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**IN THE SUPREME COURT FOR THE STATE OF MONTANA**

**No. DA 22-0543**

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JUSTIN GUY ZENO SHAWN WOLF MASON,

Defendant And Appellant,

v.

STATE OF MONTANA,

Plaintiff And Appellee.

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**APPELLANT'S OPENING BRIEF**

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On Appeal from Montana's Tenth Judicial District Court,  
Fergus County, The Honorable Heather Perry Presiding

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## **TABLE OF CONTENTS**

Table of Authorities .....	ii
Statement of the Issues.....	1
Statement of the Case.....	1
Standards of Review .....	22
Summary of the Argument.....	23
Argument.....	24
1. The district court committed reversible error when it found Mr. Mason in violation of the terms and conditions of his probation.....	26
a. The requirement that Mr. Mason “get out of town” within 14 days of his release from custody was illegal when imposed and was illegally maintained when he was resentenced. ....	27
b. The requirement that Mr. Mason “get out of town” within 14 days of his release from custody was the actual and proximate cause everything that proceeded from it and imposed an unfair burden upon him. ....	30
2. The district court’s denial of Mr. Mason’s motion to enter the video recording into evidence and holding that “simply being charged” was a violation of Mr. Mason’s probation requirements was reversible error.....	31
3. The district court’s revocation of Mr. Mason’s probation was plain error in that it was fundamentally unfair and should leave the Court firmly convinced that a failure to vacate the order may result in a miscarriage of justice, fundamental unfairness and may compromise the integrity of the judicial process. ....	34
Conclusion .....	36

## **TABLE OF AUTHORITIES**

### **Montana Code Annotated**

Mont. Code Ann. §46-16-130 .....	28
Mont. Code Ann. §46-18-202 .....	27, 28
Montana Code Ann. §46-18-203 .....	31, 34

### **Montana Cases**

<i>State v. Howard</i> , 2020 MT 279, 402 Mont. 54 .....	16, 31, 33
<i>State v. Jardee</i> , 2020 MT 81, 399 Mont. 459 .....	23
<i>State v. Johnson</i> , 2018 MT 277, 393 Mont. 320 .....	23
<i>State v. Muhammad</i> , 2002 MT 47, 309 Mont. 1 .....	27, 28, 34
<i>State v. Pennington</i> , 2022 MT 180, 410 Mont. 104 .....	22, 34
<i>State v. Triplett</i> , 2008 MT 360, 346 Mont. 383 .....	23

## **STATEMENT OF THE ISSUES**

1. Whether the district court committed reversible error when it found Mr. Mason in violation of the terms and conditions of his probation.
2. Whether the district court committed reversible error when it denied Mr. Mason's motion to enter the video recording into evidence and held that "simply being charged" was a violation of Mr. Mason's probation requirements .
3. Whether the district court's decision to revoke Mr. Mason's probation was plain error.

## **STATEMENT OF THE CASE**

Defendant and Appellant Justin Guy Zeno Shawn Wolf Mason, appeals the Orders, entered June 27, 2022 and July 27, 2022 by the Montana's Tenth Judicial District Court, Fergus County, finding him in violation of his conditions of parole and sentencing him to the Department of Corrections (DOC) for five years with no time suspended. (Appendix A)

**Sentence – December 10, 2021.** Pursuant to a plea agreement, Justin Mason plead guilty to: 1) Partner or Family Member Assault (PFMA), Causing Bodily Injury to a Partner or Family Member – 3d Offense, a Felony: 2) Unlawful Restraint, a misdemeanor, and; 3) Resisting Arrest, a misdemeanor. (DC060.1, DC066) The Fergus County District Court sentenced Mr. Mason to five years

DOC, suspended, for the PFMA charge, 6 months jail time, suspended, for the Unlawful Restraint charge, and 6 months jail time, suspended, for the Resisting Arrest charge – with all charges running concurrently. (DC066) Mr. Mason was credited with 213 days for jail time served. (*Id.*) The district court entered conditions of probation that included:

5. Unless otherwise directed, Defendant must submit written monthly reports to his supervising officer/designee on forms provided by the BOPP. Defendant must personally contact his supervising officer/designee at those individuals' discretion.

...

9. Defendant must comply with all municipal, county, state, and federal laws and ordinances and must conduct himself as a good citizen. Defendant must report any arrest or other law enforcement contact to his supervising officer/designee within seventy-two (72) hours of such an event....

(DC066)

**Petition to Revoke – April 6, 2022.** April 6, 2022, the State of Montana filed a Petition for Revocation of Suspended Sentence (PTR). (DC083) Probation and Parole Officer Gatlin Lamb swore an affidavit in support of the Petition in which he alleged Mr. Mason had committed two violations of his probation:<sup>1</sup>

Condition #8 ... On January 25, 2022, the Defendant was involved in an Assault (sic) (M), in Missoula, MT, on a security guard. The Defendant was staying a (sic) the Poverello Center in Missoula, MT upon his initial request for a transfer but has since been trespassed. The Defendant came back to the Poverello Center and was asked to leave by security and the Defendant became confrontational. The Defendant physically struck a security guard while they attempted to

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<sup>1</sup> Identified in the PTR as Count I and Count II, respectively. (DC083)

remove the Defendant off the property. The Defendant was arrested and taken to Missoula County Detention Center.(DC083.10)

Condition #4 ... On December 23, 2021, the Defendant had contact with law enforcement in Lewistown, MT. He was instructed to report to the office before noon. He was a no show. On January 22, 2022, the Defendant was instructed to report to the Missoula Probation and Parole office the following Monday (24th) before 0900 hours. He was a no show.

(DC083.10)

Officer Lamb argued that Mr. Mason's "adjustment to supervision has not been satisfactory." (DC083.10)

Since the start of supervision, the Defendant has shown that he does not respect the conditions set before him. He has been very hard to reach and only wants to operate on his time. The Defendant needed to leave Fergus County per a condition with the courts. The Defendant was very difficult to get into the Office to make a plan to help get him to his destination (sic) of Missoula. The Defendant wanted to withhold all information of his destination and plans of being in Missoula. The Defendant left abruptly after plans fell through multiple (sic) times. He was set to report to Missoula Probation and Parole and never did. The Defendant made himself very difficult to get ahold of and did not report as instructed.

