

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0447

STATE OF MONTANA

Plaintiff and Appellee

v.

CURTIS DEWAYNE FREEMAN,

Defendant and Appellant.

OPENING BRIEF

On Appeal from the Montana Thirteenth Judicial District, Yellowstone
County, the Honorable Brett Linneweber, Presiding.

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STATEMENT OF THE ISSUE

Whether the District Court erred when it failed to award Freeman with credit for street time and elapsed time when the record did not reflect substantial credible evidence of specific violations during the specific times in question. And whether Freeman's counsel provided ineffective assistance of counsel when they failed to recommend a sentence during the revocation proceedings.

STATEMENT OF THE CASE AND FACTS

Appellant, Curtis Dewayne Freeman (Freeman), appeals the Yellowstone County District Court's Order of Revocation and Imposition of Sentence in DC-09-211, filed on June 13, 2024. (D.C. Doc. 66.) This case began on April 23, 2009, when the State filed its Affidavit and Motion for Leave to File. (D.C. Doc. 1.) Freeman was charged with Count I: Theft, a felony under MCA § 45-6-301(1)(a), and Count II: Theft, a misdemeanor under MCA § 45-6-301(1)(a), and faced up to ten (10) years and six (6) months of incarceration and a total possible fine of \$51,000. (D.C. Doc. 3.)

Freeman entered into a plea agreement with the State and pled guilty to Count I as charged on June 30, 2009. (D.C. Docs. 12, 13.) The plea agreement offered in exchange for a plea of guilty to Count I: Theft, the State would argue for a ten (10)-year sentence to the Department of Corrections (DOC)

with five (5) years suspended. Freeman would be allowed to argue for a three (3)-year sentence to the DOC with two (2) years suspended. The State further agreed to drop the Persistent Felony Offender (PFO) designation and dismiss Count II. (D.C. Doc.13.) Sentencing was set for September 4, 2009, but, due to a change in counsel, Freeman was not sentenced until January 21, 2010. (D.C. Doc. 29.)

On January 21, 2010, the District Court sentenced Freeman to the DOC for a period of ten (10) years with five (5) years suspended for Count I, and the State dismissed Count II. Freeman was ordered to pay restitution in the amount of \$4,940.46 and was awarded one hundred forty-one (141) days of credit of time served for the time spent incarcerated on the matter from April 20, 2009 to September 7, 2009. (D.C. Doc. 30.) The District Court further ordered Freeman abide by the following conditions:

1. The Defendant be placed under the supervision of the Department of Corrections, subject to all rules and regulations of the Adult Probation & Parole Bureau.
10. The Defendant is prohibited from using or possessing alcoholic beverages and illegal drugs. The Defendant is required to submit to bodily fluid testing for drugs or alcohol on a random or routine basis and without reasonable suspicion.
17. The Defendant shall obtain a chemical dependency evaluation by a State approved evaluator. The

Defendant must pay for the evaluation and follow all the evaluator's treatment recommendations.

22. The Defendant will not enter any casinos.

(D.C. Doc. 30.) The list above contains only the relevant conditions and omits all other non-relevant conditions.

On November 29, 2010, Freeman was sentenced on DC-09-461 by the same court. (D.C. Doc. 58, Defendant's Exhibit A.) The District Court sentenced Freeman on Count I: Criminal Endangerment (Felony) to five (5) years to the DOC. The District Court did not suspend any of this sentence and ordered it to run consecutively to DC-09-211. (D.C. Doc. 58, Defendant's Exhibit A.) Freeman was given credit for time served from August 28, 2009 to September 7, 2009 (ten days), and from January 13, 2010 to November 29, 2010 (320 days). (*Id.*) On Count II: Habitual Traffic Offender (Misdemeanor), Freeman was sentenced to six (6) months in the Yellowstone County Detention facility (YCDF), with no time suspended. The District Court ordered Count II to run concurrently to Count I, but to run consecutively to DC-09-211. (*Id.*) Freeman received 331 days of credit for time served to be credited towards the fine. (*Id.*)

On April 18, 2016, Freeman appeared before the District Court for sentencing in DC-15-563, in which he plead guilty to Count I: Criminal Possession of Dangerous Drugs (Felony) and Count III: Fleeing or Eluding a

Peace Officer (Misdemeanor). (D.C. Doc. 58, Defendant's Exhibit B.) On Count I, the District Court sentenced Freeman to five (5) years at the Montana State Prison with no time suspended and ordered him to pay a fine of \$2,000. On Count III, the District Court sentenced Freeman to sixty (60) days at YCDF and ordered him to pay a fine of \$1,000. Count III was ordered to run concurrently to Count I. The District Court awarded credit for time served from May 22, 2015 to April 18, 2016 (332 days). (D.C. Doc. 58, Defendant's Exhibit B.)

On July 27, 2020, Freeman appeared before the District Court again for sentencing on DC-20-116. Freeman was sentenced on Count I: Criminal Possession of Dangerous Drugs (Felony) to five (5) years DOC all suspended. (D.C. Doc. 58, Defendant's Exhibit C.) On Count II: Criminal Possession of Drug Paraphernalia (Misdemeanor), Freeman was sentenced to six (6) months YCDF, all of which was suspended. Count I was to run concurrent to DC-15-563, and Count II was to run concurrently to Count I. The District Court ordered Freeman to receive credit for time served from January 29, 2020 through April 3, 2020 (65 Days). The District Court further ordered "[i]n the event the Defendant's suspended sentence is revoked, the maximum term of incarceration that may be imposed is FOUR (4) YEARS TWO HUNDRED NINETY NINE (299) DAYS." (D.C. Doc. 58, Defendant's Exhibit C.)

