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Pro Se

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.

SULLIVAN'S RESPONSE IN OPPOSITION TO STATE'S MOTION TO DISMISS APPEAL

Appellee asserts that *res-judicata*[1] bars Sullivan's-appeal as untimely. That assertion is incorrect for 2-reasons: 1) this Court reversed the grounds upon which it based its 11/14/17-Order[2] that Sullivan's-appeal was untimely; and, 2) this Court did not give Sullivan any opportunity-to-be-heard before it issued its

[1]Or collateral estoppel. Appellee does not identify or analyze either doctrine upon which it implicitly relies. Appellee bases its Motion entirely on this Court's original holding that the appealed district-court Order was an order-issued-in-a-*criminal-case*. This Court expressly reversed that holding and held that the appealed Order was an order issued in a *civil-case (special-proceeding)*.
[2]DA 17-0648.

Order that Sullivan's-DA-17-0648-appeal was untimely and dismissed it. Therefore, *res-judicata* does not apply. Furthermore, this Court holds that all such *sua-sponte* orders-of-dismissal must be reversed.[3]

Appellee also incorrectly asserts that the timing-of-Sullivan's-appeal was governed by the appellate-deadline-rules for *criminal-cases*. It totally ignores the fact that this Court expressly held that the district-court-case was a *civil-case-(special-proceeding)*. The timing of Sullivan's-appeal is thus governed by the deadline-rules-governing-*civil-cases*.[4]

I. The district-court-proceeding in this case was a *civil-case.* It was not a *criminal-case.*

The district-court-proceeding in this case was a *civil-case* ("special-proceeding.") "Special-proceedings" are governed by the Montana-Rules-of-Civil-Procedure.[5]

Rule 77(d), M. R. Civ. P., requires Notice-of-Entry-of-Judgment in special-proceeding-cases, including in the district-court-case below.[6]

The City failed to serve the required Notice-of-Entry-of-Judgment. Therefore, Sullivan served that Notice, and timely-filed his Notice-of-Appeal-from-that-Order the same day.

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[3]*Spencer v. Beck*, 2010 MT 256, ¶¶ 16-17, 358 Mont. 295, 299, 245 P.3d 21, 25.
[4]*Criminal-case* deadlines are inapplicable to the appeal of an order issued in a *civil-case*.
[5]Rule 1, M. R. Civ. P., states that "These rules govern the procedure in all...proceedings in the district-courts."
[6]"Within 10-days after entry-of-judgment-or-an-order...notice-of-such-entry...shall be served...upon all parties...."

The time-to-appeal an order in every civil-case, including a special-proceeding, begins to run upon service of the Notice-of-Entry-of-Judgment.[7]

Therefore, Sullivan's-appeal is timely.[8]

II. The Court reversed the *criminal-case*-grounds upon which it based its dismissal. It held that appealed-order was issued in *a civil-case*. *Civil-case-appeals* are governed by different deadlines than *criminal-case-appeals*.

In DA-17-0648, this Court *sua-sponte* initially erroneously-held that the 8/1/17-district-court-Order was an order-issued-*in-a-criminal-case*.[9] Based on that erroneous-holding, this Court held that Sullivan missed the 60-day-criminal-appeal-deadline.

Later, this Court reversed its holding that the Order was an order-issued-*in a-criminal-case*. Instead, it held that the 8/1/17-Order was an order-issued-*in-*

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[7]If notice of entry of judgment...is required to be served under M.R.Civ.P. 77(d), the 30 days...shall not begin to run until service of the notice of entry of judgment....Mont. R. App. P. 4(5)(a)(i).

[8]Sullivan's DA 17-0648 appeal was also timely for the same reasons.

