

IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. OP 23-0460

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MONTANA LEE COVINGTON,

Petitioner,

v.

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY  
THE HONORABLE DAVID J. GRUBICH, PRESIDING,

Respondent.

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**SUMMARY RESPONSE TO PETITION FOR WRIT OF SUPERVISORY  
CONTROL**

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*State of Montana v. Montana Lee Covington*, Cause No. ADC-22-003  
Montana Eighth Judicial District Court, Cascade County, Judge Grubich, Presiding

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APPEARANCES:

**PETITIONER**

CHAD WRIGHT

Appellate Defender

KRISTEN PETERSON

Assistant Appellate Defender

Office of the Public Defender

Appellate Defender Division

P.O. Box 200147

Helena, MT 59620-0147

krispeterson@mt.gov

**RESPONDENT**

HON. DAVID J. GRUBICH

415 2nd Ave. N. Rm. 307

Great Falls, MT 59401

David.Grubich@mt.gov

**STATE OF MONTANA**

AUSTIN KNUDSEN

Montana Attorney General

KATIE F. SCHULZ

Assistant Attorney General

PO Box 201401

Helena, MT 59620-1401

kschulz@mt.gov

COMES NOW Respondent, the Montana Eighth Judicial District Court, Cascade County and the Honorable David J. Grubich, Presiding Judge (hereinafter “District Court”), pursuant to the Order of the Montana Supreme Court (hereinafter “Supreme Court”) and Mont. R. App. P. 14(7)(a), and summarily responds to the Petition for Writ of Supervisory Control filed by Petitioner Montana Lee Covington (hereinafter “Covington”). For the following reasons, the Supreme Court should decline to exercise supervisory control. In the alternative, if the Supreme Court decides to exercise supervisory control, it should affirm the ruling of the District Court denying the State of Montana’s motion to dismiss the probation revocation proceeding.

## **INTRODUCTION**

Supervisory control is an extraordinary remedy. Mont. R. App. P. 14(3). Supervisory control is sometimes justified when: (1) urgency or emergency factors exist making the normal appeal process inadequate; (2) the case involves purely legal questions; and either (3) the lower court is proceeding under a mistake of law is causing a gross injustice or constitutional issues of statewide importance are involved. *Id.* No urgency or emergency factors exist that make the normal appeal process inadequate. This case does not involve purely legal questions. It does not raise constitutional issues of statewide importance. The District Court is not proceeding under a mistake of law, nor has the District Court caused a gross

injustice.

If the Supreme Court decides to consider the petition on its merits, the Supreme Court should affirm the ruling of the District Court denying the County Attorney's motion to dismiss. Montana abolished the common law doctrine of *Nolle Prosequi* favoring instead the Judiciary providing a check and a balance on the common law power of the prosecutor to dismiss proceedings under the prosecutor's authority. Montana's statute at § 46-13-401(1), M.C.A establishes as law Montana's standard that a judge review motions to dismiss. The District Court, in closely following and interpreting the Montana Constitution, statutes, and caselaw including the Supreme Court's July 6, 2023, Order in *Elendil v. Mont. Eighth Jud. D. Ct.*, Cause No. OP 23-0322 (hereinafter, "*Elendil*"), followed the statutory requirement by providing a check on the prosecutor's decision to seek dismissal of the revocation proceeding. The District Court took no action beyond exercising its discretion to deny a motion to dismiss pursuant to § 46-13-401(1), M.C.A. The District Court did not violate separation of powers or due process.

### **SUMMARY OF THE CASE**

Covington pled guilty and was sentenced on May 25, 2022, to:

Count I: Burglary, felony – 5-year deferred imposition of sentence;

Count II: Theft (Common Scheme), felony – 5-year deferred imposition of sentence;

and,

Count III: Criminal Mischief, felony – 5-year deferred imposition of sentence.

All counts run concurrently with one another.

The State filed its first Petition to Revoke October 27, 2022, alleging Mr. Covington had absconded from supervision. On December 14, 2022, Mr. Covington answered true and received the following disposition:

Count I: Burglary, felony – revoke and reinstate the 5-year deferred;

Count II: Theft (Common Scheme), felony – revoke and reinstate the 5-year deferred; and

Count III: Criminal Mischief, felony – revoke the 5-year deferred and impose 5 years DOC, all suspended.

