedent, did not undermine any legal or societal interests relying on the overturned cases, and were decided in each instance by a unanimous Court. In contrast, over the past 17 months, in the cases cited above, this Court has repeatedly overturned, not merely erroneous outliers, but multiple-case *lines* of authority representing decades of precedent, upon which significant legal and society interests have relied—all in deeply-divided opinions with multiple dissenters and dissenting opinions. Here, the Court overturns another 35 years of clear precedent.

¶46 The reasons a "special justification" is required by the U.S. Supreme Court for reversal of precedent are many, including "the evenhanded, predictable, and consistent development of legal doctrine," "respect for and reliance on judicial decisions," and "the actual and perceived integrity of the judicial process," *Janus*, 585 U.S. ___, ___, 138 S. Ct. at 2497 (Kagan, J., dissenting) (internal quotations omitted), but there is even a greater consideration: the potential interests at stake which rest upon the precedent. *See Janus*, 138 S. Ct. at 2497 (Kagan, J., dissenting) (discussing "the massive reliance interests at stake"). Our State's reliance upon the precedents at issue in *ALPS* and *Stiffarm* moved the Legislature to correct our decisions in those cases, but had this Court considered the precedents properly in the first place, those remedial measures would have been unnecessary.

¶47 A problem with these past decisions, and today's decision, is that the Court is untethering the "manifestly wrong" exception from the vital consideration of what is at stake—that is, what depends upon the current precedent—and is applying the exception merely upon a subjective determination that past precedent must be disposed of. Indeed, as stated in the sources cited by the Court, incorrect precedent is to be overturned only "where departure therefrom can be made *without unduly affecting contract rights or other interests calling for consideration*." Opinion, ¶ 22, n.1 (emphasis added). In the current case, charges have been assessed and filed, and criminal proceedings undertaken, in numerous cases over the past decades pursuant to our precedential interpretation of the PFO statutes. Plea bargain agreements have been entered and cases resolved upon court approval of those agreements. Sentences have been imposed in these and many more cases.

Prison terms have been served and more are being served. There is much at stake and dependent upon our precedent, and much work done by lawyers and judges over the decades that will be effectively undermined by the Court's action today, which should be considered:

> Rarely if ever has the Court overruled a decision—let alone one of this import—with so little regard for the usual principles of *stare decisis*. There are no special justifications for reversing *Abood.* It has proved workable. No recent developments have eroded its underpinnings. And it is deeply entrenched, in both the law and the real world. More than 20 States have statutory schemes built on the decision. Those laws underpin thousands of ongoing contracts involving millions of employees. Reliance interests do not come any stronger than those surrounding *Abood*. And likewise, judicial disruption does not get any greater than what the Court does today.

Janus, 585 U.S. ___, ___, 138 S. Ct. at 2487-88 (Kagan, J., dissenting.). Likewise, here, our prior decisions are "deeply entrenched, in both the law and the real world."

¶48 The Court rejects our 1985 decision in *Williamson*, by Justices Harrison, Turnage, Gulbrandson, Morrison, and Hunt, and without dissent, because the Court there used a "falsely exaggerated" premise that it offered "[u]nder the guise of ascertaining legislative intent,"—apparently believing *Williamson* was an effort in judicial deception. Opinion, ¶¶ 18, 19. The Court rejects the Court's 1991 decision in *Hamm*, by Justices Weber, Turnage, McDonough, Trieweiler, and Gray, and without dissent, despite the clear conclusion in that case "that Hamm *falls squarely within* the persistent felony offender statute." *Hamm*, 250 Mont. at 131, 818 P.2d at 835 (emphasis added). To the Court, our 2009 decision in *Anderson*, by Justices Cotter, Warner, Morris, and Leaphart, without dissent, and which reaffirmed our determinations in *Williamson* and *Hamm*, now offers nothing but a continuation of the apparently deceptive analysis that "perpetuat[ed] our

initial error." Opinion, ¶ 20. In my view, very little of the extensive, collective work of these 13 justices, on this or other issues, can be classified as false or exaggerated reasoning, but more to the point, poor reasoning is not an appropriate basis on which to overturn decades of precedent. *See United States v. Havis*, 907 F.3d 439, 442 (6th Cir. 2018) (internal citation omitted) ("Nor do we enjoy greater latitude in situations where our precedents purportedly are tainted by analytical flaws.").