On April 10, 2023, a Report of Violation was filed with the District Court in DC-09-211. (D.C. Doc. 37.) According to the record, Freeman began the suspended portion of his sentence on November 3, 2022, and since that date the State alleged Freeman committed the following compliance violations:

COUNT I: Court/Parole Condition Other: I will not enter casinos. Compliance violation.

SUPPORTING EVIDENCE: GPS through [sic] Beta Alternatives from 1/27/2023-3/28/23 placed Defendant at several casinos, and he admitted to accompanying his daughter in casinos during 3/28/23 office visit.

COUNT II: Court/Parole Condition Other: I will obtain a chemical dependency evaluation by a State-approved evaluator. I will pay for the evaluation and follow all of the evaluator's treatment recommendations. COMPLIANCE VIOLATION.

SUPPORTING EVIDENCE: Defendant obtained chemical dependency evaluation per his court conditions on 3/6/23 and was signed up to begin Intensive outpatient treatment on 3/14/23, three days per week. As of 3/24/23 he had only attended one session, according to Feline Whiteman, LAC.

(D.C. Doc. 37.) Regarding Count II, it should be noted that Freeman received the recommendation on Tuesday, March 14, 2023, to engage in intensive outpatient treatment. Only ten days later, Friday, March 24, 2024, Officer Hall deemed Freeman out of compliance for attending only one session. There is no indication whether Freeman had missed any sessions, or even whether

other sessions had been scheduled by the provider prior to Officer Hall's decision finding Freeman out of compliance.

In the Report of Violation, the State indicated that the following interventions and incentives were utilized:

- Enhanced Supervision Program: 12/20/22, 1/27/23.
- Electronic monitoring: 1/27/23.
- Intervention Hearing: 1/25/23.
- Verbal reprimand: 2/17/23.
- Increased UA/BA: 12/20/22, 1/27/23.

(D.C. Doc. 37.) The State indicated Freeman admitted to methamphetamine use on December 20, 2022 and was signed on to ETSS with Alternatives for thirty (30) days of random UAs. Freeman allegedly did not report for his intake and was unreachable by Alternatives and the probation officer. However, Freeman was present at an intervention hearing held on January 25, 2023. (D.C. Doc. 37.) As a result of this hearing, Freeman was referred to ETSS again, but for sixty (60) days of random UAs and GPS monitoring. The State reported that during those sixty (60) days, Freeman provided nineteen (19) positive UAs. However, Officer Hall did not report how many total UAs Freeman provided and did not report any missed UAs or missed check-ins. (D.C. Doc. 37.) The State recommended the District Court revoke Freeman's suspended sentence and resentence him to five (5) years to the DOC with all but nine (9) months suspended. The State asserted Freeman should receive

forty-seven (47) days of credit for street time from November 3, 2022 to December 20, 2022. (D.C. Doc. 37, p. 3.)

On May 10, 2023, Freeman appeared before the District Court for the first hearing on the revocation. The District Court quashed the warrant, and Freeman was released on his own recognizance. (D.C. Doc. 40.) After several continuances, Freeman made admissions on November 20, 2023. (D.C. Docs. 43, 46-53, 55.) Specifically, Freeman admitted to Count I, affirming that between January 27, 2023 to March 28, 2023 he was placed, via GPS ankle monitor, at a number of casinos, and that on March 28, 2023 he accompanied his daughter to casinos. (November 20, 2023 Revocation Hearing Transcripts (hereinafter 11/20/23 Hr. Tr.) at p. 7:21-p. 8:1-5.) The State moved to dismiss Count II. (11/20/23 Hr. Tr. at p. 8:6-13.) Sentencing/Disposition was set out as both parties disagreed regarding the credit for time served calculations and the maximum time available to the District Court for Freeman's sentence. (11/20/23 Hr. Tr. at p. 8:16-p. 9:1-9.) Both parties were allowed to file sentencing memorandums, and Sentencing/Disposition was set for January 24, 2024. (11/20/23 Hr. Tr. at p.6:16-25, D.C. Doc. 55.)

Sentencing/Disposition was ultimately continued to May 29, 2024, and on March 8, 2024 Freeman filed Defendant's Sentencing Memorandum with Exhibits. (D.C. Docs. 56-58.) Counsel for Freeman primarily argued

Freeman's sentence should be discharged as he should have been entitled to credit for street time on the suspended portion of his sentence while the non-suspended sentences were being served, but made no other recommendations as to what the District Court should sentence Freeman to if the District Court did not agree with Freeman's request to dismiss. (D.C. Doc. 58.)

On May 29, 2024, the District Court held a Disposition/Sentencing hearing. (D.C. Doc. 64.)¹ The District Court denied Freeman's request to dismiss the Petition, ruling Freeman was not entitled to credit for street time for his suspended sentences while the portions of his non-suspended consecutive sentences were being served. (May 29, 2024 PV- Disposition Hearing Transcripts (hereinafter 5/29/24 Hr. Tr.) at p. 5:19-25 – p. 6:1-13.) Both parties indicated they were prepared to proceed, and the District Court asked for recommendations for sentences. (5/29/24 Hr. Tr. at p. 6:13-25.) Freeman's counsel did not make any sentencing recommendations and instead only argued that Mr. Freeman should receive credit for street time. Freeman's counsel requested credit from November 22, 2022 through December 20, 2022; and from December 23, 2022 through January 17, 2023. (5/29/24 Hr. Tr. at p. 7:15-18.) Freeman further requested credit from January 19, 2023

