IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0351

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ISAAC WILLIAM MACY,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

On Appeal from the Montana Nineteenth Judicial District Court,
Lincoln County, the Honorable Matthew Cuffe Presiding

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The Defendant and Appellant, Isaac William Macy ("Macy"), respectfully replies to the State's Answer as follows:

ARGUMENT

Macy argues on appeal that this case should be remanded with instructions to the district court to reinstate the suspended portion of his sentence and credit him with the custodial time he has served in the interim. He acknowledges that revocation hearings are civil in nature, *State v. Finley*, 2003 MT 239, ¶ 29, 317 Mont. 268, 77 P.3d 193, but emphasizes that probationers are entitled to the minimum requirements of due process, *State v. Pedersen*, 2003 MT 315, ¶ 20, 318 Mont. 262, 80 P.3d 79; Mont. Const. art. II, § 17; U.S. Const. amend XIV. Among those minimum requirements are disclosure of the evidence against a probationer, and the right to cross-examine adverse witnesses at a hearing. *Finley*, ¶ 31 (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973)); Section 46-18-203(4), M.C.A.

Macy received neither. He learned for the first time at his revocation hearing that the evidence against him included two alleged confessions, one to the probation officer, and one to a sheriff's deputy. Additionally, Macy was not given the opportunity to cross-examine the

deputy, whose report of Macy's alleged confession initiated the revocation proceeding. The district court revoked Macy's suspended sentence based entirely on these two alleged confessions, so the deprivation of Macy's due process rights was sufficiently prejudicial to warrant reversal. *See Pedersen*, ¶ 21.

In response, the State asserts that (1) Macy had sufficient notice of the contents of the deputy's report because the report number was disclosed to his attorney of record in advance of the revocation hearing; (2) Macy's claim that the district court erroneously admitted his alleged confession to his probation officer is not reviewable on appeal; and (3) Macy was not prejudiced by the admission, via the probation officer's testimony, of his alleged confession to the deputy because Macy's subsequent confession to the probation officer corroborates the confession allegedly given to the deputy. Each argument will be addressed in turn.

I. Macy was deprived of due process when his suspended sentence was revoked based upon evidence that had not been disclosed to him before the hearing.

First, the parties appear to agree, (Opening Br. at 5; Answering Br. at 9), that the sum total of the documentation actually provided to

Macy in the revocation proceeding was probation officer Darrell Vanderhoef's report of violation, which said, "On February 17, 2022, the defendant was arrested for Criminal Possession of Dangerous Drugs (METHAMPHETAMINE), a Felony, § 45-9-102 MCA. Please refer to LCSO Report Number 22LC00828 by Deputy James Derryberry." (D.C. Doc. 21 Ex. A at 2.) The report written by Deputy Derryberry may have been produced to Macy's counsel of record as discovery in another criminal matter,[1] Lincoln County Cause No. DC-22-18, but it was not disclosed to Macy in Lincoln County Cause No. DC-17-119. This is not a meaningless distinction, because at the adjudication hearing Macy's counsel represented to the district court that this was the first time he had seen the report and the report was not among the records associated with Macy's revocation proceeding in the Office of the Public Defender's case management system. (Tr. 04/19/2022 Adjudication Hearing at 20–21.) Thus, Macy's agreement at the initial hearing that he has had an opportunity to review the "Petition to Revoke and its

[1] This cannot be confirmed from the record because Liam Gallagher was standing in for Keenan Gallagher at the revocation hearing. (Tr. 04/19/2022 Adjudication Hearing at 64–65.) It was Keenan Gallagher who may have received the report as discovery in another case, but that is not reflected in the record of this revocation proceeding.

attachments," (Tr. 03/21/2022 Initial Hearing on Petition to Revoke at 5), is not a disagreement with his counsel about what had been provided by the State, but rather an assurance to the district court that he had personally reviewed everything his counsel had been provided. What his counsel had at that point did not include Deputy Derryberry's report.

As this Court has explained before, "[t]he offender is entitled to receive written notice of the alleged violation *and* disclosure of the evidence against him or her." *State v. Macker*, 2014 MT 3, ¶ 9, 373 Mont. 199, 317 P.3d 150 (quoting *Finley*, ¶ 31) (emphasis added). Macy did not receive disclosure of the evidence against him before it was presented at his revocation hearing, which means he did not know until he was confronted with it at the hearing that the State intended to prove a violation of the terms of his probation with evidence of his own alleged confession to law enforcement.