The State filed its second Petition to Revoke around three months after the disposition hearing on March 27, 2023. The State alleged Covington violated the conditions of probation by being charged with: Theft, felony; Criminal Endangerment, felony; Reckless Driving, misdemeanor; Fleeing from or Eluding Peace Officers, misdemeanor; and speeding. It further alleged Covington violated the conditions of probation by possessing two loaded firearms in the vehicle in which he was fleeing from police. After several continuances, an evidentiary/dispositional hearing was scheduled for August 2, 2023. On July 17, 2023, the State filed a Motion to Dismiss Petition to Revoke. The State reasoned,

Had the State known the full extent of the Youth's childhood trauma, it would have offered a plea agreement with a stipulated transfer to Youth

Court [of the original charges in 2022]. The State understands the male brain isn't fully developed until the mid-20s. In this case, the Youths [sic] childhood trauma will likely result in his brain development continuing for several more years. This directly affects his impulse control and logical thinking. Services are available in the community to address these issues. Mr. Covington's pending case in this Court would better serve as the controlling case.

The State would request the Court Dismiss [sic] Petition to Revoke. The State would request that this motion be set on the Wednesday morning docket.

Petition, Ex. C, Mot. To Dismiss Petition to Revoke (July 19, 2023), pp. 1-2.

At the time scheduled for the evidentiary/dispositional hearing on August 2, 2023, the District Court first took up the State's motion to dismiss. *Petition*, Ex. B, *Transcript* (Aug. 2, 2023), pp. 4-12. The District Court heard from the State on the motion and specifically requested the State to support the arguments made in its motion. *Id.*, p. 5-7. Ultimately, the District Court exercised its discretion to deny the motion to dismiss. The next step would have been to begin the scheduled evidentiary hearing. The District Court asked the State for its position. *Id.*, p. 12. The State mulled several options on the record including moving to dismiss, proceeding with the hearing, or continuing the hearing but with the State intending to call no witnesses. *Id.*, p. 13. The State ultimately chose to proceed with the evidentiary hearing. *Id.* At that time, and before the State had an opportunity to either choose to call a witness or choose to not call a witness and rest, the Defense requested a continuance, which was granted. *Id.*, pp. 13-14. Neither an evidentiary hearing nor a revelation of how the State would proceed at an evidentiary hearing occurred. This

Petition for Writ of Supervisory Control followed, and the underlying case has been stayed.

Covington is currently incarcerated on a \$25,000 bond in this case which runs concurrently with the bond in Cause No. ADC-23-176. He is incarcerated on a \$2,500 bond in ADC-23-176. He has been released on his own recognizance in BDC-23-206.

### **SUMMARY ARGUMENT**

**A. Supervisory control is not appropriate because the case does not involve purely legal questions, and there are no urgent or emergency factors that make the normal appeal process inadequate.**

Covington argues supervisory control is appropriate because “Mr. Covington faces immediate, long-term, and illegal incarceration before he could resolve the district court’s legal error on appeal.” *Petition*, p. 10. The District Court disagrees. Covington is incarcerated because he has not posted bond in either this case or another matter before this Court, ADC-23-176. Even if the Petition for Writ of Supervisory Control is granted and the District Court is reversed, Covington will remain incarcerated in ADC-23-176. His present incarceration is not illegal regardless of whether the Supreme Court ultimately finds the District Court erred in not granting the State’s motion to dismiss. This is distinguishable from *Elendil*. In *Elendil*, the defendant was incarcerated solely on the case in which the petition for writ of supervisory control was brought, and because of Mr. Elendil’s incarceration

solely on that matter, the District Court stipulated supervisory control was appropriate. That is not the case here.

There is no urgency or emergency rendering the appeal process inadequate for Covington. The delay and continued incarceration in this case for Covington has not been caused by the District Court. It has been caused by Defense Counsel moving to continue the evidentiary hearing and then filing the instant Petition before the evidentiary hearing could be held. If Defense Counsel had not requested a continuance, the evidentiary hearing could have gone two ways. First, the State could have refused to call a witness, and the District Court, pursuant to *Elendil*, would have dismissed the Petition to Revoke because the allegations would not have been proven by a preponderance of the evidence pursuant to § 46-18-203(9), MCA. Second, the State could have proceeded in calling witnesses. It remains to be seen what the State will chose to do. Therefore, the Defendant's Petition for Writ is premature, and the Supreme Court should deny the Writ.