¹ It should be noted, from the time Freeman initially appeared before the District Court to May 29, 2024, the record is void of any petitions to revoke Freeman's release, and void of any addendums to the original Report of Violations.

through January 25, 2023; and from January 27, 2023 to February 14, 2023. (5/29/2024 Hr. Tr. at p. 7:15-23.) Again, from February 14, 2023 to March 28, 2023; then from March 31, 2023 through April 5, 2023; then from April 20, 2023 through May 2, 2023. Further, counsel requested credit from May 24, 2023 to June 30, 2023; July 12, 2023, through April 17, 2024; and lastly from April 17, 2024 to May 29, 2024. (5/29/24 Hr. Tr. at p. 8:1-9.) In total, Freeman was requesting two-hundred and sixty (260) days of credit for street time.

The District Court asked a number of questions of Freeman's current probation officer, Officer Hall, regarding credit for street/elapsed time. (5/29/24 Hr. Tr. at p. 17:6- p. 23:4.) The District Court specifically stated:

Now, I'm going to go into the street time credit. The basis for this revocation was, I believe, casino and lack of chemical dependency. Let me pull that open just to quadruple check.

But I am going to inquire of the Department here, pursuant to Jardee, whether or not this defendant had periods since November 2022 onward where he was having ongoing violations whether or not he had specific violations. I want to know - - I'm not interested so much in the specific violations. I want to know if he had ongoing violations for which you have not filed an addendum or sought revocation.

And what those ongoing violations would be specifically is to requirements under the judgment in 09-211

Conversely, what I also want to find out is if there were temporary portions in which you believe Mr. Freeman was in compliance. Ms. Miltcheva has listed most of that time. You've indicated before I kind of cut everybody off that you didn't feel the same for the street time credit, but this is how it really boils down to.

If he generally has not been compliant for an ongoing requirement, he's not entitled to street time credit. But that's, of course, if you've been requiring him to do something

(5/29/24 Hr. Tr. at p. 17:2-p. 18:2.)

The District Court first inquired into Freeman's payment of restitution. Officer Hall indicated they did not have a current restitution balance for him, but when asked whether Freeman was making payments, Officer Hall indicated "I do not believe so." (5/29/24 Hr. Tr. at p. 19:1-8.) However, Freeman offered that he had been making payments and indicated that he had only \$35 left towards restitution. Upon hearing that, Officer Hall changed her answer, stating that "[h]e might be up to date. I can e-mail." (5/29/24 Hr. Tr. at p. 19: 5-13.)

When asked by the District Court whether Freeman had completed cognitive and behavioral modification, or whether that had been requested of him, Officer Hall did not know and indicated that she believed Freeman would have completed that in prison. (5/29/24 Hr. Tr. at p. 19:14-20.) The District Court inquired whether Freeman had completed a chemical dependency

evaluation (CDE), and Officer Hall stated Freeman completed the CDE as of March 6th, 2023. (5/29/24 Hr. Tr. at p. 19:23- p. 20:1.) When asked why it took so long, Officer Hall indicated that Freeman had “absconded prior to that.” (5/29/24 Hr. Tr. at p. 20:8.) It should be noted that the CDE requirement from the original judgement did not specify a time frame for completion, aside from by the general expiration of the probation term, and Officer Hall did not articulate when it was requested that Freeman complete this condition. Instead, Officer Hall indicated

So he was given a referral to get ETSS services, including drug testing, on December 20th of 2022. He had a positive substance test on that date. He then - - he tested positive at P and P on December 20, 2022, and he was reached out to by both ETSS and Probation and Parole until he reported on 1/19 of '23. So about a month.

(5/29/24 Hr. Tr. at p. 20:12-18.) Upon further questioning by the District Court, Officer Hall indicated Freeman was again referred to ETSS for sixty (60) days, beginning on January 27, 2023. Officer Hall generally stated Freeman was out of compliance from January 27, 2023 to March 28th, 2023, as Freeman provided nineteen (19) positive UAs. However, Officer Hall did not articulate what days those tests were provided on, or how many tests Freeman provided in total. (5/29/24 Hr. Tr. at p. 21:6-11.)

Further, Officer Hall indicted Freeman had not followed the recommendations of the CDE. Specifically, Officer Hall indicated Freeman obtained a CDE on March 6, 2023, and the evaluation recommended he engage in intensive outpatient treatment three (3) days per week. Officer Hall stated “as of 10 days after that recommendation . . . he’d only attended one session.” However, Officer Hall neglected to inform the District Court Freeman received the recommendations on Tuesday, March 14, 2023, and did not specify what day he had attended or whether Freeman had made any additional attempts. (5/29/24 Hr. Tr. at p. 22:1-5.)

Officer Hall provided Freeman attended and completed inpatient treatment at Rimrock on his own and

was clean that we know of for a few months. But then missed an appointment in September of 2023 and an appointment in October of 2023 at Probation and Parole. And the next time he reported at the end of October 2023, he provided a positive UA.

(5/29/24 Hr. Tr. at p. 22:1-13.) The District Court further inquired whether Freeman was compliant since October 2023. Officer Hall generally stated

I do not think there has been any substantial period of clean time since October of 2023. I know it has been in and out. He has been doing his aftercare with his counsellor, but I don’t think there’s been any significant length of time where he’s been not using.

(5/29/24 Hr. Tr. at p. 22:16-21.) Officer Hall provided no specific dates of violations, or any specific types of violations.