[9]And was thus governed by the 60-day appeal rule. It is well-recognized that appellate courts acting *sua-sponte*, and without the benefits of the adversarial system, can and do make errors about their jurisdiction's own laws. A court acting sua-sponte has a higher probability of reaching an erroneous result because it must make a decision without the benefit of the litigants' views. The grave risk of error is obvious: "[O]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error." *Mackey v. Montrym*, 443 U.S. 1, 13 (1979); see also *Penson v. Ohio*, 488 U.S. 75, 84 (1988) ("[The] system is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question.") "Judges are not omniscient, and 'in any given opinion, [a court] can misapprehend the facts...or even overlook important facts or controlling law.'" *In re Sulfuric Acid Antitrust Litigation*, 446 F. Supp. 2d 910, 913 (N.D. Ill. 2006) (quoting *Olympia Equipment v. Western Union*, 802 F.2d 217, 219 (7th Cir. 1986)). Moreover, "before a judge can gauge the full force of an argument, it must be presented to him with partisan zeal by one not subject to the constraints of the judicial office. The judge cannot know how strong an argument is until he has heard it from the lips of one who has dedicated all the powers of his mind to its formulation." Lon L. Fuller, *The Adversary System, in Talks on American Law* 31 (Harold J. Berman ed., 1976).

a-special-proceeding-(civil-case.) In its 12/5/17-Order, this Court stated that the district-court-proceeding was a "civil-proceeding." Based on that holding, the Court held that the Rules-of-Civil-Procedure applied. This Court stated that "the District-Court's 8/1/17-order-of-dismissal...was a final judgment *in-a-special-proceeding*."[10] Therefore, this Court explicitly holds that the 8/1/17-Order Sullivan appeals is not an-order-entered-*in-a-criminal-case*. The district-court-proceeding was not a *criminal-case*, but was a *civil-case-special-proceeding*.

Thus, the Court implicitly held that its sole-basis for dismissing the DA 17-0648-appeal never existed. Logic dictates therefore that the dismissal was erroneous.

Sullivan could not appeal the erroneous dismissal because it was the appellate-court that made that error *sua-sponte*. Therefore, Sullivan's remedy[11] was to file a second-appeal, relying on the Court's dispositive-holding that the proceeding was a *special-proceeding* in a *civil-case* and that thus, his appeal was timely.

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[10]Order, Doc. 35, DA 17-0648, *City v. Sullivan*, p. 5.

[11]MCA § 1-3-214. For every wrong there is a remedy. It would violate due process to leave Sullivan without a remedy, when he had an absolute right to appeal and had appealed according to the deadlines governing appeals from orders issued in civil special proceedings.

III. The Court raised and decided all issues *sua-sponte* in the DA-17-0648-appeal. It apparently overlooked the ramifications of its change-of-the-grounds that were the basis for its dismissal-of-that-appeal.

The Court *sua-sponte* raised all the issues adjudicated in its 11/14/17-Order. Later, the Court vacated and withdrew that Order and issued a superseding-Order.[12] In the 1/2/18-Order, this Court *sua-sponte* reversed its 11/14/17-Order that the district-court-proceeding was a *criminal-proceeding* and instead made a radically-different finding that the district-court-proceeding was a *special-proceeding-in-a-civil-case.*[13]

When the Court issued its 1/2/18-Order, it did not consider the appeal-deadline ramifications of its new-holding that the district-court-proceeding was a *civil-special-proceeding*, rather than a *criminal-proceeding*.

Those ramifications were that the entire-grounds upon which this Court based its 11/14/17-holding that Sullivan's-appeal-was-untimely changed. The Court never reversed its erroneous finding of untimeliness, despite the fact that the Court reversed the erroneous-basis for that erroneous-untimeliness-decision. This discrepancy between the dispositive-finding that the case was a *civil-case* is inconsistent with the dismissal on the grounds that it was a *criminal-case*. The rationale underlying the dismissal never existed.

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[12]on 1/2/18.

[13]In its 12/5/17-Order, this Court also stated that the district-court-proceeding was a "civil-proceeding." Based on that holding, the Court held that the Rules-of-Civil-Procedure applied. Thus, Rule 77 applies to this case.

