APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Montana Supreme Court Order	filed April 23, 2019

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 18-0451

CITY OF MISSOULA,

Plaintiff and Appellee,

v.

TERRY JAMES SULLIVAN,

Defendant and Appellant.

ORDER

Before this Court are an Opposed Motion to Dismiss Appeal filed by Appellee State of Montana and self-represented Appellant Terry James Sullivan's response. The State moves for dismissal because presently more than 300 days have elapsed since the filing-date deadline and because this Court has already deemed Sullivan's appeal untimely.

Referring to the court record on file here, the State explains the pertinent background. In May 2016, Sullivan was charged with disorderly conduct in the City of Missoula Municipal Court. A jury found him guilty on January 5, 2017. Sullivan appealed to the Missoula County District Court. The District Court granted Sullivan several extensions to file his brief on appeal, and Sullivan later filed a 212-page brief on June 14, 2017. Upon granting the State's motion to strike, the court struck the brief from the record. Sullivan received more time to file his opening brief in accordance with the requisite page limit. After Sullivan failed to file his opening brief, the State moved for dismissal in the District Court. The court granted the motion to dismiss, thereby dismissing the appeal and remanding it to the Municipal Court on August 1, 2017. After remand, Sullivan then sought reconsideration of the motion to dismiss, and the District Court entered an Order denying his motion on September 7, 2017.

Sullivan then filed a Notice of Appeal on November 3, 2017, with this Court. He also filed a motion to appoint counsel. We denied his motion for the appointment of

counsel, and we *sua sponte* dismissed his appeal as untimely because the August 1, 2017 Order dismissing his appeal was the final judgment for purposes of appeal. *City of Missoula v. Sullivan*, No. DA 17-0648, Order (Mont. Nov. 14, 2017) (hereinafter *Order I*). Through counsel of limited appearance, Sullivan filed a petition for an out-of-time appeal and a petition for rehearing. We denied both petitions. *City of Missoula v. Sullivan*, No. DA 17-0648, Order (Mont. Dec. 5, 2017) (hereinafter *Order II*).

Again through counsel of limited appearance, Sullivan filed a petition for rehearing. In a detailed Order, this Court vacated and withdrew *Order I* and *Order II*, "[d]ue to analytical imprecision . . . ." This Court, however, reached the same result by denying both the petition for rehearing, filed in December 2017, and the earlier November 2017 petition for an out-of-time appeal. We pointed out the constraints of the Montana Rules of Appellate Procedure in what was the final appealable order.

> M. R. App. P. 6(1), in pertinent part, only authorizes appeals from final intermediate appellate judgments, not appeals from orders denying post-judgment motions for reconsideration or rehearing on those judgments. *See* M. R. App. [P.] 6(1) ("party may appeal from final judgment in an action or special proceeding and from those final orders specified in" M. R. App. P. 6(2) through (4)). Here, the District Court's August 1, 2017 order of dismissal was "a final judgment in an action or special proceeding" as referenced in M. R. App. P. 6(1). In contrast, regardless of Sullivan's newly-asserted grounds for relief, the court's September 7, 2017 order was no more than an order denying a post-judgment motion for reconsideration or rehearing on its final appellate judgment. As such, the District Court's September 7 order was neither "a final judgment in an action or special proceeding," nor other appealable "final order," as referenced in M. R. App. P. 6(1). Thus, the District Court's August 1, 2017 order was an appealable order, but its subsequent September 7, 2017 order was not.