Upon conclusion of the District Court’s questioning of Officer Hall, Freeman’s counsel was given the opportunity to question Officer Hall under oath. Freeman’s counsel elicited that on December 20, 2022, Freeman made a wire transfer for \$21 for the cost of his supervision, even though Officer Hall previously indicated Freeman was not making payments. (5/29/24 Hr. Tr. at p. 26: 3-25.) Freeman’s counsel introduced a letter From Journey Recovery. (D.C. Doc. 65.) This letter detailed that Freeman was actually present for group for his intensive inpatient treatment on March 14, 2023 to March 16, 2023. Although the Exhibit details that Freeman did miss three sessions, he then appeared for the following two. (D.C. Doc. 65.) This evidence was contrary to the earlier statements provided by Officer Hall, and contrary to the violation detailed in the ROV.

Officer Hall further admitted that since July of 2023, Freeman reported to the office, even though she had indicated he was generally out of compliance. Under oath, Officer Hall corrected her previous statement to the District Court that Freeman failed to report in September 2023. Specifically, Officer Hall failed to inform the District Court that Freeman “may have been allowed for that one because I guess his mother had a medical emergency. So

he did contact the office.” (5/29/24 Hr. Tr. at p.28:20-24.) Officer Hall again testified differently from what she had initially informed the District Court, that while Freeman missed an appointment on October 16th, he reported on October 27th and signed a substance use admission form. (5/29/24 Hr. Tr. at p. 28:24- p.29:1.) Officer Hall testified that from October 27th and on, Freeman may have had two more substance use admissions, “but we discussed his substance use and his meeting with his counsellor each time he’s come in. But I did not get a UA from him as he has difficulty providing UAs.” (5/29/24 Hr. Tr. at p. 29:15-19.) Officer Hall clarified that this was due to a medical reason. (5/29/24 Hr. Tr. at p. 29:20-21.)

At the conclusion of testimony from Officer Hall, the District Court asked both parties what their recommendations were. (5/29/24 Hr. Tr. at p. 33:1-10.) The State continued to request the District Court follow what was requested in the ROV, which was for the District Court to revoke Freeman’s sentence and resentence him to five (5) years to the DOC with all but (9) months suspended. (5/29/24 Hr. Tr. at p. 33:11-12.) While counsel for Freeman argued the case should be dismissed, it is important to highlight that counsel failed to argue for any recommended sentence to the District Court, leaving only the State’s recommended sentence to be considered. At the conclusion of the hearing, the District Court revoked Freeman’s sentence and

imposed a five (5) year sentence to the DOC with all but nine (9) months suspended. The District Court orally pronounced it based its decision on the District Court's characterization of Freeman's inability to self-monitor and general references to longstanding periods of noncompliance. (5/29/24 Hr. Tr. at pp. 35:17-22, 36:1-22.) Regarding credit for elapsed time/street time, the District Court stated:

So, I am going to give you street time credit between November 22nd and December 20th of 2022. The Court does find you were substantially out of compliance from then until June of 2023. However, your attorney has persuasively argued that at least through - - I'm going to give you a little benefit of the doubt - - through October of 2023 that you were generally compliant. Or if you weren't, that it hadn't reached - - gotten back to a stage of general pattern of noncompliance.

But since that time, there's no evidence - - and this mental health center letter, while it's dated September 19th, doesn't provide any information going forward. And I do find that Officer Hall is credible in the way that she described your general noncompliance since that time.

And I'm giving you the benefit of the doubt of the September of 2023 missed session because you did reach out, did contact, and had a basis to do that. But after that, there is continued substance abuse or substance use admissions afterwards which harken back to your original use.

(5/29/24 Hr. Tr. at p. 36:23- p. 37:19.)

On June 13, 2024, the District Court issued its Order of Revocation and Imposition of Sentence. (D.C. Doc. 66.) The District Court ruled that Freeman was entitled to receive credit for elapsed time while not incarcerated pursuant to § 46-18-203(7)(b) MCA as follows: November 22, 2022 through December 20, 2022 (28 days) and June 1, 2023 through October 31, 2023 (152 days). (D.C. Doc. 66, p. 1.) The District Court failed to provide any other reasons for its ruling regarding credit for street time.

Freeman now timely appeals. (D.C. Doc. 69.)

STANDARDS OF REVIEW

I. CREDIT FOR STREET TIME/ELAPSED TIME.

This Court “review[s] the revocation of a suspended sentence for abuse of discretion.” *State v. Charles*, 2025 MT 58, ¶ 10 (citing *State v. Jardee*, 2020 MT 81, ¶ 5). Because “revocation decisions involve both legal and factual findings,” this Court reviews a “district court’s legal findings de novo and its factual findings for clear error.” *Charles*, at ¶ 10.

This Court will review a district court’s findings of fact regarding credit for elapsed time for clear error. *Charles*, at ¶ 10 (citing *Jardee*, at ¶¶ 5, 12). “Factual findings ‘are clearly erroneous if they are not supported by substantial credible evidence, 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.” *Charles*, at ¶ 10 (citing *Jardee*, at ¶ 5, quoting *State v. Johnson*, 2018 MT 277, ¶ 10).

“When the district court’s authority to take a specific action is at issue, the question is one of law and [this Court’s] review is de novo review.” *Charles*, at ¶ 10 (citing *State v. Gudmundsen*, 2022 MT 178, ¶ 8). “As such, a district court’s determination of street time or time served credit is reviewed for legality” and this Court exercises de novo review. *Charles*, at ¶ 10 (citing *State v. Tippets*, 2022 MT 81, ¶ 5). “Calculating credit for time served is not a discretionary act, but a legal mandate,” *Gudmundsen*, at ¶ 8 (citing *Jardee*, at ¶ 5), and therefore this Court assesses a district court’s determination of credit for time served for legality. *Gudmundsen*, at ¶ 8. Further, the “interpretation and construction of a statute is a matter of law,” and this Court reviews “whether the district court interpreted and applied the statute correctly de novo.” *Charles*, at ¶ 10.