If the district-court-proceeding is a criminal-case, one deadline applies. If the district-court-proceeding is a civil-case (special-proceeding), an entirely different deadline applies. Here, the Court initially held the lower-proceeding was a criminal-case, to which a 60-day-deadline applied. When the Court later issued its superseding-Order that the lower-proceeding was a civil-case (special-proceeding), it did not consider the fact that a new deadline would apply. The Court did not consider the ramifications of its Orders that reversed the criminal-case-finding underpinning the dismissal.

Sullivan rightfully followed the deadline-rules that apply to civil-cases (special-proceedings), and filed his current appeal under the rules that govern civil-cases (special-proceedings). This appeal is timely.

IV. Because Sullivan was not given-any-opportunity-to-be-heard before the Court issued its 11/14/17-Order dismissing his DA-17-0648-appeal, that dismissal does not bar this appeal. By this Court's own rules, that Order should be reversed and further-proceedings conducted.

Sullivan was not given any opportunity to be heard before this Court issued its Order dismissing his DA-17-0648-appeal. This Court holds that such a procedure violates Constitutional-due-process, and any order issued in such an unconstitutional-manner must be reversed and further-proceedings conducted:

> A *sua-sponte* decision to raise a time-bar...for dismissal-purposes invokes due-process-considerations. When a court is inclined to make such a dispositive-ruling on an issue-not-raised by-the-parties, the court must first "afford the parties...an-opportunity-to-present-their-positions before acting on its own initiative to dismiss-a-petition-as-untimely"...we hold that

> the...Court erred in *sua-sponte*....dismissing [the complaint] as untimely...We therefore reverse and remand for further proceedings consistent with this Opinion.[14]

The above-described reversible-erroneous-procedure occurred in this case. Here, the Court did not afford Sullivan an opportunity to present-his-position before acting on its own-initiative to dismiss Sullivan's appeal as-untimely. Under the Court's own holdings, its order-of-dismissal must be reversed and the case should proceed further. That is exactly what Sullivan's present appeal is—it constitutes the "further proceedings" required by this Court when a court issues a *sua-sponte*-order-dismissing-proceedings without affording a party an opportunity-to-be-heard before the dismissal.[i]

Res-judicata does not apply if the party was not afforded a full-and-fair-opportunity to litigate the issue decided by a court before the court's-decision.

V. Appellee's rationale for its motion-to-dismiss is contrary to the Court's holding that the case is a civil-case.

Appellee asserts that the criminal-proceeding-deadline applies to this appeal, rather than the civil-case-(special-proceeding)-deadline, and accordingly, asserts that Sullivan's-appeal is untimely.[15] Appellee's grounds-for-its motion-to-dismiss are contrary to the Court's-holding that the district-court-proceeding

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[14] *Spencer v. Beck, supra.*

[15] Although Sullivan brought this civil-case (special-proceeding) holding to counsel's attention before he filed his Motion, he totally ignored it in his Motion. His silence on that dispositive matter is inexplicable.

was a civil-case (special-proceeding). Appellee asserts that criminal-case-deadline-rules apply, even though this Court has already expressly held that the district-court-case was a civil-case-special-proceeding, rather than a criminal-case. The Court has identified and characterized the district-court-case as a civil-case-special-proceeding and implicitly instructed the parties to act in a manner consistent with that holding. Thus, criminal-proceeding appellate-deadline rules do not apply. Sullivan's-appeal was timely.

VI. The Court should apply the civil-case-deadline-rules instead of its erroneous-Order.

Justice requires the Court apply the civil-case-deadline-rules that actually apply, rather than rely at-all on its erroneous-Order. When the Court finally decided that the case was a civil-case-(special-proceeding), to be consistent, it perhaps should have also reversed the dismissal that was based on the initial erroneous-finding that it was a criminal-case.[16] If the Court overlooked that matter, it should now regard that it did do that-which-it-ought-to-have-done.[17] The Rules trump any erroneous-order and govern this matter. Under the Rules, Sullivan's-appeals were both timely.