The Defendant has been a no show on two (2) separate occasions after he has had Law Enforcement contact. One of those contacts resulted in new charges.

The Defendant has been trespassed from his current residence in Missoula, MT due to conflict that he created. The Defendant has been on supervision for approximately three (3) months and has been very difficult to supervise.

The Defendant has a history of resisting arrest and not respecting authority. There is no doubt that he poses a risk to the members of the community. It is clear that he has no intention of following the rules and conditions of his probation.

(DC083.10)

**Initial Appearance – May 3, 2022.** Appearing with counsel, Mr. Mason denied all allegations in the PTR. (5/3/2022 Hrg. Tr. 6:4-7:12)

**Adjudicatory Hearing – June 22, 2022.** Officer Lamb testified in support of the PTR. (6/22/2022 Hrg. Tr. 2:9, et seq.) Officer Lamb testified Mr. Mason had reported, as required after sentencing but, “We didn’t quite have the full conditions from the Court at that time....”

He showed up – I think that was about a week later – he showed up as scheduled.... We tried to make a game plan because he had to leave Fergus County..., and he had a date. I can’t remember the exact date. So, our process is to create a plan on where you’re gonna go, get the details, how we can contact you. And once we have those, that information we create a travel permit to wherever his destination is going to be and then transfer him to whatever jurisdiction he’s gonna be in and we schedule that date and make a plan and he’d come back.... I didn’t hear from him.... And then I received a phone call from the Lewistown Police Department that he was a passenger in a vehicle in town and that they had him there. I said, all right, cool, tell him to report to my office by noon. We’ve got to make a travel plan to get out of here, and he didn’t show up again.

(6/22/2022 Hrg. Tr. 5:1-25)

Officer Lamb said he established contact with Mr. Mason in a gas station in Rocker, Montana. (6/22/2022 Hrg. Tr. 6:7-22) “I believe he ran out of money and couldn’t travel anymore, or didn’t have a ride from there, I guess...” (*Id.* 6:22-25) Officer Lamb said he didn’t know where Mr. Mason was going, but they “tried to hammer out the details...we’re gonna figure this out. You need to let me know when you get there.” (*Id.* 7:3-8) Officer Lamb testified he had trouble reaching Mr. Mason by phone because “he was using wi-fi... so it can be kind of hard

sometimes.... I understood that.... I tried to get all the information... so I could get him over to Missoula because he was headed to Missoula at the time. I was gonna transfer him to Missoula Probation and Parole.” (6/22/2022 Hrg. Tr. 7:10-17)

Officer Lamb testified that Mr. Mason’s Missoula address was the Poverello Center and his phone number, “was the same number he was using. It was a text mail number that, which can change if you don’t log in to it after a while, but he from my knowledge kept that number for quite a while....” (*Id.* 8:1-10) Officer Lamb explained that a text mail number, meant that, if you “try to leave a voicemail...they might not receive [it]. So, you... leave it, but if they don’t log back in, they won’t get it...” (*Id.* 8:7-16) Officer Lamb said neither he nor the Missoula Probation and Parole had contact with Mr. Mason after he reached Missoula. (*Id.* 8:17-24)

Officer Lamb said the transfer just involved sending an e-mail with contact information to Missoula, “and then they usually accept it, and then they reach out to.... Kind of get him squared away....” (6/22/2022 Hrg. Tr. 7:20-25) According to Officer Lamb, the next information he had regarding Mr. Mason was in or around January 2022 when he received an e-mail saying Mr. Mason had been involved with law enforcement, and had been trespassed from the Poverello Center. (*Id.* 9:1-11)



On cross-examination, Officer Lamb said Mr. Mason had been given 14 days after sentencing to leave the Lewistown area, and he had no certain place to go. (6/22/2022 Hrg. Tr. 10:17-11:12) “[W]e were having a hard time creating plans because he wasn’t sure where he was gonna go. Missoula, Butte... Helen, I think, was on that option list too.” (*Id.* 11:12-15) Officer Lamb also acknowledged Mr. Mason didn’t have much money, that the weather was cold, and that made his case difficult to manage. (*Id.* 11:16-12:6) Contrary to his earlier testimony, Officer Lamb said he had contact with Mr. Mason in Missoula, “I was able to get a hold of him and we kept calling each other back and forth because he was losing wi-fi at the time I remember and we were trying to hash out some details so I could get him transferred.” (*Id.* 12:7-15) Officer Lamb also acknowledged that he contacted Labor Max in Missoula to confirm Mr. Mason’s employment after getting that information from Mr. Mason, “we were calling each other back and forth when he was losing it, losing service, I got those details from him.” (*Id.* 12:16-13:6)

On redirect examination, Officer Lamb agreed with counsel that Mr. Mason was required to leave the city 14 days after sentencing “as part of a pretrial diversion agreement in another case.” (6/22/2022 Hrg. Tr. 14:8-16) Making it clear he had not direct knowledge of events, Officer Lamb testified that he was notified of Mr. Mason’s police contact by e-mail from the Missoula probation office, “There was a piece there I believe when he was trespassed. Originally, he had

contact with Missoula PD. He was trespassed which I don't believe resulted in any charges at that point. But the Missoula PD officer told him to report to Missoula office the next day at 9:00 o'clock so we could get that official transfer done and he didn't show up for that." (*Id.* 15:1-11)

The district court asked if, "[T]he fact that Mr. Mason may not have been to trial yet on his counts in Missoula. The fact that he was charged, and the court found probable cause to charge him is that a violation of his conditions?" (6/22/2022 Hrg. Tr. 16:1-3) Officer Lamb responded, "Yes, it is, Your Honor." (*Id.* 16:4)

Mr. Mason testified that he "took a deal where I was to be on 5 years suspended DOC and also another pretrial diversion which entailed me having to be gone in 14 days." (6/22/2022 Hrg. Tr. 17:9-12) Mr. Mason testified that he did not get report to Officer Lamb when expected because, "I didn't get released on the same day that he thought I did." (*Id.* 19:4-16) According to Mr. Mason, "I went and checked in with him and he says this is kind of highly unorthodox I've never really done this kind of thing before. You have 14 days to leave, he says, that's illegal you know that right?.... and he says okay well when you... figure out when your gonna be leaving let me know, and we'll get a travel permit set up." (*Id.* 19:25-20:16)

