

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0666

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

DANIEL ALLEN DIETZ,

Defendant and Appellant.

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**REPLY BRIEF OF APPELLANT**

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On Appeal from the Montana First Judicial District Court,  
Lewis and Clark County, the Honorable Michael Menahan, Presiding

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## ARGUMENT IN REPLY

In addition to the arguments raised by Appellant Daniel Dietz in the Brief of Appellant, he responds to the arguments in the Brief of Appellee as follows:

**I. A court must afford a defendant a reasonable opportunity to make a personal statement to the court prior to imposing a sentence on revocation.**

For the first time on appeal, the State argues a criminal defendant has no right to allocute during a “revocation hearing” held pursuant to Mont. Code Ann. § 46-18-203 because 1) there is no constitutional right to allocute at sentencing, Br. of Appellee at 18-20, 25; 2) to the extent such a constitutional right to allocute exists, it is merely the right to allocute upon the defendant’s request—not a right to have the court inquire as to whether the defendant wishes to make a statement prior to imposing sentence, *id.* at 31; and 3) even if a defendant has a constitutional right to require the court to afford a defendant an opportunity to make a personal statement at an initial sentencing hearing, a “revocation hearing” is not a “sentencing hearing” and, thus, neither that right nor the statutory right to allocute applies, *id.* at 26-30. The State never raised any of these arguments below. Indeed, the

State asked the court to order a “presentence investigation,” Admit/Deny Hr’g Tr. at 3; referred to the later-held hearing as a “sentencing hearing” and made a sentencing recommendation to the court, Sent. Hr’g Tr. at 3; did not object when defense counsel—twice, once before imposition of sentence and once after—indicated his client wished to make a statement to the court, *id.* at 15, 20; and did not indicate in any way that the judge was wrong when he acknowledged he had “stepped ahead of myself” by not “giving [Daniel] an opportunity to talk first” and then allowed him to make a statement, albeit after the court had already imposed sentence, *id.* at 20-21, 24-25. This Court follows the “firmly established rule that a party may not raise new arguments or change its legal theory on appeal.” *State v. Carter*, 2005 MT 87, ¶ 12, 326 Mont. 427, 114 P.3d 1001. As such, it should not address the State’s new legal arguments and factual assertions regarding the nature of the hearing below raised for the first time on appeal.

In any event, the State is wrong. First, the State argues that to the extent this Court has recognized a constitutional “due process right to explain, argue, and rebut any information that may lead to a

deprivation of life, liberty, or property,” that right “protect[s] against sentencing a defendant based on false information, not the defendant’s right to provide a personal allocution” at sentencing. (Br. of Appellee at 20.) The State’s purported limitation on the due process guarantees afforded in sentencing hearings does not exist. As this Court recently held in *State v. Santoro*, 2024 MT 136, ¶¶ 37-38, 40, 417 Mont. 92, 551 P.3d 822, a district court commits “clear error” and “plainly err[s]” when it fails to afford the defendant a reasonable opportunity to make a personal statement to the court prior to the imposition of sentence. In finding plain error, this Court explicitly referenced and relied on the “due process guarantee” that a defendant “be given an opportunity to explain, argue, and rebut any information that may lead to a deprivation of life, liberty, or property.” *Santoro*, ¶¶ 37-38. *See also State v. McCoy*, 2021 MT 303, ¶¶ 38-39, 406 Mont. 375, 498 P.3d 1266 (considering but declining to exercise plain error review over the defendant’s allocution claim in light of the facts of the case). The State’s contention that this Court has not recognized a constitutional right to allocute separate from a right not to be sentenced based on misinformation is incorrect.

Similarly, the State’s argument that any such constitutional right is limited to the right to request to make a statement is foreclosed by *Santoro*. In that case, this Court held the district court plainly erred and violated the defendant’s right to allocute when it failed to afford the defendant a reasonable opportunity to make a personal statement to the court prior to the imposition of sentence by inquiring whether the defendant wished to do so. *Santoro*, ¶ 38. That is, the court’s plain and clear error was directly proceeding to impose sentence “without [first] asking Santoro if he wished to make a statement.” *Santoro*, ¶ 13. That Santoro did not *request* to make a statement was irrelevant. Rather, this Court squarely placed on the court the affirmative duty to inquire and afford a defendant the opportunity to allocute even though Santoro never asked to do so. The State’s argument that the constitutional right to allocute is merely a right to request to allocute is, thus, also incorrect.