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[16]Sullivan assumes the Court just left it to Sullivan to file another appeal by applying the civil-case law the Court said applied.

[17]That which ought to have been done is to be regarded as done. MCA § 1-3-220.

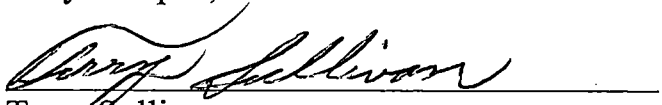
VII. Appellee's-Motion for more-time is identical to Sullivan's unopposed-Motion pending when the district-court dismissed his appeal.

Sullivan does not oppose State's-4th-motion-for-extension-of-time "to-file State's-responsive-brief."[18] Appellee did not file its brief due-on-4/9/19. That is exactly the situation that occurred below. While Sullivan's unopposed-motion-for-an-extension-to-file-his brief was pending, the district-court dismissed Sullivan's-appeal. That was an egregious denial-of-due-process. This Court would never have done that. Appellee was rightfully-confident that it could safely-ignore the 4/9/19-brief-deadline.

CONCLUSION

For the above-stated reasons, Appellee's Motion-to-Dismiss should be denied.

Respectfully submitted this 12th day of April, 2019.



Terry Sullivan

ENDNOTE

[i]The U. S. Supreme Court holds that actions by appellate courts constitute governmental actions that are subject to constitutional due process guarantees. See, e.g., *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930)(holding that "the judgment of the Supreme Court of Missouri must be reversed, because it has denied to the plaintiff due process of law—using that term in its primary sense of an opportunity to be heard and to defend its substantive right"); see also, e.g., *Ownbey v. Morgan*, 256 U.S. 94, 111 (1921) ("[Due Process] restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard...in judicial proceedings.") Therefore, it follows that appellate courts should not render decisions that adversely affect a party without giving that party an oppor-

[18]See the motion made in the last sentence of State's "Motion."

tunity to be heard on the issue that the court deems dispositive before it renders its decision. Appellate courts do just that, however, when they render *sua sponte* decisions. Thus, these decisions are fundamentally inconsistent with the due process guarantees of the Montana and United States Constitutions.

See, e.g., *Perez v. Ortiz*, 849 F.2d 793, 798 (2d Cir. 1988) (holding that district court committed reversible error when it dismissed claims *sua-sponte* "without giving plaintiffs notice and an opportunity to be heard"); *Stewart Title Guar. Co. v. Cadle Co.*, 74 F.3d 835, 836 (7th Cir. 1996) ("We have found that *sua-sponte* dismissals without [notice of the court's intent to do so and an opportunity to respond] conflict with our traditional adversarial system principles by depriving the losing party of the opportunity to present arguments against dismissal and by tending to transform the...court into a proponent rather than an independent entity."

In *Nolen v. Gober*, 222 F.3d 1356 (Fed. Cir. 2000), the U. S. Court of Appeals held that the lower court violated due process when it decided a case on a ground that neither side had briefed without affording the party an opportunity for supplemental briefing. It held that "[s]uch action by [a] court is inconsistent with general principles of fairness." Id. at 1361.; In *Esslinger v. Davis*, 44 F.3d 1515 (11th Cir. 1995), the 11th Circuit held that a federal court violated due process by *sua sponte* dismissing a federal habeas petition based on a procedural bar to relief not raised by the State. The Court ruled that it was "fundamentally unfair for a court *sua sponte* to invoke a procedural default without giving the petitioner an opportunity to show cause for the default." "If the petitioner is to be afforded due process, he must receive notice of the court's inclination to interpose the default, an opportunity to demonstrate 'cause' for the default and 'prejudice,' and, if material issues of fact are present, an opportunity to present his evidence." See also, e.g., *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1336 (11th Cir. 2011) (holding that a court violates due process when it *sua sponte* dismisses a complaint without affording the plaintiff notice of its intent to dismiss and an opportunity and collecting other cases with similar holdings). In *California Diversified Products v. Musick*, 505 F.2d 278 (9th Cir. 1974), the 9th Circuit held that a court violated due process when it *sua sponte* dismissed a complaint. It said the court violated "[t]he fundamental requirement of due process" by *sua sponte* dismissing the complaint without prior notice because doing so deprived the plaintiff of "an opportunity to submit a written memorandum in opposition..., a hearing, and an opportunity to amend the complaint to overcome the deficiencies raised by the court." Id. at 280–81.