A probationer's confession is ample evidence of a violation, and it may be admitted at a revocation hearing without offending § 46-16-215, M.C.A., or other trial protections. *Macker*, ¶ 12. But this Court has not addressed a situation precisely like this one before: the confession is allegedly made to a law enforcement officer, who does not testify about

the confession, but records it in a report, which is read by a probation officer, who informs the defendant of the report's existence but does not furnish him with a copy, and who ultimately testifies that the report says the defendant confessed to the absent law enforcement officer. This sequence of events does not amount to due process because Macy was entitled to "disclosure of the evidence against [him]." *Finley*, ¶ 31. Unless this Court now chooses to define "disclosure" as contemporaneous production of the evidence at a hearing rather than production of the evidence prior to the hearing, Macy clearly was not afforded the minimum due process protections in this case.

The district court based its decision to revoke Macy's suspended sentence entirely on his alleged confession to Deputy Derryberry, (Tr. 04/19/2022 Adjudication Hearing at 63), so the due process violation was sufficiently prejudicial to warrant reversal, *cf. State v. Megard*, 2004 MT 67, ¶ 67, 320 Mont. 323, 87 P.3d 448; *Pedersen*, ¶ 21.

II. Macy's claim that the district court erroneously admitted his alleged confession to his probation officer is reviewable on appeal.

Second, Macy's claim that the district court erroneously admitted his alleged confession to his probation officer is reviewable on appeal.

The State is correct that "[a] party may not raise new arguments or change its legal theory on appeal." *State v. Martinez*, 2003 MT 65, ¶ 17, 314 Mont. 434, 67 P.3d 307; § 46-20-104(2), M.C.A. "The reason for the rule is that it is fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider." *Martinez*, ¶ 17. But that was not the case here. Macy's oft-stated objection at the hearing was lack of due process, which encompasses several rights (notice, disclosure, confrontation, etc.). (*See, e.g.,* Tr. 04/19/2022 Adjudication Hearing at 19–23, 26, 50.) In his argument to the district court, Macy summarized his objection to the manner in which the entire hearing was conducted:

> [Officer Vanderhoef] said it several times from the witness stand. There is a confession in this case. That confession does not occur in the Sheriff's Office Report. It does not—it is not referenced in the Report of Violation. It came as a surprise and should have come as surprise to defense. I think the Court should look at that alleged confession with skepticism. When we have confessions that for the first time come out from the witness's mouth on the stand and are not documented, I think that is problematic. [. . .] The State should not be benefiting from being vague. From writing a Report of Violation and not including details such as when and where the confession happened [. . .] And I would argue that in this case the process that occurred was beneath what is due to an individual in [Macy's] shoes.

(Tr. 04/19/2022 Adjudication Hearing at 61–2.) The district court was well aware of Macy's objections to the process of his hearing before it issued its ruling revoking Macy's suspended sentence. Because the spirit of the contemporaneous objection rule was followed here, this Court should not decline to review this issue on appeal because of the placement of the word "objection" in the record.

The prejudice to Macy was the same with respect to this alleged confession as it was with respect to the alleged confession to Deputy Derryberry: the district court found that the testimony about the confessions Macy made to Deputy Derryberry and Officer Vanderhoef are "sufficient in and of itself to support a finding that [Macy] did, in fact, commit the alleged violations in Count I and Count II." (Tr. 04/19/2022 Adjudication Hearing at 63.) The due process violation was therefore not harmless. *Cf. Pedersen*, ¶ 21.

III. Macy was deprived of due process when his suspended sentence was revoked based upon the testimony of an adverse witness whom he was not able to cross-examine.

Third, in the final issue it raises, the State's logic is circular. It argues that, "Macy's right to due process was not violated in this case by Officer Vanderhoef's reliance on Deputy Derryberry's report because

Macy acknowledged to Officer Vanderhoef that he committed the charged violation by possessing methamphetamine." (Answer Br. at 13.) But in order to reach that conclusion, one must grant the State's premise: that Macy in fact said what Officer Vanderhoef said he said (but did not bother to record). Using that logic, no prosecutor should have to disclose to the defense a defendant's taped confession to law enforcement because the defendant should already know what he said. But of course, that is not our system. Ours is an adversarial system, which not only relies on but assumes an adverse party's right to confront and cross examine the witnesses against him. *See State v. Mizenko*, 2006 MT 11, ¶ 13, 330 Mont. 299, 127 P.3d 458 ("In the cross-examination essential to the adversarial system, the defendant tests the witness's testimony in the most rigorous, demanding, and exacting test. Through cross-examination, the defendant can delve into the witness's story and potentially reveal inherent flaws, inconsistencies, and insidious motives. Indeed, John Henry Wigmore called cross-examination the 'greatest legal engine ever invented for the discovery of truth.'" (internal citations omitted.))

