IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 25-0131

STATE OF MONTANA,

Plaintiff and Appellant,

v.

ANDREW EMMINGS,

Defendant and Appellee.

REPLY BRIEF

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable John W. Larson, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
SELENE KOEPKE
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
selene.koepke@mt.gov

MATTHEW JENNINGS
Missoula County Attorney
Courthouse – 200 West Broadway
Missoula, MT 59802

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TAMMY A. HINDERMAN
Division Administrator
EMMA N. SAUVE
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147

ATTORNEYS FOR DEFENDANT
AND APPELLANT

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Appellant, the State of Montana, maintains the arguments made in its Opening Brief (St.Br.) and offers the following arguments in reply to Emmings' Response Brief (Br.).

ARGUMENT

I. Law of the case

Emmings erroneously asserts that the law of the case doctrine only applies to issues decided by this Court and remanded for further proceedings. (Br. at 17-18.) In doing so, Emmings ignores *McCormick v. Brevig*, 2007 MT 195, ¶ 38, 338 Mont. 370, 169 P.3d 352, which states:

> Under the doctrine of law of the case, a legal decision made at one stage of litigation which is not appealed when the opportunity to do so exists, becomes the law of the case for the future course of that litigation and the party that does not appeal is deemed to have waived the right to attack that decision at future points in the same litigation.

Id. The Court extended this same holding specifically in the criminal context in *State v. Carden*, 170 Mont. 437, 439, 555 P.2d 738, 739-40 (1976), stating that, "[a]lthough some courts limit application of the 'law of the case' doctrine to final decisions of the highest appellate court, we consider the better rule permits application of this principle to prior rulings of a trial court in the same case as well." *Id.* (internal citations omitted).

Emmings argues that the law of the case doctrine does not prohibit a subsequent court from "chang[ing] its mind or overrul[ing] its own prior decision in a case." (Br. at 17.) That is true; however this Court has held that such reviews must show clear error. *Carden*, 170 Mont. at 440-41, 555 P.2d at 740. In *Carden*, the State appealed the decision of the district court after the sixth judge in the case dismissed 28 counts in an information. *Id*. at 438-39, 555 P.2d at 739. The dismissal came after two previous judges had reviewed the same issues and denied the defendant's motion. *Id*. at 438, 555 P.2d at 739.

The Court found that it was an abuse of discretion for the judge to reconsider the prior rulings, given the lack of error, and warned that to allow such practice "would permit endless manipulation of the judicial system and thwart its proper operation and objectives. It would also permit a judge of coordinate jurisdiction to perform appellate functions, in effect, over the decisions of another district judge, a practice which this Court has previously condemned." *Id.* at 440-41, 555 P.2d at 740 (citing *State ex rel. State Highway Comm'n v. Kinman*, 150 Mont. 12, 430 P.2d 110 (1967)). Emmings cannot show error in Judge Halligan's orders sufficient to warrant this level of condemned review.

This Court has recently held that the law does not permit a court to correct its own "judicial errors," i.e., its errors in judgment. *State v. Zielie*, 2025 MT 90, ¶ 29, 421 Mont. 452, 568 P.3d 516 (citing *State v. Damon*, 2025 MT 12, ¶ 9,

420 Mont. 225, 562 P.3d 1061). This Court also reaffirmed its holding that a district court may not "exercis[e] a revisory or appellate power over its own decisions." *State v. Megard*, 2006 MT 84, ¶ 20, 332 Mont. 27, 134 P.3d 90. Instead, as argued below, the proper remedy for an alleged judicial error is a timely appeal. *State ex rel. Torres v. Mont. Eighth Judicial Dist. Court*, 265 Mont. 445, 453, 877 P.2d 1008, 1023 (1994).