Mr. Mason said he arranged for a ride on the 14th day, “but a snowstorm, a really, really bad snowstorm struck at that time. So, I wasn’t able to get my ride from Missoula that was coming to pick me up to take me to Missoula.... [S]he wasn’t able to make it here because of the snowstorm, she had to cancel.... [W]e didn’t know exactly how I was gonna get to Missoula. I just knew I had to be gone from here.... [A]fter my ride fell through, I made as best attempt as I could.... So, I informed my probation officer that she had cancelled but I was making other arrangements and I did in fact make other arrangements. I had got a bus ticket.”<sup>2</sup> (6/22/2022 Hrg. Tr. 17:16-23, 20:13-23)

Mr. Mason said the priest at the Lewistown Catholic Church helped him get a bus ticket, “from Great Falls to Missoula because no bus leaves from here, there’s no bus station that comes in and out of here.” (6/22/2022 Hrg. Tr. 18:1-7) Mr. Mason testified he did not contact Officer Lamb to get a travel permit because he didn’t know exactly how he was going to get to Missoula after his ride fell through, “I just knew I had to be gone from here.... I got a friend to give me a ride [to Great Falls] because my bus ticket was that day. I left him a message on his cell phone saying that.... I sent [Officer Lamb] him a message letting him know that, if

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<sup>2</sup> Mr. Mason testified about a second friend who was unable to give him a ride because he “flipped his truck and got a DUI.” It is unclear from the testimony exactly when and how this ride was to take place. (6/22/2022 Hrg. Tr. 18:18-25, 20:23-21:1)

he needed to get ahold of me..., I can be in within the next hour. Otherwise, I have to get to Great Falls because that was the only timeframe [the friend] could give me a ride.... So, I got to Great Falls. He dropped me off. I got on the bus that evening.” (*Id.* 20:17-21:11)

Mr. Mason testified the bus dropped him off in Butte at 12:40 AM. (6/22/2022 Hrg. Tr. 21:12-15) “But buses don’t run from Butte to Missoula on Thursday, Friday, Saturday or Sunday and I did not know that. So, I was stuck in Butte during Christmas from the 23rd until like the 28th.... It was freezing. It was really bad snowstorms.... I was homeless on the streets with my big backpack, and I let [Officer Lamb] know I was in Butte. I called him once or twice at least... letting him know I was in Butte and then when I got to Rockler.... [T]here was lots of times when I did call, could only get his answering machine on his cell phone.” (*Id.* 21:22-3) Mr. Mason said his cell company had authorized release of his call records if the district court would order it. (*Id.* 22:3-6)

Mr. Mason said after “about 20 hours” in Rockler, he called Officer Lamb and let him know he was going to hitchhike to Missoula. (6/22/2022 22:13-21) Mr. Mason said he got a ride from Rockler to Deer Lodge, then another ride from Deer Lodge to Missoula. (*Id.*) “And, once I got to Missoula, I informed him that I was in Missoula – that I was staying at the Poverello. And then, a couple days later, I called him back again and informed him of my job.” (*Id.*)

According to Mr. Mason, he kept in touch with Officer Lamb “keeping him apprised of what I was going through and what was going on in Missoula. He says, they’ll get ahold of you in Missoula because he knew where I was staying and everything. And so, I was waiting for Missoula to get ahold of me... PD or probation department.” (6/22/2022 Hrg. Tr. 23:15-21)

Mr. Mason testified that, on the night of his contact with law enforcement<sup>3</sup>, “It was freezing cold. [H]omeless people were dying out there on the streets that night.... [M]y feet were soaking wet.” (6/22/2022 Hrg. Tr. 24:12-25:2) Mr. Mason said he had planned on staying somewhere else that night but “that fell through. So, by the time I... walked back to the Poverello – because busses don’t run at night – ... the cutoff for staying there... had already passed. So I couldn’t sign up and stay there the night. But I still had my property in a locker there.” (*Id.*) Mr. Mason explained that the Poverello Center had an “in-and-out” that would allow him to go to his locker and get dry socks and other clothing, after which he “would’ve got some cardboard and stayed on some cardboard in a dry, warm – more dry – unwindy spot that I could find until the next morning, and then get on the bus and warm up a bit, and then get to Labor Max.” (*Id.* 25:6-20)

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<sup>3</sup> January 25, 2022 (6/22/2022 Hrg. Tr. 15:1)

Mr. Mason testified that a staff member was following him to the locker, “and I told him he didn’t have breathe down my neck... I was just gonna grab my property and go. And then security got called.... [A] guy grabbed me and, when he grabbed me, I kind of put my hand up. I didn’t try to strike him.... But I did. I was startled that humped and grabbed me.... I was just trying to tell him that... all I needed was my property – my dry socks and shoes so that I didn’t freeze.”

(6/22/2022 Hrg. Tr. 26:3-18) Mr. Mason said the security guard was wearing a video camera, that the whole altercations was recorded on it, that he had seen it, and that it was a true and accurate representation of everything that happened, “It shows everything that happened. Me being tased. The alleged altercation.... It shows ... what the weather was like outside. It shows what I was wearing.” (*Id.* 26:20-27:7)

Counsel moved for introduction of the video recording into evidence, and the State objected. “I don’t think it’s relevant to the issue before the court.<sup>4</sup> The issue before the court is whether or not the defendant violated his conditions, not whether or not the defendant will be convicted on the assault charges.... I also disagree... that it shows everything. I think that there’s a whole bunch of stuff it doesn’t show....” (6/22/2022 Hrg. Tr. 27:12-23) The district court sustained the

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<sup>4</sup> The state also objected on the grounds of relevance and incompleteness. (6/22/2022 Hrg. Tr. 28:17)

objection, “Without the Officer being here to testify about the authenticity of the camera.... And the court agrees that, simply by being charged is a violation of Mr. Mason’s requirements.” (*Id.* 28:1-5) Defense counsel responded that the video was relevant for disposition as “it definitely explains the situation...” (*Id.* 28:21-25)

Mr. Mason testified that, as the video shows, one officer said, “I may have either hit him open handed or closed handed on the chest.... [T]he other officer... did not say anything about me assaulting him. He said that he seen me – maybe – assault the other officer or the other security officer. And security officer... that I’ve allegedly assaulted had tased me for 45 seconds straight.... The video shows... what happened exactly from the time that the... security guard... walked on to the scene. He had it on... even going through the questioning with the officers when they showed up and we got outside. It shows when I was tased, how long I was tased for, it shows me losing my bladder, it shows all the altercations between both of us.” (6/22/2022 Hrg. Tr. 29:17-30:19)