II. INEFFECTIVE ASSISTANCE OF COUNSEL.

“Ineffective assistance of counsel claims are mixed questions of law and fact which [this Court] review[s] de novo.” *State v. Wright*, 2021 MT 239, ¶ 7 (citing *State v. Larson*, 2019 MT 211, ¶ 6).

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SUMMARY OF THE ARGUMENT

The District Court erred in its calculation of street time/elapsed time. The District Court relied heavily on the statements provided by Probation and Parole Officer Hall, whose statements and testimony to the District Court were not credible and full of contradictions. The District Court did not apply the correct standard of law when, in its denial of credit for street time/elapsed time, failed to state specific instances of non-compliance and instead cited general non-compliance. The District Court incorrectly granted Freeman only 152 days of credit for street time/elapsed time, when he should have received 562 of credit for street time/elapsed time. The District Court's sentence was illegal as it failed to grant the correct amount of credit for Street time/elapsed time, and this Court must reverse and remand for resentencing, requiring that the District Court credit Freeman a total of 562 days credit of street time/elapsed time between November 3, 2022 and May 29, 2024.

Additionally, Freeman's counsel failed to provide effective assistance of counsel when she failed to advocate for any form of sentence at the Disposition/Sentencing Hearing. Both the State and Freeman were provided the opportunity to present sentencing recommendations. The State recommended Freeman's sentence be revoked, and that the full sentence be reimposed with nine (9) months of custodial placement. While Freeman's

counsel did argue for credit for street time/elapsed time, she made absolutely no sentencing recommendations as to the type of sentence, or the amount of time Freeman should be sentenced to. Further, counsel made no argument contrary to the State's recommendation and made no indication as to whether Freeman agreed with the State's recommendations. This failure prejudiced Freeman as he did not have anyone to advocate or articulate a sentence for him, and as the District Court was only provided with recommendations from the State to consider. There is no plausible explanation for counsel's failure. To remedy this prejudicial failure of representation, this Court must reverse and remand for resentencing, which would allow Freeman the opportunity to have an attorney advocate for him effectively.

ARGUMENT

I. THE DISTRICT COURT FAILED TO AWARD THE CORRECT AMOUNT OF CREDIT FOR STREET/ELAPSED TIME.

According to the Montana Code Annotated,

If a suspended or deferred sentence is revoked, the judge shall consider any elapsed time, consult the records and recollection of the probation and parole officer, and allow all of the elapsed time served without any record or recollection of violations as a credit against the sentence. If the Judge determines that elapsed time should not be credited, the judge shall state the reasons for the determination in the order.

§ 46-18-203(7)(b) (2023). A district court may not “deny credit for street time served unless there is a specific violation.” *Charles*, at ¶ 12, *Gudmundsen*, at ¶ 12, *Jardee*, at ¶ 10. This Court held that without substantial evidence of specific violations during the times in question, a defendant is statutorily entitled to credit for elapsed time. *Charles*, at ¶¶ 12 (citing *State v. Johnson*, 2022 MT 216, ¶ 29). The denial of credit for elapsed time cannot be based “solely on a pattern of criminal behavior.” *Gudmundsen*, at ¶13, (citing *Jardee*, at ¶ 11). This Court held “[s]uch generalized assessments of a probationer’s conduct do not render the elapsed-time credit discretionary. Rather, specific violations established upon ‘the record or recollection of the probation officer’ are necessary ‘to establish a basis for denial of street time credit’ for the period claimed, and must be stated by the sentencing court.” *Gudmundsen*, at ¶ 13 (quoting *Jardee*, ¶ at 11). Further, this Court found that “§ 46-18-203(7)(b) allows elapsed time credit for periods after or between violations.” *Charles*, at ¶ 15. This means the “statute allows for elapsed time credit even after the revocation petition is filed.” *Charles*, at ¶ 15.

In *State v. Gudmundsen*, Gudmundsen’s original suspended sentence of five (5) years DOC was revoked. 2022 MT 178, ¶ 3. At sentencing, Gudmundsen requested ten (10) months of credit for elapsed time. *Gudmundsen*, at ¶¶ 5-6. The district court denied this request citing only a

general pattern of criminal behavior. *Gudmundsen*, at ¶¶ 6-7. In reliance on *Jardee*, this Court maintained that denying credit for elapsed time solely on a pattern of criminal behavior was insufficient. *Gudmundsen*, at ¶ 13. Further, this Court reiterated that credit for elapsed time was not discretionary, and that for a district court to deny credit for elapsed time, “specific violations established upon ‘the record or recollection of the probation officer’ are necessary ‘to establish a basis for denial of street time credit’ for the period claimed, and must be stated by the sentencing court.” *Gudmundsen*, at ¶13 (quoting *Jardee*, at ¶ 11).

Ultimately, this Court reversed and remanded *Gudmundsen* holding that “the District Court’s reference to ‘repeated violations of terms and conditions’ without a connection to the claimed period was merely a generalized ‘pattern of criminal behavior’ justification that was insufficient under the statute to deny the requested credit.” *Gudmundsen*, at ¶ 13.