Although the opinion in *Santoro* was issued months before the State’s brief was filed in this case, the State did not cite it, let alone explain why *Santoro* does not mean what it says—that the due process right to explain, argue, and rebut information that may lead to a deprivation of liberty requires a district court judge to provide a

defendant a reasonable opportunity to make personal statement to the court prior to the imposition of sentence. The State's failure to address *Santoro* speaks volumes. What's more, "[i]t is not this Court's job to develop legal analysis that may lend support to [the State's] positions." *State v. Allery*, 2023 MT 25, ¶ 31, 411 Mont. 219, 523 P.3d 1088, This Court should simply apply *Santoro* to this case given the lack of so much as a mention of that case by the State. It applies and it controls this issue.

Finally, the State argues even if a right to allocute at sentencing exists, that right does not apply in a "revocation hearing." The State contends a probation revocation proceeding is "not a criminal trial but a summary hearing to establish a violation of the conditions of the prisoner's probation" and that "the defendant already stands convicted of a crime." (*See* Br. of Appellee's Br. at 16.) While that is true of the adjudicatory portion of a revocation proceeding—in this case, Daniel's Admit/Deny Hearing—it matters not at all here. Again, the prosecution below sought a presentence investigation before setting this matter for sentencing and making a sentencing recommendation, and what resulted from that proceeding was the imposition of a sentence. As this

Court recently explained, when a court revokes the suspended portion of an initial sentence, the initial sentence is “no longer in existence and [is] replaced by his new . . . Revocation Sentence.” *State v. Wolfblack*, 2024 MT 166, ¶ 14, 417 Mont. 376, 553 P.2d 9. While “§ 46-18-203, MCA governs the sentence that may be imposed upon revocation,” this Court made clear that what the revocation court is doing during the revocation hearing is “impos[ing]” a new “revocation sentence” that “replace[s]” the initial sentence, which is “no longer in existence.” *Wolfblack*, ¶¶ 13-14. *See also, e.g., State v. Toulouse*, 2024 MT 184, ¶ 14, 418 Mont. 1, 554 P.3d 706 (discussing the “revocation sentence” and the “sentence upon revocation”); *State v. Kortan*, 2022 MT 204, 410 Mont. 336, 518 P.3d 1283 (same). Whether that action is designated a resentencing, a modification of the original sentence, or the imposition of a new revocation sentence, it is a sentencing hearing that results in the imposition of a sentence that replaces any previously-imposed

sentence and often results in a loss of previously-granted, albeit conditional, liberty.<sup>1</sup>

Due process guarantees in probation revocation proceedings are designed not only to assure the fact finding in the adjudicatory portion of a revocation hearing will be accurate but also that the court's exercise of discretion in deciding whether to revoke and what sentence to impose upon revocation is the product of an informed decision making process, including by taking mitigating circumstances, the defendant's remorse regarding his behavior, and his personal explanation of his behavior into account, so that the defendant's liberty is not unjustifiably taken away. *See Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 488 (1972). To determine whether a particular procedural safeguard is required in a specific circumstance, this Court employs the flexible balancing test from *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), weighing the interests of the private party and the government, and the risk of erroneous deprivation of liberty against the

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<sup>1</sup> The State seems to at least implicitly acknowledge that when a revocation hearing involves a deferred sentence, the revocation court has the authority to "impose any sentence that might have been originally imposed under Mont. Code Ann. § 46-18-203(7)(a)(iv). (*See Br. of Appellee at 29.*) That action is the imposition of a sentence by any standard.

value of the added procedural safeguard. *See, e.g., In re N.A.*, 2013 MT 255, ¶ 23, 371 Mont. 531, 309 P.3d 27.