The reason why a post-decision opportunity to be heard is inadequate is obvious. Judges are human beings, and human beings find it difficult to change their minds about anything. See Nancy L. Douglas, Enemies of Critical Thinking: Lessons from Social Psychology, 21 READING PSYCHOLOGY 129– 44 (2000) (describing extensive research showing that, "once beliefs are formed, they are extremely resistant to change"); see also Richard S. Arnold, Why Judges Don't Like Petitions for Rehearing, 3 J. App. Prac. & Process 29, 37 (2001) ("[C]hanging anybody's mind about conclusions already reached after deliberation is necessarily going to be difficult."); cf. *Morrissette v. State*, 147 So.3d 978 (Ala. Crim. App. 2012) ("It is impossible for jurors to completely erase from their minds a decision-making process that has already occurred and to begin anew as if they had never discussed the

matter."). Judges may find it more difficult than other people to change their minds. See Emily Bazelon, Better Judgement, NY TIMES MAGAZINE (June 17, 2015) ("Judges rarely change their minds. They often feel they can't. When they put on their robes, they wrap themselves in a mythos of authority and certainty. They're supposed to be distant, neutral and wise. They're supposed to have all the answers."). "Judges have expressed their hostility to rehearing petitions." Mayer Brown LLP, Federal Appellate Practice § 13.2(a) (2008) (titled: "Judicial Reluctance to Rehear Cases: the Grim Statistics"). "Statistically, the chances of changing of changing [a] court's mind in a way that impacts the result of [an] opinion are extremely small on motions for rehearing." Besty Gallager & Amy Miles, The Appellate Opinion is Out—Now What Do I Do?, 82 Fla. B. J. 29, 31 (2008).

In *Blumberg Associates Worldwide v. Brown & Brown of Conn.*, 84 A.3d 840 (Conn. 2014), the Connecticut Supreme Court addressed "when a reviewing court properly may raise and decide an issue that was not raised by the parties." In *Blumberg*, Connecticut's intermediate appellate court *sua sponte* raised an issue that neither side had raised but, before deciding it, "ordered the parties to submit supplemental briefs" addressing the point. Id. at 851. In upholding the intermediate appellate court's decision, the Connecticut Supreme Court held that the "[f]undamental fairness" guaranteed by "due process" dictates that a court give the parties "'notice and an opportunity to be heard before deciding [an issue] *sua sponte*.'" Id. at 863–65 & nn. 24, 26 (quoting Adam Milani & Michael Smith, Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts, 69 TENN. L. REV. 245, 267–29 (2002), and Barry A. Miller, Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard, 39 SAN DIEGO L. REV. 1253, 1310 (2002). The Connecticut Supreme Court held that due process requires "an opportunity to be heard on the issue" raised *sua sponte* before it is resolved. Id. In *Holzer v. Jochim*, 557 S.W.2d 57 (N.D. 1996), the Supreme Court of North Dakota found a due process violation, saying the court violated "[t]he fundamental requirement of due process"—"that a party receive adequate notice and fair opportunity to be heard"—because a reversal was effected "without notice or warning to the parties that the court was going to reconsider liability." In *Brown v. Triple "D" Drilling*, 585 P.2d 987 (Kan. 1978), the Kansas Supreme Court held that a trial court violated due process by *sua sponte* reinstating a lawsuit that had been dismissed for want of prosecution without providing the defendant with notice and an opportunity to be heard. In *Brown*, the Court held that the trial court's action in reinstating the suit *sua sponte*, without affording the co-signer prior notice and an opportunity to be heard, "did not afford the defendant due process of law." Id. at 990.