Finally, the District Court's denial of the motion to dismiss in this case does not involve purely legal questions or constitutional issues of state-wide importance. This case is distinguishable from *Elendil*. As the Supreme Court found to have occurred in *Elendil*, the District Court did not violate separation of powers or due process in Covington's case based on the Court's actions taken at the evidentiary hearing. That is because an evidentiary hearing has not yet been held. This case does

not involve the denial of the State's motion to dismiss based on the District Court's interpretation of § 46-18-203(9), MCA as occurred in *Elendil*. That statute would only be implicated had an evidentiary hearing been held. The Court and the parties never reached the evidentiary hearing for Covington because Defense Counsel moved for and was granted a continuance. The only statute implicated here is § 46-13-401(1), MCA. This case involves the sole issue of whether the District Court abused its discretion in denying a motion to dismiss. *See State ex. rel. Fletcher v. Dist. Court*, 260 Mont. 410, 413-14, 859 P.2d 992, 994 (1993).<sup>1</sup> The District Court's decision to deny the motion to dismiss involved factual issues, not legal ones. While hearing the State's motion to dismiss, the District Court considered the circumstances in Covington's case and the information it was provided by the State in support of its motion to dismiss. *Petition*, Ex. B, Transcript (Aug. 2, 2023), pp. 5-12. Based on the facts and circumstances before the District Court, it denied the motion finding, pursuant to § 46-13-401(1), MCA, dismissal was not in furtherance of justice. The District Court found the evidentiary hearing should proceed, and it is yet to be seen what the State will do at that hearing. The question of dismissal

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<sup>1</sup> The District Court is following *Fletcher* and *Elendil* which state that the denial of a motion to dismiss in these circumstances is reviewed for abuse of discretion. The District Court alerts the Supreme Court that denials of motions to dismiss in criminal cases for other reasons are considered questions of law reviewed de novo for correctness. *See State v. Soto*, 2020 MT 265, ¶ 8, 401 Mont. 545, 474 P.3d 815. If the Supreme Court chooses to review the instant denial of the motion to dismiss de novo for correctness, then the District Court requests the Supreme Court consider the District Court's overall arguments in Section B to be made under this higher standard.

based on how the State proceeds at an evidentiary hearing remains open before the District Court.

Because there is no urgency or emergency factor rendering the normal appeal process inadequate, there is no constitutional issue of state-wide importance, and the case does not involve purely legal questions, the District Court requests the Supreme Court decline to consider the merits of Covington's Petition.

**B. The District Court did not abuse its discretion in denying the State's Motion to Dismiss.**

The State's motion to dismiss was based on an agreement with the defendant and the prosecutor's disagreement with how the State originally proceeded with Covington. *Petition*, Ex. C, Mot. To Dismiss. The State, in essence, wishes it could unwind the clock and return this matter to Youth Court given Covington's age and past trauma. *Petition*, Ex. B., Transcript (Aug. 2, 2023), pp. 5. The District Court specifically requested the State to provide support for its position and considered those reasons for the motion to dismiss. *Id.*, p. 5-12. The State argued it is "common knowledge male brains are not fully developed until mid-to-late 20's." *Id.*, p. 6. The State provided little more than this conclusory statement in support of its position. The State provided the Court no specific information about Covington's past trauma and the prosecutor admitted she was ". . . not even completely aware of what trauma would have occurred before [Covington] ended up with his adopted family." *Id.*, p.

7. The District Court was provided no substantive evidence to support the State's motion to dismiss. The District Court concluded the facts provided by the State were insufficient for it to exercise its discretion under § 46-13-401(1), MCA to grant the motion to dismiss the revocation proceeding. *Id.*, pp. 5-12. As the District Court's discussion during the hearing reveals, this involved the District Court's consideration of the extensive background of Covington's case, multiple factual issues, questions regarding natural male brain development, and accountability once a defendant is convicted of a crime, sentenced, and revoked. The District Court made clear that the issues raised as a basis for the motion to dismiss were already considered at sentencing and the subsequent dispositional hearing upon the first revocation. *Id.*, pp. 7-8. "The test for abuse of discretion is whether the district court acted arbitrarily without conscientious judgment or exceeded the bounds of reason." *State v. Ayers*, 2003 MT 114, ¶ 26, 315 Mont. 395, 68 P.3d 768. The transcript shows the District Court did not act arbitrarily without conscientious judgment nor did it exceed the bounds of reason when considered and ultimately rejected the State's proffered reasons for the motion to dismiss and ultimately finding them lacking.