Again, probation revocation hearings implicate defendants' fundamental interests in physical liberty. The stakes in probation revocation cases are often very high, particularly in light of recent enactments of mandatory minimum sentences, lengthier maximum sentences, and the courts' embrace of longer probationary tails to address those changes in the law. Indisputably, "[r]evocation of a suspended or deferred sentence can adversely implicate a probationer's liberty interests as seriously as the original determination of guilt." *State v. Finley*, 2003 MT 239, ¶ 29, 317 Mont. 268, 77 P.3d 193. Indeed, here, Daniel was facing the prospect of an additional 40-year prison sentence upon revocation, a prison term 4 times as long as the 10 years he had previously served on his original sentence.

What's more, the court's discretion to fashion an appropriate revocation sentence is great, spanning from continuing the suspended sentence as is; to modifying or adding conditions to the suspended sentence; to imposing the original sentence; to imposing any sentence that could have been imposed that does not include a longer

imprisonment or commitment term than the original sentence, *i.e.*, a sentence that may *increase the defendant's punishment over what was originally imposed*. See *State v. Tracy*, 2005 MT 128, ¶ 20, 327 Mont. 220, 113 P.3d 297 (concluding this portion of § 46-18-203, MCA, authorizes the revocation court to impose a straight prison sentence that does not include a longer term than the original Department of Corrections commitment while acknowledging the new sentence “does impose an additional, more burdensome, condition requiring Tracy go to prison” that was not imposed at his original sentencing); *see also Toulouse*, ¶ 14.<sup>2</sup> The district court also has the authority to increase the length of time the defendant will ultimately serve under State supervision or in its custody by denying elapsed time credit served on probation, discretion which has the potential to result in a defendant serving “a sentence in perpetuity.” See *State v. Johnson*, 2022 MT 216, ¶ 34, 410 Mont. 391, 519 P.3d 804, McKinnon, J., dissenting. Thus, the State’s suggestion that Daniel was merely facing the prospect of having

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<sup>2</sup> Presumably, the statute also authorizes the court to impose a fine not previously imposed or increase a pre-existing fine, as such sentence would not include a longer imprisonment or commitment term than the original sentence.

a sentence that had already been imposed by the court at his original sentencing implemented is not correct. (*See Br. of Appellee at 30.*) He was facing much worse than that, and because the court denied him any credit for lapsed time, the amount of time he would be required to spend under State supervision or in custody was significantly increased.

As discussed more fully in the Brief of Appellant, allocution is a traditional and important procedural safeguard for reducing the risk of erroneous deprivation of defendants' fundamental and significant liberty interests at play in revocation proceedings, which burdens the State little if at all—so little, in fact, that the State did not even object to Daniel making a statement to the court below. For these reasons, and based on the additional arguments raised in the Brief of Appellant, due process requires that a defendant be afforded an opportunity to make a personal statement in allocution before the court revokes his sentence and imposes a new sentence upon revocation.

## **II. The district court violated Daniel's right to allocute.**

The State seems to argue that Daniel's right to allocute was not violated because 1) the district court "impliedly offered" him an opportunity to speak before the judge began discussing his sentence, Br.

of Appellee at 14; 2) regardless, Daniel was given the opportunity to speak before the court actually “announc[ed] its disposition,” *id.* at 32-33; and, apparently, 3) even if the court didn’t, the district court “objectively considered what [Daniel] had to say,” so any error was harmless, *id.* at 32. Again, the State’s arguments are not based in law or fact.

As a matter of fact, the district court did not “impliedly offer” Daniel an opportunity to make a personal statement before the court actually imposed sentence. Although the court asked *counsel* if he had anything further regarding his sentencing recommendation, *see* Sent. Hr’g Tr. at 17, the court never addressed Daniel personally. Confirming that defense counsel was done speaking is simply not the same thing as inquiring as to whether Daniel wished to make a personal statement. And, as Daniel explained, he did not anticipate the court was going to immediately proceed to sentencing and was not “quite ready for your sentence before I said anything.” (Sent. Hr’g Tr.at 25.) Most importantly, the judge acknowledged he did not, in fact, offer Daniel the opportunity to allocute—impliedly or not—stating he had made a mistake in not offering Daniel the opportunity to make a statement