To illustrate Wigmore's point, cross examination of Officer Vanderhoef revealed that Macy had signed a written confession to smoking marijuana, but he did not sign a written confession to possessing methamphetamine, and his urinalysis had come back negative for methamphetamine. (Tr. 04/19/2022 Adjudication Hearing at 30–31, 40.) Although he was handicapped by the lack of disclosure of this evidence ahead of the hearing, Macy was still able to generate doubt about the veracity of Officer Vanderhoef's testimony. Therefore, its accuracy should not be assumed for purposes of deciding whether or not Macy was prejudiced by the inability to cross examine Deputy Derryberry. Even if Officer Vanderhoef testified with perfect accuracy, he would still only be testifying accurately about what Deputy Derryberry wrote in his report, not about what Deputy Derryberry saw or heard. Although the hearsay rules do not prohibit a probation officer from testifying at a revocation hearing about information he received from a third party, "[i]t is undisputed that a revocation hearing must be fundamentally fair and must meet minimum due process requirements." *Megard*, ¶ 23. As a probationer facing revocation, Macy did not have a right under the Confrontation Clause to cross examine

Deputy Derryberry. *Megard*, ¶ 22. But he did have both a statutory right and a constitutional right to due process of law. Mont. Const. art. II, § 17; U.S. Const. amend XIV. Due process demands the right to cross-examine adverse witnesses. Section 46-18-203(4)(c), M.C.A.; *Finley*, ¶ 31 (citing *Gagnon*, 411 U.S. at 786).

The cases cited by the State that are purported to authorize a process such as the one used here are different in important respects. In *Macker*, this Court approved the district court's admission of a probation officer's testimony about what the probationer's mother had told the probation officer because the statement at issue was given directly to the probation officer who was testifying. *Macker*, ¶ 15. In *State v. Fetveit*, 2020 MT 264, ¶ 8, 401 Mont. 538, 474 P.3d 811, the probation offer testified about the report of violation (written by a prior supervising officer) as well as her own experiences supervising the probationer. The report in that case contained the prior officer's observations, not simply a note to refer to another report written by another person. *Cf. Fetveit*, ¶ 8. This Court found the process in *Fetveit* comported with the minimum standards of due process because the testifying probation officer "verified the contents of the report [she did

not write] and testified about her own experiences supervising Fetveit, particularly his failing to report repeatedly for months." *Fetveit*, ¶ 14.

In Macy's case, the evidence on which the district court based its decision to revoke his suspended sentence was two alleged confessions, neither of which were disclosed to Macy ahead of time, and neither of which were verified or corroborated by any other evidence. The State attempts to bolster one confession by assuring this Court that a second confession was made, so, the logic goes, it must be true. But since the testifying witness only knows the circumstances of one alleged confession, he cannot be adequately cross-examined about the details of the other. And because the confessions are the only evidence on which the district court based its decision to revoke Macy's suspended sentence, he was prejudiced by the denial of his minimal due process rights.

CONCLUSION

Macy's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article II, Section 17 of the Montana Constitution were violated when his suspended sentence was revoked on the basis of confessions he allegedly made to a

probation officer and an arresting officer. He was not informed of the evidence against him prior to the revocation hearing, and he was not able to cross-examine one of the two adverse witnesses at the hearing. Even in the context of a civil proceeding in which the rules of evidence are not enforced, the Montana and Federal constitutions guarantee that due process still applies. This Court should vacate the Judgment and Sentence revoking Macy's December 11, 2017 suspended sentence, (D.C. Doc. 38), and remand with instructions to reinstate the suspended portion of Macy's sentence and credit him with the custodial time he has served in the interim.

Respectfully submitted this 10th day of November, 2023.

By: /s/ *Caitlin Boland Aarab*
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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 proportionally-spaced roman text, Century Schoolbook, and a typeface of 14 points, and is double-spaced except for footnotes and quoted, indented material. This brief contains 2,390 words, as calculated by Microsoft Word for Windows, excluding the Cover, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

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