Turning to the plea agreement, dismissal of the Petition to Revoke was not addressed in the plea agreement. *Petition*, Exhibit D. Despite this, both parties acknowledge this was a mistake and it was supposed to be included. The District

Court acknowledges, without extensive review, consideration of basic contract law would likely lead the District Court to consider it a term of the plea agreement. Moreover, it could easily be resolved by the execution of an amended plea agreement. *Elendil* did not resolve whether plea agreements may be entered into for probation revocation proceedings. The District Court continues to argue that the plea agreement statute does not permit plea agreements in probation revocation proceedings, and the District Court did not abuse its discretion or err as a matter of law by declining to follow a fatally defective plea agreement. For the sake of brevity, the District Court incorporates its argument on this issue from its Summary Response to the Petition for Writ of Supervisory Control in *Elendil*, OP 23-0322, pages 13-15, which is attached hereto as **Exhibit 1**. Despite this, the record is clear on the District Court's reasons for denying the motion to dismiss.

Covington comments that the District Court was inconsistent by analyzing whether good cause existed to support the motion to dismiss and if dismissal was in furtherance of justice pursuant to § 46-13-401(1), MCA, when the District Court argued in *Elendil* the statute does not apply to probation revocation proceedings. The District Court did so because the Supreme Court declined to reach this issue in *Elendil*. See *Elendil*, FN1. Out of an abundance of caution, and taking instruction from *Elendil*, the District Court will analyze all motions to dismiss in criminal and probation revocation proceedings under the standard in § 46-13-401(1), MCA.

**C. The District Court did not violate separation of powers, due process, or err in its interpretation of § 46-18-203(9), MCA by denying the State's Motion to Dismiss.**

Covington repeatedly argues that this case is identical to *Elendil* and that the District Court is defying the Supreme Court's ruling in *Elendil*. Such a position is without merit. *Elendil* did not eradicate a district court's duty to review motions to dismiss pursuant to § 46-13-401, MCA. *Elendil* held that the District Court erred at the evidentiary hearing by taking judicial notice of a court record after the State refused to call a witness, and this error violated separation of powers and Mr. Elendil's right to due process. *Elendil Order*, p. 5. *Elendil* further found the District Court incorrectly interpreted § 46-18-203(9), MCA by applying a standard not found in that statute. *Id.*, p. 6. The District Court in Covington's case never reached § 46-18-203(9), MCA. It denied a motion to dismiss pursuant to § 46-13-401(1), MCA. It could not proceed to the evidentiary hearing because Defense Counsel requested and was granted a continuance. The District Court did not place itself in the shoes of the prosecutor in Covington's case. It did not judicially notice anything or challenge the sufficiency of the State's evidence or lack of evidence at the evidentiary hearing. An evidentiary hearing has not yet occurred.

Covington continues rely on the mistaken premise that if the State moves to dismiss, this Court has no authority to review it and must, instead, submit to the State's demand despite the clear language in § 46-13-401(1), MCA. In denying the

motion to dismiss pursuant to § 46-13-401(1), MCA, the District Court merely exercised the role it has been given by the Legislature by statute (§ 46-13-401(1), MCA) following the abolition of the common law doctrine of *nolle prosequi*, to provide a check on the Executive Branch's otherwise unbridled power to dismiss a case. This authority cannot, and should not, be ignored or circumvented. For the sake of brevity, the District Court incorporates its argument on this issue from its Summary Response to the Petition for Writ of Supervisory Control in *Elendil*. Exhibit 1, *Elendil* Summary Response, pp. 5 – 13.