Furthermore, although not specifically discussed under the law of the case doctrine, this Court has repeatedly followed this principle in similar situations. The Court has held that a defendant who fails to appeal their sentence within 60 days of the entry of judgment cannot later challenge that sentence in a subsequent revocation proceeding. *State v. Adams*, 2013 MT 189, ¶ 15, 371 Mont. 28, 305 P.3d 808; *State v. Muhammad*, 2002 MT 47, ¶¶ 22, 33, 309 Mont. 1, 43 P.3d 318; *see also State v. White*, 2008 MT 464, ¶ 20, 348 Mont. 196, 199 P.3d 274 (overruled on other grounds) (citing *Muhammad*, ¶ 22, "White may not, within the context of the [2007] revocation proceeding, challenge the legality of the conditions imposed on her 1997 suspended sentence, as such a challenge is untimely."); *In re M.W.*, 2012 MT 44, ¶ 12, 364 Mont. 211, 272 P.3d 112 (citing *Muhammad*, ¶ 22, "M.W. did not appeal from the order imposing the registration requirement entered by the Youth Court in July 2009 . . . . [T]he challenge he now

attempts to make to the original imposition of the requirement has been forfeited."). These holdings are consistent with the law of the case doctrine.

This Court has explained the circumstances under which a sentencing court can correct a sentence alleged to be illegal. The Court reasoned that:

> [A] sentencing court's authority to re-sentence a criminal defendant based upon an illegal sentence depends upon *when* the illegal sentence is discovered and challenged. If the illegal sentence is challenged while the defendant is serving the sentence, the court has the authority to correct the sentence by imposing a sentence that was statutorily authorized . . . . If, however, the illegal sentence is challenged during a revocation proceeding held while the defendant is serving the suspended portion of the illegal sentence, the court, upon sentencing in the revocation proceeding, is constrained by the particulars of [the revocation sentencing provisions].

State v. Seals, 2007 MT 71, ¶ 15, 336 Mont. 416, 156 P.3d 15 (emphasis in original).

In *Muhammad*, the defendant asserted the district court abused its discretion when it revoked his deferred sentence based upon a finding that he violated a "banishment" condition that precluded him from residing or working within the county. *Muhammad*, ¶ 20. Muhammad claimed that the banishment condition was illegally imposed. *Id.* ¶ 22. However, this Court held it was without jurisdiction to review the legality of the sentence because Muhammad failed to timely appeal the

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underlying condition and sentence within 60 days of its imposition. [1] *Id.* ¶ 22. The Court affirmed the district court and held that it was without jurisdiction to review whether the court erred when it revoked Muhammad's deferred sentence based upon the violation of an allegedly illegal condition. *See id.* ("Having held we lack jurisdiction to address the legality of the banishment condition . . . we therefore hold we lack jurisdiction to determine whether the District Court abused its discretion in revoking Muhammad's deferred sentence based upon his violation of that condition.").

Similarly, in *Adams*, the defendant never challenged his underlying sentence until the State petitioned to revoke. *See Adams*, ¶¶ 4-10, 17. Adams argued that his underlying sentence was illegal because the district court lacked the statutory authority to order his adult criminal sentence to run consecutively to his juvenile disposition. *Id.* ¶ 13. This Court held that Adams' claim regarding his underlying sentence was untimely and found that he was limited to challenging his immediate revocation sentence. *Id.* ¶ 17 (citing *Muhammad*, ¶ 22; *White*, ¶ 20).

In *White*, the defendant was revoked numerous times, and each time failed to appeal her revocation or the conditions. *See White*, ¶¶ 2-7. Finally, after her last revocation in 2007, White filed a motion to dismiss her revocation proceedings

[1]Although the Court found that it lacked jurisdiction to review the banishment condition, it reviewed a later order by the district court that was timely appealed. *Muhammad*, ¶¶ 23-29.

based on challenges related to conditions and sentences dating back to 1994. *Id*. ¶ 8. Just as in *Muhammad* and *Adams*, this Court held that White was unable to challenge the legality of the conditions imposed in earlier proceedings in the context of her latest revocation.[2] *Id*. ¶ 20.