In *State v. Charles*, Charles asserted the district court erred when it denied him credit for street time. 2025 MT 58, ¶ 11. Charles began the suspended portion of his sentence on February 14, 2021. *Charles*, at ¶ 3. On October 21, 2022 an ROV was filed detailing that Charles admitted “to using methamphetamine on June 6, 2022, and he thereafter tested positive for methamphetamine eight times from June 6, 2022, through October 20, 2022.”

Charles, at ¶ 4. The ROV further alleged Charles failed to report eleven (11) times from August 16, 2022, through October 18, 2022, that Charles made a fake Facebook profile and threatened people, and that he failed to initiate his CDE and mental health evaluations. *Charles*, at ¶ 4.

On October 24, 2022, the State filed a petition to revoke. Charles was released on his own recognizance, which the district court issued an order revoking his release on December 19, 2022 for a positive drug patch test. *Charles*, at ¶¶ 5, 6. On February 15, 2023, “Charles admitted to two of the four counts contained in the ROV—testing positive for methamphetamine and failing to appear for his drug tests.” *Charles*, at ¶ 7. At the May 3, 2023 disposition hearing, the State recommended Charles receive sixteen (16) months of street time, and “defense counsel argued for 16 months plus the six months from the time the ROV was filed to the date of the hearing.” *Charles*, at ¶ 8. However, the district court only gave Charles credit for 487 days of street time. The district court “noted it was not including the six months from the filing of the ROV to the date of the hearing because ‘the credit you’re receiving is that you’re not going back to the Department of Corrections right now. You’re getting a suspended sentence, so I’m not going to give you additional credit for those six months.’” *Charles*, at ¶ 9.

This Court determined that a review of the record in *Charles* showed there was only one demonstrable violation from October 21, 2022 (the date of the ROV) to May 3, 2023 (the disposition hearing), which was that on November 30, 2022, one of Charles’ drug patches was positive for methamphetamine. *Charles*, at ¶ 16. This Court found the district court “erred by not giving Charles credit for [the] elapsed time during which there were no specific violations[,]” and awarded Charles an additional 154 days of credit for elapsed time. *Charles*, at ¶ 16.

Here, as in *Gudmundsen* and as in *Charles*, the District Court erred in its calculations and judgment for street time and elapsed time as the record does not reflect substantial evidence of specific violations, and the District Court failed to articulate specific reasons for denying credit for time served. Freeman began serving the suspended portion of his sentence on November 3, 2022. (D.C. Doc. 37.) As of Sentencing, on May 29, 2024, 573 days had elapsed, much of which Freeman should receive credit for street time/elapsed time.

Freeman began serving the suspended portion of his sentence on November 3, 2022. (D.C. Doc. 37.) The ROV in this matter was filed on April 10, 2023. (D.C. Doc. 37.) From November 3, 2022 to April 10, 2023, there are 158 days. During the Sentencing Hearing, Officer Hall stated to the

District Court that Freeman admitted to methamphetamine use on December 20, 2022, and failed to report to probation and parole until January 19, 2023. However, just as in *Gudmundsen* and *Charles*, the ROV and Officer Hall did not speak to any specific violations for Mr. Freeman from November 3, 2022, to December 20, 2023. As there were no specific reported violations during that period, Freeman was entitled to forty-seven (47) days of credit for street time.

Officer Hall reported to the District Court Freeman had generally failed to report from December 20, 2022, to January 19, 2023. However, no information was provided as to when he was required to report, and no specific dates of violations were articulated or testified to from December 21, 2022 to January 19, 2023. As no evidence was presented as to any specific violations that occurred Freeman is entitled to credit from December 21, 2022 to January 19, 2023, adding an additional twenty-nine (29) days.

From January 19, 2023 to January 27, 2023, no evidence of any specific violations was presented to the District Court, except for Freeman's admission to attending a Casino on January 27, 2023 with his daughter. Freeman is entitled to an additional eight (8) days of credit for that period of street time.

From January 28, 2023 to March 28, 2023, Officer Hall also stated Freeman was required to engage in sixty (60) days of ETSS, during which he was subject to random UAs. Officer Hall argued Freeman was out of compliance from January 27, 2023 to March 28, 2023 as he provided nineteen (19) positive UAs. The District Court further relied on statements from Officer Hall indicating Freeman did not complete a CDE until March 6th, 2023, although at no point in the record is there evidence of a deadline of completion set by Officer Hall. The District Court also relied on Officer Hall's statements that Freeman failed to comply with the CDE requirement of intensive outpatient treatment. However, Freeman's counsel introduced a letter from the treatment provider that completely contradicts Officer Hall's statements. (D.C. Doc. 65.)

Here, similar to *Charles*, the record lacked evidence of violations as Officer Hall did not provide the dates of the alleged positive UAs, did not specify for what substance Freeman had tested positive, and did not indicate how many tests Freeman took. Further, Officer Hall's statements and testimony to the District Court were full of contradictions, making it less than credible. This does not meet the standard of substantial evidence of specific violations and instead articulates a general non-compliance. Freeman was

entitled to an additional fifty-nine (59) days of credit for street time for that period.

Freeman is further entitled to credit for elapsed time/street time from March 29, 2023 to October 27, 2023 (212 days). The record is devoid of any specific violations during that time, just as in *Gudmundsen* and *Charles*. Although Officer Hall did state to the District Court that Freeman had missed an appointment in September of 2023, it was later clarified under oath, during the Defense's questioning, that Freeman had contacted Probation and Parole shortly after the missed appointment, and the absence was excused due to family emergency. The next specific reported violation was on October 27, 2023, when Officer Hall reported Freeman provided a positive UA.