On cross-examination, Mr. Mason explained that he had not been trespassed from the Poverello center after the incident but had been placed on “a 30 day out” meaning, “I have 30 days that I’m not allowed to stay the night there.... They let me stay outside, I just couldn’t stay inside. They have a window where you could still go to and get like sandwiches and stuff like that and talk with people. So, I was going there every day to check in with them and see if I had mail or if Probation

and Parole had gotten a hold of me at all because I was waiting as Gatlin Lamb said they'd be in touch with me, I was waiting for them to get in touch with me so I checked in every day with the Poverello to see if anybody had shown up.... And I still had my property down there which I had access to and would be able to go down and grab my property and switch stuff out because I had a locker that I could put stuff in and out of there.” (6/22/2022 Hrg. Tr. 31:17-32:7, 38:1-3<sup>5</sup>) Asked why he didn't go to the Probation and Parole office, Mr. Mason responded, “I didn't think I was supposed to yet because I had never ever been given any probation officer to check in with. I didn't know who I was to check in with for one. For two, I was told that they would get in touch with me.” (*Id.* 32:8-15) Mr. Mason confirmed that he had been charged in Missoula Municipal Court in connection with the January 25th altercation, but “I do have evidence that refutes that.” (*Id.* 36:23-37:5)

Upon inquiry by the Court about Officer Lamb's allegation that, “on January 22, 2022 you were instructed to report to Missoula Probation and Parole the following Monday before 0900 hours, and you did not show,” Mr. Mason responded that he had seen the allegation but, “I don't remember being told to report there on January 22nd.... I didn't have anybody to report to other than Gatlin

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<sup>5</sup> On redirect examination.



Lamb, and the last conversation I had with him was they'd be in touch with me."

(6/22/2022 Hrg. Tr. 38:22-39:11) The district court confirmed Mr. Mason had been on probation before, and that he was used to the rules, before concluding Mr. Mason knew, "you have an obligation to check in independent of the officers coming and finding you." (*Id.* 39:12-18) Mr. Mason objected, "I didn't know who I was supposed to check in with." (*Id.* 39:20-24) The court pressed, "Why wouldn't you just go directly to the office itself and find out?" Mr. Mason responded, "Because I was waiting for Gatlin to have his paperwork in and the transfer to be successful. Because, when I left – or before I left – there was gonna be [a] transfer. I wouldn't know. It was just kind of a "wing it" kind of thing."<sup>6</sup> (*Id.* 40:1-6)

After conclusion of testimony, the State argued that regardless of whether the banishment of Mr. Mason from the Lewistown area was legal, "The banishment provision is actually not part of this case it's part of his pretrial diversion agreement in a different case in this jurisdiction and that's a contract between the county attorney's office and the defendant..." to which the district court replied, "Understood." (6/22/2022 Hrg. Tr. 40:16-24)

The district court entered oral findings. (6/22/2022 Hrg. Tr. 40:24, et seq.) The court held that whether or not he actually committed the offense for which he

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<sup>6</sup> Counsel presumes there is an error in the transcript here based on prior testimony.

was arrested on January 22, 2022, “It’s clear that Mr. Mason was charged. He may have some defenses and that may, in fact, weigh in on the disposition hearing....but the court finds that Count I has been proven.” (*Id.*) As to Count II, the district court held that, “Mr. Mason knew the rules. He knows where he is supposed to go, and the court cannot simply excuse him based on the fact that he states he was waiting for somebody to tell him who to go see and what to do.” (*Id.*)

Before conclusion of the hearing, Mr. Mason addressed the district court regarding the pretrial diversion agreement under which he was banished from the Lewistown area, citing the sentencing order underlying his conviction:<sup>7</sup>

It states that.... the defendant voluntarily negotiated to enter into a plea agreement and acknowledge of rights... to resolve this matter and that the resolution of this matter is also connected to a pretrial diversion agreement in another case. So, it directly correlates that it is... a part of the pretrial diversion agreement and that was part of this sentence and reason for sentence was taken into consideration there. So, for her to try to separate that I believe is unfair, Your Honor because I only had 14 days. And I tried with good faith as best as I could to get to Missoula and do what I had with all things considered, Your Honor

(6/22/2022 Hrg. Tr. 42:3-24)

June 27, 2022 the district court entered its written order holding that, “Based on the testimony and evidence before the Court, the Court found that the

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<sup>7</sup> Mr. Mason identifies the matter as “DC 2021-32,” presumably in Fergus County District Court. (6/22/2022 Hrg. Tr. 42:8)

Defendant violated the conditions of his sentence as alleged in the report of Violation dated February 11, 2022....” (DC095)

**Defendant’s Motion to Disallow Charge of Assault – July 20, 2022.** July 20, 2022 Mr. Mason filed a motion that the district court not consider the assault charges against him at disposition. (DC104) Defense counsel disputed the State’s representation to the court that, “all the state has to do was prove that there was a charge against the defendant, without any evidence that he committed a crime.” (*Id.*, citing 6/22/2022 Hrg. Tr. 16:1-5), 28:1:5) Citing *State v. Howard*, 2020 MT 279, counsel argued that “this was a misrepresentation. Though a defendant can be arrested on new charge..., the conduct of the new charge must be proven by a preponderance of the evidence.” (DC104) Therefore, counsel argued, the district court should only consider the violation of failure to keep in touch with probation for disposition purposes. (*Id.*)

July 25, 2022 the State filed its response. (DC109) The State argued that the motion should be denied because, “The defendant failed to raise this issue at the adjudicatory hearing... and failed to give the judge who presided over the adjudicatory hearing an opportunity to address this unraised argument.”<sup>8</sup> (*Id.*) The State further argued that Mr. Mason’s statements about the altercation were

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<sup>8</sup> It should be noted, at this point, that the adjudication and the disposition were heard before different judges.

sufficient to find, by a preponderance of the evidence that he had committed the alleged offenses. (*Id.*) The State said that consideration of the charges for sentencing was relevant “because the new charges constitute a non-compliance violation. The allegations pertaining to failure to report, because the defendant was never designated an absconder, constitutes (sic) a compliance violation.”