¶49 Is there sufficient justification for this precedent-overturning decision by the Court? I would echo the words of Justice Kagan, "the majority does not have anything close," *Janus*, 585 U.S. ___, ___, 138 S. Ct. at 2497 (Kagan, J., dissenting), that would justify overturning decades of precedent and the mountain of work based thereon. Nor is the Court's decision justified by a need for "reform and fair warning." Opinion, ¶ 26. Seeking to join the reform effort, the Court attempts to wring legislative support for its decision from the 2017 amendments to the PFO statutes. Opinion, ¶ 23. However, the proper inference to be drawn is precisely the opposite. The Legislature revised the PFO statutes but very clearly chose *not* to revise our 35-year interpretation of qualifying offenses. As Justice Baker explains, we have always treated legislative inaction for what it is—a choice to leave the law alone. Concurrence and Dissent, ¶ 32. Here, given the Legislature's substantial reform of the PFO statutes, that principle speaks, *a fortiori*, in favor of the inference that the Legislature determined to retain our long precedent. The Court's attempt to engineer a reverse legislative intent under the banner of "reform" is nothing more than a policy endorsement of the changes made to the PFO statutes and a desire to push the reform further. The Court reasons that Running Wolf "has not been warned about

enhanced consequences of future criminal conduct prior to the commission of the principle offense," Opinion, ¶ 26, but that is an incorrect premise, and a red herring. Since 1985, this Court's decisions have repeatedly and fairly warned everyone, including Running Wolf, that commission of multiple felonies could result in an enhanced penalty. For this reason, there is no violation of Running Wolf's constitutional rights that compels the Court to act. The Court's attempt to justify its decision as constitutionally necessary is mere whitewash.

¶50 I dissent from the Court's overturning of our long established precedent.

/S/ JIM RICE

Justice James Jeremiah Shea, concurring and dissenting.

¶51 I concur with the Court's resolution of the first issue. I dissent from the Court's resolution of the second issue. Although I think the Court provides a well-reasoned analysis and interpretation of § 46-18-501, MCA, I cannot conclude that the decisions the Court overrules today are *manifestly* wrong.

¶52 Recognizing the gravity of overturning an established precedent, we have set the standard that a prior decision will be overturned only if it is "manifestly wrong." *See Allstate*, ¶ 39 (quoting *Formicove*, 207 Mont. at 194, 673 P.2d at 472). In applying this standard, we must recognize that "manifestly" is not an idle adverb; it raises the bar substantially. Merely wrong does not get us over the bar. The end result is that, as Justice

Rice noted, "[r]especting stare decisis means sticking to some wrong decisions." Rice Concurrence and Dissent, ¶ 45 (quoting *Janus*, Kagan, J., dissenting).

¶53 The Court today interprets the use of "previous felony conviction" in § 46-18-501(2), MCA, to mean "that the felony conviction for which you become an 'offender' must occur prior to . . . 'the commission of the present offense.'" Opinion, ¶ 17. This is an entirely reasonable interpretation of the statute. It is not, however, this Court's interpretation prior to today, and since 1985. Prior to today, this Court consistently held that, for a PFO enhancement to apply, the previous felony conviction must occur within five years of the commission of the present offense—but not necessarily within the *preceding* five years. *See Anderson*, ¶ 15; *Hamm*, 250 Mont. at 131, 818 P.2d at 835; *Williamson*, 218 Mont. at 246, 707 P.2d at 532-33. Whether or not this is, on balance, a better interpretation of the statute than the interpretation the Court employs today, it does not rise to the level of "manifestly wrong."

¶54 Parsing the statute out, the first sentence of § 46-18-501, MCA, defines a "persistent felony offender" as "an offender who has previously been convicted of a felony and who is presently being sentenced for a second felony committed on a different occasion than the first." The plain language of this definition, standing alone, supports this Court's statutory interpretation in *Williamson*, *Hamm*, and *Anderson*, as it only requires a previous felony conviction be at an indeterminate time before the *sentence imposed* for a second felony that was committed on a different occasion than the first felony. Under this definition, the previous felony conviction could be mere seconds before the sentence imposed for the second felony, irrespective of whether the previous felony conviction

occurred before the *commission* of the second felony. This is precisely what our precedents allow.

¶55 Beginning with the next sentence of § 46-18-501, MCA, things start to get muddied. The remainder of the statute provides, in relevant part: "An offender is considered to have been previously convicted of a felony if . . . less than 5 years have elapsed between the commission of the present offense and . . . the previous felony conviction." Section 46-18-501(2)(a), MCA (2015). This language appears internally inconsistent with the definition of a "persistent felony offender" because it draws a temporal relationship between the previous felony conviction and the *commission* of the second felony, rather than the *sentence imposed* for the second felony. This Court's prior decisions in *Williamson, Hamm,* and *Anderson* resolved this conflict in favor of an interpretation that allowed a PFO designation if less than five years had elapsed between the commission of the offense that was subject to the PFO enhancement, and the conviction that was the predicate for the PFO designation, regardless of whether the predicate conviction occurred before or after commission of the offense subject to the PFO enhancement. Effectively, our prior decisions deferred to the definition of "persistent felony offender" over the description of when an offender is considered to have been "previously convicted of a felony." Whether or not I fully embrace that interpretation, I cannot say it is manifestly wrong.

¶56 The Court provides a solid analysis for its current interpretation of the statute and, if writing on a clean slate, I would be inclined to agree it is the better-reasoned analysis. As Justice Baker aptly observes, however, the slate here is far from clean.

Baker Concurrence and Dissent, ¶ 32. Though I may not wholly agree with this Court's prior interpretation of § 46-18-501, MCA, sometimes stare decisis compels us to dance with the one who brung us, even if it means getting our toes stepped on a little.

/S/ JAMES JEREMIAH SHEA