For the period from October 28, 2023 to May 29, 2024, Officer Hall could not articulate any specific violations and no addendums to the ROV were filed. Just as in *Gudmundsen* and *Charles*, because there is no evidence of specific violations during this time, Freeman is entitled to credit for elapsed time from October 28, 2023 to May 29, 2024 (215 days). In total, Freeman should have received credit for elapsed time/street time for 562 days. However, the District Court only awarded Freeman credit for street time from November 22, 2022 through December 20, 2022, and from June 1, 2023 through October 31, 2023 (a total of 180 days). Just as in *Gudmundsen* and

Charles, the District Court's Order of Revocation and Disposition of Sentence failed to state any specific reasons for denying the additional credit for time served, and instead generally cited section 46-18-203(7)(b), MCA. (D.C. Doc. 66.)

As detailed above, the District Court failed to articulate any specific reasons for the denial in its oral pronouncement of Freeman's sentence, and instead cited to Officer Hall's depiction of Freeman's general noncompliance. However, under oath it was revealed that Officer Hall did not provide the District Court with a clear picture of the alleged general compliance violations. Instead, Officer Hall had to correct the multiple statements they had just made to the District Court, and evidence was presented that contradicted Officer Hall's statements to the Court and filing of the ROV. The record further shows Officer Hall failed to articulate any specific violations during the specific alleged times, and the State failed to present any other evidence in support. Under *Gudmundsen*, denial of credit for general noncompliance is impermissible absent specifically articulated violations, and by doing so here the District Court engaged in a clear misapplication of the law, and its findings were not supported by substantial credible evidence of specific violations.

The District Court abused its discretion by denying credit for street time/elapsed time Freeman is legally entitled to. Its findings regarding credit for street time/elapsed time were clearly erroneous as the District Court's findings were not supported by substantial credible evidence, and the District Court erred in its interpretation and application of the law. The Court must reverse the District Court's order regarding credit for street time/elapsed time and remand for resentencing to include all periods of compliance, totaling to 562 days of credit for street time/elapsed time.

II. FREEMAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL FAILED TO ARGUE FOR ANY FORM OF SENTENCE AT THE DISPOSITION HEARING.

The right to effective assistance of counsel for criminal defendants is enshrined in “Article II, Section 24 of the Montana Constitution and the Sixth Amendment of the United States Constitution, as incorporated through the Fourteenth Amendment.” *State v. Wright*, 2021 MT 239, ¶ 9 (quoting *State v. Larsen*, 2018 MT 211 ¶ 6, *State v. Jefferson*, 2003 MT 90, ¶ 42). When “assessing ineffective assistance of counsel claims, [this Court applies] the two-pronged test set forth in *Strickland v. Washington*.” *Wright*, at ¶ 9. For a defendant to prevail under the *Strickland* test, they must “(1) demonstrate that ‘counsel’s performance was deficient or fell below an objective standard of

reasonableness’ and (2) ‘establish prejudice by demonstrating that there was a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.’” *Wright*, at ¶ 9 (citing *State v. Koughl*, 2004 MT 243, ¶ 11, (quoting *State v. Turnsplenty*, 2003 MT 159, ¶ 14)).

In addition to the two prongs of the *Strickland* test, this Court is tasked with first determining “whether the claims are more appropriately addressed in a postconviction relief proceeding.” *Wright*, at ¶ 10. Defendants must overcome a ““strong presumption that counsel’s conduct falls within the wide range of reasonable professional conduct[,]”” when the record “is silent about the reasons for the attorney’s actions or omissions.” *Wright*, at ¶ 10 (quoting *State v. Sartain*, 2010 MT 213, ¶ 13). However, this Court previously held that “[i]neffective assistance of counsel claims are appropriate for review on direct appeal . . . when ‘no plausible justification’ exists for the actions or omissions of defense counsel.” *Wright*, at ¶ 10 (quoting *Koughl*, at ¶ 15).

In *State v. Wright*, Wright appealed claiming she received ineffective assistance of counsel when her counsel at sentencing failed to assert “Alternative Sentencing Authority (ASA), § 45-9-202, MCA[,]” while arguing for a deferred sentence. *Wright*, at ¶ 11. This Court determined that although the record failed to show why Wright’s counsel failed to raise the ASA at sentencing, Wright was still able to assert the issue on appeal.

Specifically, this Court indicated that “[i]n a case such as this, it is unnecessary to ask ‘why’ in the first instance, because this is the ‘relatively rare situation where there is ‘no plausible justification’ for what defense counsel did.’” *Wright*, ¶ at 12 (quoting *Kougl*, at ¶ 15). “When there is ‘no plausible justification’ for the actions of counsel, the claim is appropriate for review on direct appeal. *Wright*, at ¶ 12 (citing *State v. Fender*, 2007 MT 268, ¶ 10).

In *Wright* there was no plausible justification for counsel’s failure to assert the ASA as this statute was fundamental to counsel’s argument for a deferred. Counsel for Wright was ignorant of this area of law and failed to remedy that ignorance through basic research of statutes and case law. This Court determined that counsel for Wright was deficient as such a “failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.” *Wright*, at ¶ 18 (citing *State v. Walter*, 2018 MT 292, ¶ 15).