**Disposition and Sentencing – July 26, 2022.** Before hearing testimony, the district court entered its decision on Mr. Mason’s petition to disallow the assault charge. (7/26/2022 Hrg. Tr. 3:1, et seq.) The court denied the motion “because, as the parties are aware, I was not the judge that was sitting on the adjudicatory hearing. But the court’s order on the adjudicatory hearing... stated it found the defendant did violate conditions of his sentence.... On page 41 of that transcript, it states... the court will find both violations to have been proven to a preponderance of the evidence. So, based on Judge Oldenburg’s rulings at the prior hearing – which was followed up by his written order – the court will proceed to... resentencing today as a result of both of those violations being proved... by a preponderance of the evidence.... (*Id.*)

Defense counsel made an offer of proof, arguing that – while the court previously found, in Count I, that the State had proven by a preponderance of the evidence a violation had been reported and that Mr. Mason had been charged with

criminal conduct – being charged was not, in itself, a violation. (7/26/2022 Hrg. Tr. 3:21-4:5)

The district court went in recess to allow Mr. Mason to review a recent PSI report, and for the court and the State to review Mr. Mason’s recent mental health evaluation – both of which had been filed shortly before the hearing. (7/26/2022 Hrg. Tr. 4:16, et seq.) Mr. Mason subsequently objected to the use of an updated PSI, arguing, “[T]here’s a lot of discrepancies and a lot of misprint and a lot of wrongs that have gone in here....” (*Id.* 17:16-23) Defense counsel subsequently entered the objection for the record, offering to “make a list of all the corrections. I will submit it to the prosecutor to see if she objects, and we will submit it to the court so these things don’t follow him.”<sup>9</sup> (*Id.* 18:23-19:4) The district court denied Mr. Mason’s request that the PSI not be used, but granted permission to file “what you believe you need to file....” (*Id.* 20:8-12)

Officer Gatlin Lamb testified regarding his opinions on alcohol use, marijuana use and mental health. (7/26/2022 Hrg. Tr. 23:4, et seq.) Officer Lamb testified that, in his opinion Mr. Mason’s criminal history showed a connection between his offenses and alcohol use. (*Id.* 23:3-7) Officer Lamb said his recommended conditions of probation included chemical dependency and mental

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<sup>9</sup> No list of PSI discrepancies were filed in the case.

health evaluations and follow-up because, “I think it’s important that somebody with a little more experience in the mental health field and in the drug dependency field can make an assessment and give their recommendation on what’s gonna help the offender, help the offender themselves whereas I’m not a medical professional.” (*Id.* 25:7-11) Officer Lamb said Mr. Mason had reported job experience in construction, glass blowing and nursing, “He showed strong skill sets.... I mean his mind is unbelievable.... He’s very smart.” (*Id.* 25:20-26:1) Officer Lamb reported, “Mr. Mason, from day one that I signed him to conditions it was very difficult. And...that’s just not good signs.” (*Id.* 27:16-28:4) According to Officer Lamb, Mr. Mason’s criminal history showed “high signs for recidivism.... That he’s not out here to change his ways, and that’s hard as a probation officer because it’s my job and duty... to make sure he is... abiding by those rules and being a good citizen.” (*Id.*) Asked the criminal history in Mr. Mason’s the PSI report, Officer Lamb testified that, “I think the biggest thing for me was the revocation to suspended sentences or the violations of conditions... There was multiple in there.” (*Id.* 28:6-15) On cross-examination<sup>10</sup>, Mr. Lamb agreed there were difficulties “in terms of how things were set up for him leaving the community” though he said they weren’t “unmanageable.” (*Id.* 39:16-21)

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<sup>10</sup> And subsequent inquiry by the district court.

Mr. Mason testified that he had been accepted into a sober living program in billings and had a job lined up there. (7/26/2022 Hrg. Tr. 35:10-23) Mr. Mason acknowledged his poor history with probation and communication but that, in the current case,

I was kind of thrown into a hard situation.... I didn't really get put off on the right foot... I had been in jail for about 6 months, got released, had a deadline to be out of town within a certain short amount of time. Had no money, no funds, no vehicle, no nothing. I got the pastor, or the priest at the Catholic Church, Father Sam, to help me with a bus ticket. He was able to get me a bus ticket from Great Falls to Butte and then I ended up, I was there for about 5 days. It was really cold. I was homeless. I didn't have nowhere to stay and I hitchhiked from there and made it to Missoula and got to Missoula.

Got housing, informed my probation officer where I was staying and then once I got a job... I let him know where I was working.... It was a touch and go thing. I didn't have a phone at the time so I wasn't able to call him and be in contact. I could only do it with wi-fi.... He knew I was getting a bus ticket and leaving that day, but everything wasn't set in order. I didn't have a probation officer over there set up ready to go with a probation officer to check in with. He had to still finish his paperwork because it was just, it was kind, it was a bit of a difficult situation I thought it was.

And it was also really cold out and I had been trying, so I had been waiting around, doing what I was supposed to.... I tried to do the Missoula thing, it didn't work and it was difficult. I mean no money, no car, no nothing. I tried, I tried. And I do have a lot of disabilities. I was on, I only had two weeks worth of my medication to keep me going. I wasn't able to get into with a new provider over there either.

(7/26/2022 Hrg. Tr. 36:4-37:12)

Mr. Mason acknowledged that the mental health evaluation brought out underlying causes to his behavior and testified that he had never had any mental health treatment. (7/26/2022 Hrg. Tr. 17:16, et seq.) “I’ve never had any treatment or anything like that so I believe it would help especially when I informed her that I would probably be getting accepted into a sober living program. It could go hand in hand with the treatment....” (*Id.* 38:3-7) Regarding his criminal history, Mr. Mason did not try to minimize it or make excuses. (*Id.* 38:17, et seq.) He did, however, say that he did not feel like he was a “career criminal” and recounted his previous efforts to reform his behavior. (*Id.*)

On cross-examination, Mr. Mason conceded that his mental health evaluation described him as defensive and minimizing, and that he was reported to have said he did not need any treatment. (7/26/2022 Hrg. Tr. 43:22-44:7) But, Mr. Mason explained, “I didn’t think I did at the time, but after reading her report it clearly, it clearly shows that I do and I would like to have some treatment actually. Because I didn’t realize after she talked with me, I didn’t realize that the co-occurring problems was a lot of my problems that needed to be dealt with which is causing me to use and which is also causing me to reoffend.”<sup>11</sup> (*Id.* 44:8-13) When