City of Missoula v. Sullivan, No. DA 17-0648, Order, at 5 (Mont. Jan. 2, 2018) (footnote omitted) (hereinafter *Order III*). We further stated that:

> M. R. App. P. 4(2)(c) clearly mandates that "timely filing of a notice of appeal . . . is required to invoke the appellate jurisdiction of the supreme court." While we typically provide pro se litigants considerable latitude with technical pleading requirements, all litigants must strictly adhere to procedural rules, particularly those that are jurisdictional in nature. *Xin Xu v. McLaughlin Research Inst. for Biomedical Sci., Inc.*, 2005 MT 209, ¶ 23,

> 328 Mont. 232, 119 P.3d 100. "Extraordinary circumstances" justifying an out-of-time appeal "do not include mere mistake, inadvertence, or excusable neglect." M. R. App. P. 4(6). Even liberally viewed, Sullivan has at best shown no more than his own mistake, or otherwise excusable neglect, neither of which is sufficient alone to constitute a supported showing of an infrequent harsh case involving a gross miscarriage of justice resulting from extraordinary circumstances.

Order III, at 7.

On July 26, 2018, Sullivan filed a Notice of Appeal, and stated that he was appealing an August 1, 2017 final written judgment or order issued in the Fourth Judicial District Court, Missoula County. He attached a copy of this August 1, 2017 Order Denying Motion to Disqualify; Order Granting Motion to Dismiss Appeal; and Order of Remand to his Notice. The Clerk of the Supreme Court filed the Notice of Appeal. *City of Missoula v. Sullivan*, No. DA 18-0451.

In the State's instant motion to dismiss, the State contends that Sullivan's second appeal is untimely. The State points out that the sixty-day deadline pursuant to M. R. App. P. 4(5)(b)(i) was October 1, 2017, and that Sullivan filed his second appeal on July 26, 2018. The State acknowledges that while Sullivan is appealing the correct judgment, however, the State reiterates that it is untimely. The State points out that Sullivan has not petitioned this Court for an out-of-time appeal of this judgement; moreover, the State adds that we have already denied such a petition.

Sullivan responds that his appeal is timely. He states that *res judicata* or collateral estoppel do not apply here. He contends that the District Court proceeding is a civil proceeding, and not criminal, as stated in *Order III*. Sullivan argues that based upon this conclusion, any dismissal was erroneous, the Montana Rules of Civil Procedure apply, and his remedy was to file a second appeal, which is timely.

It appears that Sullivan is referring to this Court's language about a separate proceeding in *Order III*. We were explaining the Montana Rules of Appellate Procedure in contrast to the Montana Uniform Municipal Court Rules of Appeal. We did point out that "an appeal to district court from a municipal court is a separate appellate proceeding,

within the appellate jurisdiction of the district court, for review of the underlying criminal proceeding for compliance with applicable law." *Order III*, at 3. We went on to explain that in applying this Court's rules and § 46-20-104, MCA, "[a] party aggrieved by an order or judgment of a district court may appeal to this Court but only 'from a final judgment in an action or special proceeding' or 'from those final orders specified in' M. R. App. P. 6(2)[] through (4). M. R. App. P. 6(1)." *Order III*, at 3-4. While Sullivan is correct that the Montana Rules of Civil Procedure apply to proceedings in district courts, he misinterprets the meaning here which does not advance his cause.

This Court has been in this position before with Sullivan, and it is time for some judicial economy. We have determined previously that Sullivan's appeal is untimely. "In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *State v. Gilder*, 2001 MT 121, ¶ 11, 305 Mont. 362, 28 P.3d 488, (citing *Messenger v. Anderson*, 225 U.S. 436, 444, 32 S. Ct. 739, 740 (1912)). "The doctrines of law of the case and *res judicata* often work hand in glove but are not identical. Two important policies underlie and are common to both principles: judicial economy and finality of judgments." *Gilder*, ¶ 10 (referring to *State v. Perry*, 232 Mont. 455, 463, 758 P.2d 268, 273 (1988)). Sullivan's instant appeal should not have been filed because it was untimely. Having been filed, however, his appeal should not be relitigated in light of this Court's previous final decisions. Therefore,

IT IS ORDERED that the State's Opposed Motion to Dismiss Appeal is GRANTED, and this appeal is DISMISSED with prejudice.

The Clerk is directed to provide a copy of this Order to counsel of record and to Terry James Sullivan personally.

DATED this 23rd day of April, 2019.

Chief Justice