The State argued in *Wright* that “even if [Wright] can prove her counsel was deficient for not directing the District Court to the ASA, Wright cannot prove she suffered the prejudice of the *Strickland* test.” *Wright*, at ¶ 19. In fact, the State argued that Wright would have been exposed to a longer possible sentence. *Wright*, at ¶ 19. However, this Court was not persuaded by

that argument. *Wright*, at ¶ 19. This Court held that while it was possible for Wright to “have received more onerous conditions on her sentence . . . her counsel did nothing to protect Wright from facing more onerous conditions than she actually received in this case, but simply took the option of receiving a deferred sentence off the table by failing to alert the District Court to the ASA.” *Wright*, at ¶ 19. This Court further held that “[w]hile we cannot say whether or not the District Court would have indeed given Wright a deferred, rather than a suspended, sentence in this case, we determine she ‘has demonstrated a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.’” *Wright*, at ¶ 20 (quoting *Larsen*, at ¶ 19 (quoting *Kougl*, at ¶ 11)). This Court determined that the performance of Wright’s counsel was deficient and therefore prejudiced Wright, and reversed and remanded for resentencing. *Wright*, at ¶¶ 20-22.

Here, just as in *Wright*, the record is silent as to the reasons for Freeman’s counsel’s failure to argue or articulate a requested sentence. However, Freeman overcomes the “strong presumption that counsel’s conduct falls within the wide range of reasonable professional conduct[,]” as there is “no plausible justification” for counsel’s failure to argue for any type of sentence at this hearing. *Wright*, at ¶ 10. The basic function of a defense attorney is to advocate for their client, and it is unfathomable as to why a

defense attorney would not argue for any type of sentence. This is especially true when the State was asking for the maximum amount of revokable time, and Freeman's counsel made no argument for less.

Here, Freeman's counsel filed a sentencing memorandum in support of a baseless argument to dismiss the petition. (D.C. Doc. 58.) In that sentencing memorandum, counsel did not make any sort of sentencing recommendations. At the sentencing/disposition hearing, counsel repeated the same argument in support of dismissal, and the District Court denied counsel's motion to dismiss. The District Court proceeded with the hearing, and although counsel did argue for credit for street time/elapsed time, counsel again failed to make any sort of sentencing recommendation to the District Court. The State articulated it supported what the Probation and Parole Officer was requesting, for the District Court to revoke Freeman's sentence, and that Freeman be resentenced to maximum five (5) years to the DOC with all but nine (9) months suspended. Freeman's counsel did not indicate whether they were in agreement with that requested sentence and did not argue for any alternative sentence.

It is clear from the record that Freeman overcomes the strong presumption that his attorney's conduct fell "within the wide range of reasonable professional conduct[,]" as there is no plausible justification for

his counsel's failure to argue for or even—at a baseline—recommend a sentence. *Wright*, at ¶¶ 10, 12. Thus, this case is appropriate for direct appeal. Further, counsel's failure to perform such a fundamental function of a defense attorney must be considered by this Court to be “a quintessential example of unreasonable performance under *Strickland*.” *Wright*, at ¶ 18 (citing *Walter*, at ¶ 15 (internal citations omitted)).

As provided above, the second factor of the *Strickland* test is whether Freeman was prejudiced by his counsel's errors. Here, just as in *Wright*, this Court likely cannot determine whether the District Court would have sentenced Freeman to anything other than what the State recommended. However, Freeman's counsel failed to argue for any sentence, essentially gutting her client's right to effective assistance of counsel. Just as in *Wright*, where counsel failed to provide the relevant law for the district court to rely on for sentencing, Freeman's counsel failed to provide the District Court with any alternative argument to the State's sentencing recommendation. This left Freeman with no one to advocate for him and left the District Court with only one proposed sentence to consider with no counter arguments or recommendations. The lack of any recommended sentence shows a “reasonable probability that, but for counsel's errors, the result of the proceeding would have been different” *Wright*, at ¶ 20 (citations omitted).

Just as in *Wright*, the deficient performance of Freeman’s counsel prejudiced him during sentencing and he is entitled to a new sentencing hearing. Given that Freeman received ineffective assistance of counsel, his sentence must be vacated and this matter must be remanded for resentencing.

CONCLUSION

This Court must reverse the District Court’s Order of Revocation and Sentencing and remand for resentencing as the District Court abused its discretion in its failure to correctly determine the amount of credit for street time and elapsed time. The District Court’s findings of fact were clearly erroneous as they were not supported by substantial credible evidence. The District Court relied extensively on the statements provided by Officer Hall about Freeman’s non-compliance, but the record shows Officer Hall failed to articulate any specific violations during the specific alleged times, Officer Hall’s testimony was less than credible, and the State failed to present any other evidence in support of specific violations. The District Court relied on less than substantial evidence to deny Freeman credit for street time/elapsed time. Freeman requests this Court reverse the District Court and order Freeman be resentenced with the correct amount of credit for 562 days street time and elapsed time.

Further, this Court must reverse and remand the District Court's Order of Revocation and Sentence as Freeman received ineffective assistance of counsel. Freeman's fundamental rights were violated when his counsel failed to argue for any sentence during his sentencing hearing. Counsel's failure has no plausible explanation or justification, and Counsel's failure to act severely prejudiced Freeman as he had no one to advocate for a sentence other than the maximum sentence presented by the State. This failure shakes the bedrock of a Defendant's right to effective assistance of counsel and this Court must reverse and remand for resentencing.

Respectfully submitted this 26th day of August 2025.

By: /s/ Westen Young

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Appellant's OPENING 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 words 7,920, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Westen Young
WESTEN YOUNG

APPENDICES

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Thirteenth Judicial District Court *Report of Violation*.....B

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CERTIFICATE OF SERVICE

I, Westen Grant Young, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 08-26-2025:

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