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<sup>11</sup> Specifically, the evaluator recommended that, “...if he were to have an in-depth, cooccurring therapy where these things could be addressed and ease some of the deep-rooted trauma, it would make a difference in how he views the world and help him find some happiness.”



asked what he would do if his probation was reinstated, Mr. Mason very specifically described plans to get to Billings for treatment, make certain he had an assigned PO when he got here and enter a sober living program. (*Id.* 46:1-24) The State reminded Mr. Mason that, under his existing diversion agreement, he was not allowed to be in Lewistown to make arrangements, to which he responded, “Yes but, if you gave me two weeks again, I could see my doctor here... and get put on my medication and have a... referral over to Billings....”<sup>12</sup> (*Id.* 47:1-7) Counsel persisted that, because he had previously failed to “get out of town” within the prescribed two weeks, “the State is... reluctant to even consider it.” (*Id.* 47:11-14)

After hearing recommendations of counsel and a lengthy statement by Mr. Mason, the court resentenced him to the DOC for five years, none suspended, and gave him 370 days credit for jail time. (7/26/2022 Hrg. Tr. 47:15, et seq.)

### **STANDARDS OF REVIEW**

Generally speaking, the Montana Supreme Court reviews a district court’s decision to revoke a suspended sentence for an abuse of discretion. *State v. Pennington*, 2022 MT 180, ¶16, 410 Mont. 104, 517 P.3d 894. Beyond that, a revocation decision is reviewed for both legal correctness and correctness of the

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<sup>12</sup> As a personal impression, appellate counsel finds this question to be somewhat vindictive and counterproductive, particularly since the questionable diversion agreement was likely drafted by the State counsel and was certainly under her purview. There is no doubt suitable arrangements could have been made to allow Mr. Mason a fair opportunity to arrange a transfer to supervision in another county.

factual findings. *State v. Jardee*, 2020 MT 81, ¶5, 399 Mont. 459, 461 P.3d 108.

The interpretation and construction of statute is a matter of law and the Court reviews whether the district court interpreted and applied a statute correctly *de novo*.” *State v. Triplett*, 2008 MT 360, ¶13, 346 Mont. 383, 195 P.3d 819. “A district court’s factual findings are clearly erroneous if they are not supported by substantial credible evidence, if the court misapprehended the effect of the evidence, or if a review of the record leaves this Court with the definite firm conviction that a mistake has been made.” *State v. Johnson*, 2018 MT 277, ¶10, 393 Mont. 320, 430 P.3d 494.

### **SUMMARY OF THE ARGUMENT**

It is undisputed that Justin Mason was released from custody in Lewistown, Montana with an order to “get out of town.” It is undisputed Mr. Mason was forced to leave Fergus County destitute, homeless and without a transfer to a new probation officer. It is undisputed Mr. Mason spent several days without shelter in freezing winter weather just trying to get to Missoula. While it is disputed why Mr. Mason did not go to Missoula Probation and Parole<sup>13</sup>, the evidence shows he attempted to maintain communication with Officer Lamb from the time he arrived in Missoula until he was arrested for violating the conditions of his probation. It

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<sup>13</sup> Mr. Mason testified he was waiting for Officer Lamb to complete a transfer and tell him to whom he should report. Officer Lamb did not dispute this assertion, but simply testified Mr. Mason did not report to Missoula Probation and Parole and they could not maintain regular, reliable communication.

was legal error for the district court to refuse to consider all evidence regarding whether Mr. Mason committed a criminal offense. In light of the evidence presented, it was an abuse of discretion for the district court to find Mr. Mason in violation of the terms of his probation on either count alleged by the State. Finally, given the totality of the circumstances, it was plain error to revoke Mr. Mason's probation and resentence him.

### **ARGUMENT**

On December 3, 2021 Justin Mason was placed in an impossible position.<sup>14</sup> He was released on a plea agreement after spending 213 days in jail.<sup>15</sup> Under a legally questionable and ethically indefensible diversion agreement, Mr. Mason was required to leave Fergus County within 14 days of his release. Mr. Mason's Parole and Probation Officer testified that, because of the imminent "get out of town" requirement, Mr. Mason's poverty, the winter conditions and the lack of any prior planning, Mr. Mason did not have a transfer order in place when he left Fergus County. Mr. Mason was forced to take a long, circuitous route to get to Missoula. He was stranded for several days in Butte in freezing weather with no money, no shelter and no food. Mr. Mason persisted, and made his way to

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<sup>14</sup> 7/7/2022 Hrg. Tr. 13:21.

<sup>15</sup> 7/7/2022 Hrg. Tr. 50:1-10.

Missoula, where he registered with the Poverello Center, found employment and – though he continued to be homeless – began to put his life in order.

Though Probation Officer Lamb testified that Mr. Mason did not maintain communications, Mr. Lamb testified to having employment, shelter and other information that Officer Lamb could only have gotten from Mr. Mason. Both Officer Lamb and Mr. Mason testified that the communication was sporadic and challenging. Officer Lamb did not testify that he had ever specifically instructed Mr. Mason to contact Missoula Probation and Parole, or that he had completed a transfer to Missoula. Conversely, Mr. Mason testified – without contradiction – that he was waiting for such instructions from Officer Lamb.

Mr. Mason was arrested in Missoula on January 25, 2022. Officer Lamb’s testimony on the encounter was vague and uninformed.<sup>16</sup> Officer Lamb did not know what Mr. Mason was arrested for, did not know whether he had been trespassed from the Poverello Center, and did not know what, if any charges were made against Mr. Mason.<sup>17</sup> Rather, Officer Lamb testified that – based upon an e-mail that was never entered into evidence – he believed Mr. Mason was instructed by Missoula PD to “Missoula office the next day at 9:00 o’clock so we could get

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<sup>16</sup> 6/22/2022 Hrg. Tr. 15:1, et seq.

