

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0565

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

JAMES JESSE JOHNSON,

Defendant and Appellant.

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**REPLY BRIEF OF APPELLANT**

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On Appeal from the Montana Eleventh Judicial District Court,  
Flathead County, the Honorable Robert B. Allison, Presiding

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## ARGUMENT

James Johnson challenged the sufficiency of the state's evidence and the district court's finding that the condition of his suspended sentence was enforceable. He argued the state failed to prove that both his treatment provider and his probation officer deemed the treatment condition necessary, and he could not be found to have violated a contingent condition. He renewed that argument before this Court. In response, the state points to evidence on which the district court did not rely, and refers to other factors which the state argues could have supported the decision that Johnson had violated the sentencing condition.

This Court should review the district court's decision to revoke Johnson's sentence based on the court's actual findings.

### The District Court Findings are not Supported by the Evidence.

The loss of liberty associated with a revocation of sentence is a serious deprivation of liberty requiring that the probationer be accorded due process. *State v. West*, 2008 MT 338, ¶ 26, 346 Mont. 244, 194 P.3d 683; *Gagnon v. Scarpelli*, 411 U.S. 778, 781, 93 S. Ct. 1756, 36 L.Ed.2d 656 (1973). Due process requirements include a hearing on whether the probationer has in fact acted in violation of a condition of his probation, and, when the probationer objects to the sufficiency or accuracy of the evidence, specific findings that

show the basis on which the district court resolved disputes at the time of the hearing. *State v. Baird*, 2006 MT 266, ¶¶ 29-30, 334 Mont. 185, 145 P.3d 995; *Gagnon*, 411 U.S. at 784; *United States v. Sesma-Hernandez*, 253 F.3d 403, 409 (9<sup>th</sup> Cir. 2001).

The requirement of a written statement provides benefits in the sentence and the appellate review processes because it “helps to insure accurate factfinding with respect to any alleged violation and provides an adequate basis for review to determine if the decision rests on permissible grounds supported by the evidence.” *Sesma-Hernandez*, 253 F.3d at 408, quoting *Black v. Romano*, 471 U.S. 606, 613-14, 105 S. Ct. 2254, 85 L. Ed. 2d 636 (1985).

Specific findings are constitutionally required where, as in this case, the defendant objects to the sufficiency or accuracy of the evidence. See *Sesma-Hernandez*, 253 F.3d at 409. “Where the parties have any specific disagreements, . . . the record must clearly reflect that the court considered the position of each of the parties and must identify the basis on which the court resolved any disputes at the time of the hearing.” *Id.* In *Baird*, this Court cited this passage and relied on *Sesma-Hernandez*. 2006 MT 266, ¶¶ 29-30.

The district court did not make any findings in the written Order of Revocation, Judgment & Sentence. The “written statement” requirement,

intended to benefit the appellate review process, is limited to the district court's oral findings at the conclusion of the adjudicatory hearing. This record establishes only that the district court found that condition 23 was enforceable based on the inference that Johnson's then-probation officer deemed continuing treatment necessary. That is, the court inferred from the fact that Johnson had enrolled in an aftercare program, that his probation officer deemed it necessary that he do so. 5/24/18 Tr. at 22. Thus, the court concluded, condition 23 was enforceable and Mr. Johnson's termination from the aftercare program constituted a violation of the condition.

The state did not produce any evidence at the hearing relative to what the Johnson's probation officer did or did not conclude regarding the challenged condition. In its response brief, the state points to a representation in the Report of Violation to the effect that when Mr. Johnson was terminated from a prior treatment program, he was given an opportunity by his probation officer to find another treatment provider "in lieu of a revocation." DC Doc. 31, at 2. Based on this sole reference, the state argues that the Report of Violation contains evidence that both Johnson's prior treatment provider and his prior probation officer "deemed continued treatment necessary." Brief of Appellee, at 9.

However, neither the state nor Johnson's current probation officer even

mentioned this representation, let alone argued that this constituted sufficient evidence that the probation officer deemed the condition necessary. At most, this statement suggests that had the probation officer filed a petition to revoke, that situation would have been the same as the posture of the case in the district court here. Had a petition been filed, that court would have had to determine after a hearing whether the state had proved the condition was enforceable, and only if the court so found would then court then proceed to determine whether to revoke the sentence.

The district court in this case did not state that its finding was based on the representation in the Report of Violation. The state's argument as to what might have been is speculative and does not support the court's finding.

The state argues that other facts support the court's decision to revoke. This argument is unavailing, because the District Court did not rely on these facts to determine that condition 23 had become enforceable. It is of no consequence that Ms. Reil, Mr. Johnson's current probation officer, testified that Johnson was ordered to complete sex offender treatment. Brief of Appellee, at 9. Mr. Reil admitted she was not Johnson's probation officer at the time he enrolled in the program, so she was not the probation officer whose decision on condition 23 could have made it enforceable.

The state's reliance on the fact that Mr. Johnson owed a balance at the time of his termination, or that he made comments when he was terminated, also is unavailing. What happened when he was terminated is not germane. The key issue was whether the state proved the condition was deemed necessary by his then-treatment provider and his probation officer. Only if these two persons deemed the condition necessary did Mr. Johnson have a duty to continue in treatment. Only if the state provided these two persons deemed the condition necessary did it become enforceable, and punishable by revocation for noncompliance.

The district court did not make any finding as to whether a treatment provider triggered the obligation of condition 23 by deemed continued treatment necessary. The court found the probation officer did so, based on an inference from Johnson's participation on a program. The finding is devoid of evidentiary support and is invalid under the due process requirements. *Douglas v. Buder*, 412 U.S. 430, 93 S. Ct. 2199, 37 L. Ed. 2d 52 (1973).

## CONCLUSION

For the reasons set out in the Opening Brief and in this Reply Brief, Mr. Johnson respectfully submits that the Court should reverse the District Court's decision that Johnson violated a condition of his suspended sentence, and vacate the Order of Revocation, Judgment & Sentence.

Respectfully submitted this 25<sup>th</sup> day of September, 2019.

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By: /s/ William F. Hooks  
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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced 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 1,122, excluding Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance.

By: /s/ William F. Hooks  
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## CERTIFICATE OF SERVICE

I, William F. Hooks, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 09-25-2019:

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