This Court's decision in DA 17-0648, which both raised and decided the timeliness issue *sua sponte*, without providing Sullivan with prior notice and a pre-decision opportunity to be heard, conflicts with each of the above decisions.

As several scholarly commentators have persuasively explained, a court violates the fundamental principles of procedural due process announced by this U. S. Supreme Court when it fails to provide notice and an opportunity to be heard before rendering a decision based on a ground that it raised *sua sponte*. See Milani & Smith, supra, 69 TENN. L. REV. at 262–71, 304–07; Barry A. Miller, Sua Sponte Appellate Rulings: When Courts Deprive Litigants of

an Opportunity to be Heard, 39 SAN DIEGO L. REV. 1253, 1288–90 (2002). In *Day v. McDonough*, 547 U.S. 198 (2006), the U. S. Supreme Court wrote: "Of course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions." Id. at 210–11. Relatedly, in *Lee v. Kemna*, 534 U.S. 362 (2002), the U. S. Supreme Court ruled that a state appellate court's denial of a federal constitutional claim on state procedural grounds was unfair and not "adequate" to preclude federal review because, among other things, the state appellate court raised, on its own motion, and for the first time on appeal, the notion that Lee's constitutional claim could be denied because he raised it only orally, and not it in a written motion. Id. at 380. The *Day* and *Lee* Courts, which addressed federal habeas courts' decisions to apply a procedural bar to relief, did not explicitly ground their holdings in the Due Process Clause, but the Court's procedural due process cases show that the rules of basic fairness they embody is grounded in the 5th and 14th Amendments. The U. S. Supreme Court has emphasized on numerous occasions that procedural due process requires, at a minimum, that citizens be afforded an opportunity "to be heard"—that is, an opportunity to present objections and arguments with regard to governmental actions that may result in a deprivation of their life, liberty, or property. See, e.g., *Nelson v. Adams USA*, 529 U.S. 460, 466 (2000); *Richards v. Jefferson County*, 517 U.S. 793, 797 n.4 (1996); *Mullane v. Cent. Hanover Bank*, 339 U.S. 306, 314 (1950); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Furthermore, the decisions of courts constitute governmental actions that must be conducted in accordance with the 5th or 14th Amendment's guarantee of procedural due process. See, e.g., *Brinkerhoff-Faris Trust, supra; Ownbey v. Morgan, supra.* "[I]t would follow that appellate courts should not render decisions that adversely impact a party" "without giving that party an opportunity to be heard on the issue that the court deems dispositive." Milani & Smith, *supra*, 69 TENN. L. REV. at 263; see also *Richards*, 517 U.S. at 797 n.4 ("The opportunity to be heard is an essential requisite of due process of law in judicial proceedings."); cf. *Nelson*, 529 U.S. at 465–67. Applying the framework of *Mathews v. Eldridge*, 424 U.S. 319 (1976), leads to the same result. See Miller, supra, 39 SAN DIEGO L. REV. at 1289–90. Under *Mathews*, a court must weigh 3 factors in determining whether the due process clause requires a given procedural protection: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and (3) the Government's interest, including the administrative burden that additional procedural requirements would impose. E.g., *U. S. v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993). Litigants before a court virtually always have a substantial interest in winning their case, e.g., *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014), and the other two considerations cut so strongly in one direction as to justify a categorical rule: due process requires notice and an opportunity to be heard before a court renders a decision on a ground that it has raised *sua sponte*.

Certificate of Service

I hereby certify that I served true and accurate copies of the foregoing Response to the following on April 12, 2019: Roy Brown, Assistant Attorney General, P. O. Box 201401, 215 North Sanders, Helena, MT 59620-1401, Roy.Brown2@mt.gov

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