<sup>17</sup> In his affidavit in support of the PTR, Officer Lamb incorrectly asserted Mr. Mason had been trespassed from the Poverello Center.

that official transfer done and he didn't show up for that." Officer Lamb did not say when or how this instruction was given, and Mr. Mason denied having received it. On the basis of this evidence, the district court found Mr. Mason had violated the Probation condition that he "contact his supervising officer/designee at those individuals' discretion." (DC066, Appendix A)

February 23, 2022, in support of the petition to revoke, Officer Lamb asserted Mr. Mason had been trespassed from the Poverello center, was asked to leave and became confrontational (DC070.1) Officer Lamb alleged Mr. Mason "physically struck" a security guard while they attempted to remove him from the property and was arrested. (*Id.*) The state presented no evidence to support this contention nor to show Mr. Mason engaged in any unlawful activity. On the contrary, Mr. Mason's request to enter law enforcement video cam footage was opposed by the State and denied by the district court. (*Id.*) The court, based solely on the fact that Mr. Mason was arrested and charged with an offense, found Mr. Mason had violated the probation condition that he must "comply with all municipal, county state and federal laws and ordinances and must conduct himself as a good citizen." (DC066, Appendix A)

**1. The district court committed reversible error when it found Mr. Mason in violation of the terms and conditions of his probation.**

**a. The requirement that Mr. Mason “get out of town” within 14 days of his release from custody was illegal when imposed and was illegally maintained when he was resentenced.**

In *State v. Muhammad*, this Court has held that the trial court erred by imposing a condition that he was not allowed within Cascade County. *State v. Muhammad*, 2002 MT 47, ¶28, 309 Mont. 1, 43 P.3d 318. The Court found the banishment condition imposed by the trial court violated Mont. Code Ann. §46-18-202(1), as the condition was not reasonably related to the goals of rehabilitation and was broader than necessary to protect the victim. *Id.* Though the Court concluded it Mr. Muhammad’s challenge of the original sentence was untimely, it held that his challenge of the reimposition of the banishment upon revocation of his suspended sentence established jurisdiction to review the terms of that sentence. Moreover, the Court held the banishment provision was “unduly severe and punitive to the point of being unrelated to rehabilitation.” *Id.* at §37.

In this case, while the record is not crystal clear, legitimate inference is possible. The “get out of town” requirement imposed upon Mr. Mason was part of a pretrial diversion agreement, which was incorporated by reference into his plea agreement. The record implies the requirement that Mr. Mason leave the Lewistown area within 14 days of his release from custody was not sanctioned by the district court and that there was no showing that it was “reasonably related to the goals of rehabilitation or that it was not broader than necessary to protect the

victim.” At the revocation hearing, the State initially argued that, as part of the underlying judgment, it was not relevant to the revocation action. Subsequently, at the disposition hearing, the State specifically admonished Mr. Mason that, if his probation was reinstated, he would be in immediate violation of his banishment and could not expect to be granted any grace period before he had to “get out of town” again. Moreover, the district court remained silent on the banishment requirement, implicitly leaving it in place as part of the resentencing.

Mont. Code Ann. §46-18-202(1) requires, inter alia, that a sentencing judge may impose any “limitation reasonably related to the objectives of rehabilitation and the protection of the victim and society.” This statutory requirement was the basis of the Court’s holding that the banishment of Mr. Muhammad was illegal. Pretrial diversion – or deferred prosecution – is governed by Mont. Code Ann. §46-16-130. The statute does not explicitly provide for banishment as a condition for a deferred prosecution. It does, however, allow for “any other reasonable conditions.”

The question then, is whether banishment is a reasonable condition if it is not reasonably related to the objectives of rehabilitation or the protection of the victim and society. Under the analysis of the Court in *State v. Muhammad*, it is not. In that case, Mr. Muhammad – who was charged with felony sexual intercourse without consent upon a fourteen-year-old female – was banished from Cascade

County because the judge “did not want to subject this victim to ever seeing you in this county.” *Muhammed* at ¶28. The Court determined that the banishment was purely punitive, did not contribute to rehabilitation and that other provisions of the sentence were appropriate and sufficient to protect the victim and society. *Id.*

Though the facts of this case are less well documented, Mr. Mason’s testimony that the PFMA for which he pled guilty was “mutual” and that he had stitches on the back of his head from the underlying altercation strongly imply that banishment was not reasonably related to rehabilitation or protection of the victim or society. Further, the fact that Mr. Mason was forced to leave in the dead of winter, without money or shelter, implicitly makes the banishment unduly severe and punitive to the point of being unrelated to rehabilitation. Moreover, the banishment was the direct and proximate of the circumstances under which the PTR was filed. Accordingly, the banishment provision of the pretrial diversion agreement should be stricken, the order of revocation should be vacated, and this matter should be remanded with instructions to dismiss the PTR.



**b. The requirement that Mr. Mason “get out of town” within 14 days of his release from custody was the actual and proximate cause everything that proceeded from it and imposed an unfair burden upon him.**

Justin Mason was released on a plea agreement after spending 213 days in jail.<sup>18</sup> Under the diversion agreement, Mr. Mason was required to leave Fergus County within 14 days of his release. Mr. Mason’s Parole and Probation Officer testified that, because of the imminent “get out of town” requirement, Mr. Mason’s poverty, the winter conditions and the lack of any prior planning, Mr. Mason did not have a transfer order in place when he left Fergus County. Mr. Mason was forced to take a long, circuitous route to get to Missoula. He was stranded for several days in Butte in freezing weather with no money, no shelter and no food. Mr. Mason persisted, and made his way to Missoula, where he registered with the Poverello Center, found employment and – though he continued to be homeless.

The tort law maxim *res ipsa loquitur* comes to mind when considering the burden placed on Mr. Mason upon being forced to “get out of town.” It is axiomatic that Mr. Mason’s travails after his release from jail were a direct and punitive result of his banishment from Fergus County. The banishment underlay Officer Lamb’s failure to transfer his case to Missoula Probation and Parole. It underlay the lack of communication between Mr. Mason and Officer Lamb. It underlay the poverty and homelessness that landed Mr. Mason – who the record

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<sup>18</sup> 7/7/2022 Hrg. Tr. 50:1-10.

shows was capable of getting gainful employment and shelter under ordinary circumstances – in the Poverello Center. It underlay Mr. Mason’s urgent need to get dry clothes on the night of January 23rd and the subsequent altercation – the nature of which remains unproven. In short, if not for the banishment the PTR would not have been filed. *Res Ipsa Loquitur*. The district court’s failure to take properly weigh the circumstances was an abuse of discretion. The resentencing order should be vacated, and this matter should be remanded with instructions to strike the banishment provision of the pretrial diversion agreement and dismiss the PTR.