In *State v. Torres*, 2017 MT 177, ¶ 4, 388 Mont. 161, 398 P.3d 279, Torres attempted to collaterally attack his partner or family member assault conviction during a revocation proceeding. *Id*. This Court held that Torres' argument that a revocation proceeding "is as good a venue as any to allege illegality of an imposed sentence for the underlying offense," was contrary to longstanding precedent. *Id*. ¶ 10. The Court cited *Muhammad*, *Adams*, *White*, and *In re M.W.* in furtherance of this point. Additionally, the Court relied on *United States v. Warren*, 335 F.3d 76, 77 (2d Cir. 2003), to find that "a supervised release revocation proceeding is not the proper forum for a collateral attack on the conviction or sentence that resulted in the term of supervised release." *Id*. The Court declined to give Torres "a second chance to appeal and raise issues he failed to raise when he did not appeal from his conviction." *Torres*, ¶ 10.

Like in *Muhammad*, *Adams*, *White*, and *Torres*, Emmings failed to file an appeal with this Court concerning Judge Halligan's August 29, 2023 order

[2] Just as in *Muhammad*, the Court reviewed a later order by the district court that was timely appealed. *White*, ¶¶ 20-27.

reimposing formal supervision. (*See* Doc. 126.) As an initial matter, Emmings' revocation of his conditional discharge was not illegal. (*See* Doc. 122.) Regardless, Emmings cannot now take a second bite at the apple to raise issues he did not appeal when he did not appeal the revocation of his conditional discharge. *See Torres*, ¶ 10. Since Emmings never appealed, he waived his right to attack Judge Halligan's order reimposing supervision, resulting in the term of supervised release at issue here, and he is precluded from challenging the order for his revocation. *See McCormick*, ¶ 38; *Adams*, ¶ 15; *Muhammad*, ¶¶ 22, 33; *White*, ¶ 20; *In re M.W.*, ¶ 12; *Torres*, ¶ 10.

This Court should follow its clear precedent and reverse Judge Larson's order, reinstating Judge Halligan's order placing Emmings on formal supervision with the Department of Corrections (DOC) (Doc. 126) because Emmings did not timely appeal the issues he raised in his revocation proceeding. Accordingly, this Court should remand this case to the district court for further proceedings to determine whether Emmings did violate the conditions of his sentence. Then, if the district court revokes Emmings' sentence and he timely appeals, this Court may consider the order related to the most recent revocation.

Similarly, in this appeal, Emmings is precluded from arguing that conditions were not "sufficiently distinguishable" under the same basis. (*See* Br. at 26.) Any issues related to Judge Halligan's July 7, 2023 order that provided Emmings could

be placed back on supervision subject to an evidentiary hearing needed to be appealed within 60 days of the final order reimposing formal supervision being issued. (Docs. 122, 126.) *See* M. R. App. P. 4(5)(b)(i). Emmings presented the same argument to Judge Halligan, who was unpersuaded. (*See* Doc. 122.) Emmings' failure to appeal constitutes a waiver, and his subsequent challenge in this state appeal is untimely; thus, this Court should disregard it entirely. *See also State v. Bao*, 2024 MT 308, ¶ 16, 419 Mont. 388, 560 P.3d 1207 (Alternate claims raised in an answer to the State's opening brief are not properly before the Court in an interlocutory appeal.). Should this Court wish to consider the issue, Judge Halligan's order provides the correct legal analysis and this Court should affirm Judge Halligan's July 7, 2023 order.

II. This Court should reverse Judge Larson's order interpreting Mont. Code Ann. § 46-23-1020(1)(b).

As an initial matter, Emmings fails to address much of the State's argument as to the proper statutory construction of Mont. Code Ann. § 46-23-1020(1)(b). Emmings provides no counter to the State's legislative history argument, apparently agreeing with the State's position. Nor does Emmings address the absurd result that would permit an offender to completely terminate his sentence and any jurisdiction of the district court by merely moving out of state for an

undetermined period of time after being granted a conditional discharge of supervision.

Emmings and the district court commit the same fundamental error precluded by the rules of statutory construction by ignoring the conditional language in Mont. Code Ann. § 46-23-1020(1)(b). (Br. at 22-23.) *See* Mont. Code Ann. § 1-2-101. Instead, Emmings erroneously conflates the term "discharge" with "termination." (Br. at 21.)