prior to sentencing and “stepped ahead of myself.” (Sent. Hr’g Tr. at 25-26.) Contrary to the State’s attempt at gaslighting on appeal, the record shows the judge did not believe he had not yet imposed sentence or that he was still considering what to do; he acknowledged he had already imposed sentence before Daniel got to speak and acknowledged that he was wrong in doing so. (Sent. Hr’g Tr. at 25-26.) And after Daniel spoke, the judge merely reiterated that he was “[a]gain” revoking Daniel’s suspended sentence and imposing a five-year commitment to the Department of Corrections followed by a 35-year probationary term, and not merely continuing his fully suspended sentence as the defense had requested. (Sent. Hr’g Tr. at 26.) That is, the judge explicitly acknowledged he had imposed the same sentence twice: once before giving Daniel the opportunity to provide a personal statement in mitigation and once after.

Nor does the State point to any evidence in the record indicating the judge “objectively considered” what Daniel had to say. Indeed, the court made no reference to what Daniel had to say at all. Instead, the court concluded, as it had before he spoke, that the State’s recommendation for a DOC commitment was “warranted” in light of the

fact that Daniel had twice violated his conditions, *see* Sent. Hr'g Tr. at 25; not that it was the right result in light of or despite Daniel's explanation for his behavior and his expressions of accepting responsibility and remorse for his conduct. The court never considered how Daniel's statement affected the decision the court should have been making: determining whether the purposes of probation—the protection of the community and Daniel's rehabilitation—were best served by a custodial sentence, or whether there were alternatives to custody that would suffice. (*See* Br. of Appellant at 32-33, collecting cases regarding the proper inquiry when determining whether to revoke a suspended sentence). He just imposed the same sentence he had already decided was warranted based on the fact of Daniel's violations. Under these facts, the district court violated Daniel's right to allocute.

### **III. Remand for a new sentencing hearing before a new judge is required.**

As a matter of law, and as discussed in the Brief of Appellant at pages 15-16, failure to afford a defendant a right to allocute is reversible error *per se*, at least where the court could have imposed a lesser sentence than the one it imposed. That is the situation here. As such, Daniel's judgment must be reversed and remanded for a new

sentencing hearing. As discussed in the Brief of Appellant, that new sentencing hearing must be before a different judge.

The State argues remand to a new judge is not required and would result in “a windfall and give [Daniel] a second bite at the apple, in addition to causing fiscal waste.” (Br. of Appellee at 44.) The State’s argument is unavailing. First, Judge Menahan did not conduct Daniel’s initial sentencing, and thus has no special knowledge regarding his original crimes and sentencing. In addition, a presentence investigation and report have already been completed at the State’s request here and would not need to be re-done as Daniel remains in prison on his revocation sentence. And a new revocation sentencing hearing would take minimal time to complete. The State’s concern regarding fiscal waste associated with ensuring Daniel’s sentencing is fundamentally fair and appears so is overblown.

The State is correct about one thing: Daniel does not contend Judge Menahan was biased or prejudiced against him. Rather, the judge simply made an honest mistake, which he appropriately and honorably acknowledged right away—something the State has been unable to do here on appeal. But having made that error and prejudged

the result, the judge took no steps to unring that bell. To ensure Daniel's sentencing was fundamentally fair and to prevent any appearance of impropriety and unfairness associated with its error, the judge could have stopped the proceedings at that time and ordered a new sentencing hearing before a different judge, or, at a bare minimum, made certain the record reflected that he actually considered Daniel's personal statement and exercised his wide discretion to craft an appropriate sentence on revocation with that allocution in mind. He did neither. Instead, he just imposed the same sentence "[a]gain" as though Daniel had said nothing at all. Because giving the judge a third bite at the apple to get it right would call into question the fundamental fairness of the proceeding on remand and any sentence resulting from it, remand before a new judge is required.

### **CONCLUSION**

Daniel's judgment on revocation must be vacated and this case remanded for a new sentencing hearing before a new judge, during which Daniel is afforded the opportunity to provide a personal statement prior to the court's imposition of sentence.

Respectfully submitted this 30th day of October, 2024.

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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 Century Schoolbook 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 3,129, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Tammy A. Hinderman  
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