**2. The district court’s denial of Mr. Mason’s motion to enter the video recording into evidence and holding that “simply being charged” was a violation of Mr. Mason’s probation requirements was reversible error.**

Montana Code Ann. §46-18-203(6)(a)(i) requires that, before a deferred or suspended sentence can be revoked or modified, “the prosecution shall prove, by a preponderance of the evidence, that there has been a violation of... the terms and conditions of the suspended or deferred sentence.”

In *State v. Howard*, this Court held that “conduct by the respondent that supports a new criminal charge or offense can also form the basis of the revocation petition, which must be proven by a preponderance of the evidence to establish a violation....” *State v. Howard*, 2020 MT 279, ¶13, 402 Mont. 54, 475 P.3d 392. In *Howard*, the Defendant argued that, since he was not subsequently convicted, there

was not sufficient evidence to establish a violation of his probation. *Id.* at ¶12. The State, in response, conceded that the trial court, “is required to determine, based on the evidence presented at the revocation hearing, whether the probationer has engaged in conduct that constitutes a new offense,” but argued that conviction is not necessary because the burden of proof for revocation (preponderance of the evidence) is lower than the burden of proof for criminal conviction (beyond a reasonable doubt). *Id.* The Court reviewed the evidence presented by the State at the revocation hearing and concluded it was sufficient for the district court to have determined the violation was proven by a preponderance of the evidence.

Mr. Mason testified that a security guard on the scene was wearing a video camera the night of January 23, 2022 and that he recorded the entire altercation of that evening. Mr. Mason testified that he had seen it, and that it was a true and accurate representation of everything that happened, “It shows everything that happened. Me being tased. The alleged altercation.... It shows ... what the weather was like outside. It shows what I was wearing.” (*Id.* 26:20-27:7)

Counsel moved for introduction of the video recording into evidence, and the State objected. “I don’t think it’s relevant to the issue before the court. The issue before the court is whether or not the defendant violated his conditions, not whether or not the defendant will be convicted on the assault charges.” (6/22/2022 Hrg. Tr. 27:12-23) The district court sustained the objection, “Without the Officer

being here to testify about the authenticity of the camera.... And the court agrees that, simply being charged is a violation of Mr. Mason's requirements." (Id. 28:1-5)

The district court was wrong to exclude the video evidence. Unlike the trial court in *State v. Howard*, the only evidence presented in this case was the assertion that a charge had been filed. Mr. Mason's attempt to actually enter evidence was denied for the ostensible reason that the officer who wore the video camera was not there to testify. This reasoning is flawed. Introduction of the video evidence was made by a person who was at the scene and who swore, under oath, that the video was a true and accurate representation of the events of the evening. It was an abuse of discretion by the district court to deny Mr. Mason the ability to enter evidence.

Under *State v. Howard*, the district court's holding that "simply being charged is a violation of Mr. Mason's requirements" is legally incorrect. It was legal error to sustain the violation without any further evidence of actual criminal conduct by Mr. Mason. The State did not "prove, by a preponderance of the evidence, that there has been a violation of... the terms and conditions of the suspended or deferred sentence."

Since a non-compliance violation of criminal conduct was not proven by the preponderance of the evidence, the only remaining violation is the compliance

violation of failure to follow instructions. Mont. Code Ann. §46-18-203(8), provides that, upon a finding of a compliance violation, the sentencing judge generally has two options: continue the suspended or deferred sentence without a change in conditions; or continue the suspended or deferred sentence with modified or additional terms and conditions. *State v. Pennington*, 2022 MT 180, ¶21, 410 Mont. 104, 517 P.3d 894.

As a result of this error law, the district court order revoking Mr. Mason's probation should be vacated, and the matter should be remanded with instructions to reinstate Mr. Mason's suspended sentence with appropriate terms and conditions as allowed by law.<sup>19</sup>

**3. The district court's revocation of Mr. Mason's probation was plain error in that it was fundamentally unfair and should leave the Court firmly convinced that a failure to vacate the order may result in a miscarriage of justice, fundamental unfairness and may compromise the integrity of the judicial process.**

This Court will review a sentence that is illegal or exceeds statutory mandates regardless of whether an objection was made at the time of sentencing. *State v. Muhammad*, 2002 MT 47, ¶23, 309 Mont. 1, 43 P.3d 318. A banishment condition in a criminal sentence is illegal unless it reasonably relates to the objectives of rehabilitation and the protection of the victim and society. *State v.*

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<sup>19</sup> Since the remaining violation is a compliance violation

*Muhammad*, ¶28. Though pretrial diversion agreements have similar reasonableness requirements, counsel has not identified precedent that specifically addresses whether banishment provisions in such agreements are illegal. Accordingly, Mr. Mason requests that, if the Court determines it lacks jurisdiction to address this unpreserved issue as a question of law, it undertakes the issue as a question of equity. It was simply unfair to throw Mr. Mason out of town after spending several months without money, employment, food or shelter. As a result of this legally-sanctioned expulsion, Mr. Mason suffered hunger, cold, homelessness and destitution. Nevertheless, Mr. Mason found his way to Missoula, found food and shelter, got employment and made efforts – imperfect as they were – to maintain communication with his probation officer. Mr. Mason’s conduct may not have been perfect, but it was not such an egregious failure as to justify revoking his probation on the grounds shown in the record from below. Absent objections preserved for appeal, the district court’s decision to revoke Mr. Mason’s probation was fundamentally unfair and should leave the Court firmly convinced that a failure to vacate the order may result in a miscarriage of justice, fundamental unfairness and may compromise the integrity of the judicial process. Mr. Mason respectfully requests the Court vacate the revocation of his probation and remand the matter to district court with such orders as the Court deems appropriate.

### **CONCLUSION**

For the reasons set forth herein, Justin Mason requests the Court vacate the district court's order revoking his probation and remand the matter for appropriate disposition as the Court deems appropriate.

Respectfully submitted this December 18, 2023.

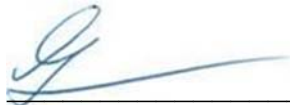


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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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Gregory D. Birdsong



## **CERTIFICATE OF SERVICE**

I, Gregory Dee Birdsong, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-18-2023:

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