In Montana criminal law, "discharge" and "termination" have distinct meanings and legal consequences. Discharge of a sentence refers to an individual being formally released from probation or parole before the full sentence has been served because of compliance and fulfillment of certain conditions. *See* Mont. Code Ann. §§ 46-23-1011(6), (7), -1021(6). The most common form is a conditional discharge from supervision, which means the individual is no longer subject to monitoring or reporting requirements but is still technically serving the remainder of their sentence. *See* Mont. Code Ann. § 46-23-1020(1). Contrary to Emmings' argument, an offender can have their discharge revoked if new offenses are committed within that period. (Br. at 21.) *See* Mont. Code Ann. § 46-23-1020(2).

Under Mont. Code Ann. § 46-23-1020(1)(a)(i), a conditional discharge is "a discharge *from supervision* by the department for the time remaining on the

sentence imposed if the probationer or parolee complies with all the conditions imposed." *Id*. (emphasis added). The definition of "discharge" as provided by Emmings is to "release from an obligation." (Br. at 23.) It logically follows that a conditional discharge from supervision releases the defendant from the obligation of *supervision.*

"Termination," as defined by both Merriam-Webster and Black's Law Dictionary, means an "end in time or existence." *Termination*, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/termination (last visited July 31, 2025); *Black's Law Dictionary*, 1471 (6th ed. 1990). Again, logic dictates that the termination of a sentence means the sentenced period imposed by the court has fully expired and the individual is completely relieved of all obligations, supervision, and court authority in relation to that sentence. This can happen automatically at the expiration of the sentence or earlier via a court order, such as termination of a suspended or deferred sentence pursuant to Mont. Code Ann. § 46-18-208.

Montana Code Annotated § 46-18-208 references both discharge and termination within the statute. *See* Mont. Code Ann. § 46-18-208(1), (1)(b)(ii). This Court has held that "[i]t is a settled rule of statutory construction that this Court interprets 'related statutes to harmonize and give effect to each. Different language is to be given different construction.' Where the Legislature used

different language in the same connection in related statutes, it is presumed it intended a different meaning and effect." *Bullock v. Fox*, 2019 MT 50, ¶ 59, 395 Mont. 35, 435 P.3d 1187 (internal citations omitted). By conflating discharge with termination, Emmings' erroneous interpretation ignores this fundamental canon of statutory construction.

Emmings claims that Mont. Code Ann. § 46-23-1020(1)(b) "has no meaning if it does not terminate a person's sentence." (Br. at 22.) In doing so, Emmings fails to counter the State's analysis of the related statutes. (*See* St.Br. at 30-32.) Contrary to Emmings' position, reading Mont. Code Ann. § 46-23-1020(1)(b) as provided by the State gives the effect intended by the Legislature. *See State v. Christensen*, 2020 MT 237, ¶ 95, 401 Mont. 247, 472 P.3d 622. It provides an individual with the opportunity to show the DOC and the district court that they can remain law abiding and follow conditions without supervision. *See* Mont. Code Ann. § 46-23-1020. As argued by the State in its Opening Brief, after 12 months on conditional release from supervision, an individual may apply for early termination of their sentence, which would fully end the district court's jurisdiction over the case. (St.Br. at 30-31.) *See* Mont. Code Ann. § 46-18-208.

Emmings cites to *State v. Little Coyote*, 2023 MT 243, 414 Mont. 299, 539 P.3d 1142, to support his position. (Br. at 21.) This Court's decision in *Little Coyote* does not apply in this situation. When Little Coyote was revoked in 2020,

the parties and the court relied on inaccurate information, leading them to believe Little Coyote had served only 455 days in custody, rather than 776 days. *Id.* ¶ 10. As a result, Little Coyote agreed to a recommended sentence that did not include 321 days of credit for time he had spent in federal custody. *Id.* ¶ 4. Little Coyote was later revoked and, on appeal, he challenged the court's failure to give him credit for those 321 days in his previous sentence. *Id.* ¶ 6. To avoid "a grievous wrong and miscarriage of justice," this Court deemed Little Coyote's appeal a request for habeas corpus relief so that the Court could correct the prior error. *Id.* ¶ 10. Based on that correction, the Court concluded that the district court did not have the authority to revoke Little Coyote in 2021 because his sentence had already expired. *Id.*

Both Judge Larson's and Emmings' interpretations of the statute omit what has been inserted—Mont. Code Ann. § 1-2-101—and ignore the statutory structure that provides the clear difference between "discharge" and "termination." Such errors constitute fundamental misunderstandings of the plain language of the statute and warrant a reversal of Judge Larson's order.