Covington also cherry picks statements made by the District Court to argue that the District Court is not a neutral arbiter, in violation of his right to due process. The District Court's comments were made during the discussion of the State's motion to dismiss. Because the District Court felt compelled to analyze whether there was good cause for the motion to dismiss and whether the motion to dismiss was in furtherance of justice, the District Court had to consider the allegations underlying the Petition to Revoke and Covington's history. Solely regarding the motion to dismiss, the District Court intended to "hold Mr. Covington to his sentence" by not granting the motion to dismiss. The fact that Covington was convicted and sentenced for the underlying crimes of burglary, theft, and criminal mischief in this case is beyond debate. The District Court made no findings as part of an evidentiary hearing regarding Covington. That is the State's burden once the

evidentiary hearing occurs if the state chooses to meet it. The District Court evaluated all the information before it when considering and ultimately denying the State's motion to dismiss. Doing so did not deprive Covington of a neutral arbiter.

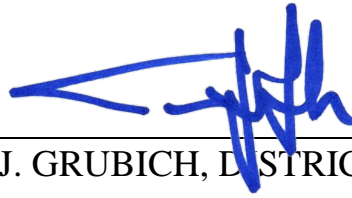
Finally, the District Court did not proceed to the evidentiary hearing because Defense Counsel requested and was granted a continuance. If the evidentiary hearing proceeds and the State does not call a witness, the District Court will, pursuant to *Elendil* and § 46-18-203(9), MCA, dismiss the probation revocation proceeding for failure of the prosecutor to prove the violation by a preponderance of the evidence. This matter is simply not done.

### **CONCLUSION**

The District Court respectfully requests the Supreme Court decline to exercise supervisory control. This case does not involve any urgency or emergency factors which render the normal appeal process inadequate. It does not involve the District Court proceeding under a mistake of law and causing a gross injustice. It does not involve constitutional issues of statewide importance. It involves discretionary decisions made by the District Court, and the District Court did not act arbitrarily without conscientious judgment or exceed the bounds of reason when it denied the motion to dismiss. The District Court respectfully requests the Supreme Court return this matter to the District Court forthwith so the District Court may hold an evidentiary hearing. If at the evidentiary hearing the State does not present any

evidence, the District Court shall dismiss the petition to revoke. If this is how the State chooses to proceed, Covington will receive the same relief but for a different reason than if the District Court had exercised its discretion to grant the motion to dismiss, which it could not do for the reasons given on the record on August 2, 2023.

DATED this 5th day of September 2023.



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DAVID J. GRUBICH, DISTRICT COURT JUDGE

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Mont. Rs. App. P. 11(e) & 14(9)(b), I certify that this response meets the following requirements:

1. Line Spacing: Double Spaced
2. Typeface: Times New Roman, 14 pt. (proportionately spaced)
3. Word Count: 3,306 (does not exceed 4,000 word limit)

DATED this 5th day of September 2023.



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DAVID J. GRUBICH, DISTRICT COURT JUDGE

## **CERTIFICATE OF SERVICE**

I, David Grubich, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Petition for Writ to the following on 09-05-2023:

Chad M. Wright (Attorney)  
P.O. Box 200147  
Helena MT 59620-0147  
Representing: Montana Lee Covington  
Service Method: eService

Kristen Lorraine Peterson (Attorney)  
Office of the Appellate Defender  
555 Fuller Avenue  
Helena MT 59620  
Representing: Montana Lee Covington  
Service Method: eService

Austin Miles Knudsen (Govt Attorney)  
215 N. Sanders  
Helena MT 59620  
Representing: State of Montana  
Service Method: eService

Joshua A. Racki (Govt Attorney)  
121 4th Street North  
Suite 2A  
Great Falls MT 59401  
Representing: State of Montana  
Service Method: eService

Rachelle Lynn (Govt Attorney)  
121 4th St N. 2A  
Great Falls MT 59404  
Representing: State of Montana  
Service Method: eService

Michael V. Kuntz (Attorney)  
615 2ND AVE N  
GREAT FALLS MT 59401-2585  
Representing: Montana Lee Covington

Service Method: eService

David J. Grubich (Respondent)  
Eighth Judicial District Court  
415 2nd Avenue N.  
Great Falls MT 59401  
Service Method: Conventional

Kathryn Fey Schulz (Govt Attorney)  
215 North Sanders  
P.O. Box 201401  
Helena MT 59620-1401  
Service Method: eService  
E-mail Address: KSchulz@mt.gov

Matthew T. McKittrick (Attorney)  
615 2ND AVE N  
GREAT FALLS MT 59401-2585  
Service Method: eService  
E-mail Address: MMckittrick@mt.gov

Electronically signed by Valerie Kamps on behalf of David Grubich  
Dated: 09-05-2023