III. Emmings had to attempt to comply before conditions could be deemed impossible.

Again, Emmings fails to address and apparently concedes that Judge Larson's order incorrectly determined Judge Halligan banished Emmings from

Montana. That concession shows the precise reason this Court has repeatedly discouraged a district court's verbatim adoption of the prevailing party's reasoning in its order. *See Planned Parenthood of Montana v. State*, 2024 MT 228, ¶ 17, 418 Mont. 253, 557 P.3d 440 (collecting cases). The concession emphasizes the State's argument that Judge Larson's order was not supported by the record and that he reached incorrect conclusions.

Emmings continues to argue that his conditions were impossible, without addressing his failure to even attempt to comply with Judge Halligan's order. He cites *State v. Cook*, 2012 MT 34, ¶ 36, 364 Mont. 161, 272 P.3d 50, for the proposition that any illegal condition must be struck from the judgment. Even if some of the conditions were illegal and could be stricken, Emmings fails to consider that he was not alleged to have violated any of the "illegal" conditions. (*See* Doc. 129.)

The violations alleged by Emmings' probation officer were that he failed to cooperate in organizing a plan for supervision as ordered by Judge Halligan and, given his absolute failure to communicate with his probation officer, was considered an absconder. (*Id.*) It was Emmings' absolute lack of participation and disregard for the court that led to the petition to revoke, not an impossible or illegal condition. Emmings' complete defiance is the sole reason he was revoked. *See State v. Villalobos*, 2024 MT 301, ¶ 14, 419 Mont. 256, 560 P.3d 617 ("The

impossibility to complete [a defendant's conditions] must not be created by the defendant's own poor efforts."). Judge Larson's order is not supported by the record and should be reversed.

Finally, Emmings argues that his conditions were impossible because DOC is prohibited from supervising someone who lives out of state. (Br. at 32.) This issue was not raised below, and Emmings is precluded from raising it now. *See Bao*, ¶ 16 (Alternate claims raised in an answer to the State's opening brief are not properly before the Court in an interlocutory appeal.).

Regardless, Emmings again fails in his plain language analysis. This time, Emmings inserts language that is not in statute, prohibiting DOC from supervising outside of Montana. *See City of Missoula v. Fox*, 2019 MT 250, ¶ 8, 397 Mont. 388, 450 P.3d 898 (citation omitted). Montana Code Annotated § 46-23-1011(1) states: "The [DOC] shall supervise probationers during their probation period . . . in accord with the conditions set by a sentencing judge." Emmings does not cite to any specific language to support his position that DOC "cannot actively supervise a probationer who lives outside of Montana." (*See* Br. at 32.) Rather, the statute requires supervision as ordered by the district court. Mont. Code Ann. § 46-23-1011(1). Emmings fails to show how his conditions were impossible either for him or for the DOC, and this Court should reverse Judge Larson's order.

CONCLUSION

This Court should reverse Judge Larson's January 29, 2025 order dismissing the petition to revoke sentence and striking Judge Halligan's August 29, 2023 order reimposing supervision.

Respectfully submitted this 6th day of August, 2025.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ Selene Koepke*
SELENE KOEPKE
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal 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 3,357 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Selene Koepke
SELENE KOEPKE

CERTIFICATE OF SERVICE

I, Selene Marie Koepke, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 08-06-2025:

Tammy Ann Hinderman (Attorney)
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena MT 59620
Representing: Andrew Emmings
Service Method: eService

Matthew C. Jennings (Govt Attorney)
200 W. Broadway
Missoula MT 59802
Representing: State of Montana
Service Method: eService

Emma Nelson Sauve (Attorney)
Appellate Defender Division
P.O. Box 200147
Helena MT 59620
Representing: Andrew Emmings
Service Method: E-mail Delivery

Electronically signed by Janet Sanderson on behalf of Selene Marie Koepke
Dated: 08-06-2025