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Memorandum

To: Law and Justice Interim Committee
From: Julianne Burkhardt
Date: January 13, 2020
Re: Important Decisions of the Montana Supreme Court Regarding Constitutional Issues and Other Matters Related to the Montana Sexual or Violent Offender Registration Act (SVORA)

I. Introduction

In 1989, the first registration law for sex offenders was enacted. In 1995 the requirement for violent offenders to register was added and the act became known by its current name, the Sexual or Violent Offender Registration Act (SVORA). Over the years SVORA has been amended many times. This memo discusses some of the key judicial cases that have challenged SVORA on important constitutional issues.

The Montana Legislature amended SVORA again in 1997 and included a retroactive applicability clause making the registration requirements for sexual offenders retroactive to offenders who were sentenced or in the custody or under the supervision of the Department of Corrections on or after July 1, 1989, the date the act was originally effective. Likewise, the retroactivity clause required violent offenders to register if they were sentenced or in the custody or under the supervision of the Department of Corrections on or after October 1, 1995. Regarding sexual offenders, the 1997 amendments created tier levels to be assigned by the sentencing court based upon the risk level of the offender.

In subsequent years the Legislature amended SVORA in a number of ways, including increasing the information available to the public, requiring offenders with convictions from other jurisdictions to register, adding qualifying offenses, requiring juvenile offenders to register, and other changes.

This memo provides an analysis of the key constitutional issues related to SVORA and the various amendments as well as a discussion of other key issues.

II. Retroactivity -- *Ex Post Facto*

The Montana Legislature amended SVORA in 1997 and included a retroactive applicability clause making the registration requirements for sexual offenders retroactive to offenders who were sentenced or in the custody or under the supervision of the Department of Corrections on or after July 1, 1989, the date the act was originally effective. Likewise, the retroactivity clause required violent offenders to register if they were sentenced or in the custody or under the supervision of the Department of Corrections on or after October 1, 1995. Regarding sexual offenders, the 1997 amendments also created tier levels to be assigned by the sentencing court based upon the risk level of the offender.

In October of 2003 the Montana Supreme Court decided *State v. Mount*, 2003 MT 275. Mount challenged SVORA arguing that the retroactive applicability section in the 1997 amendments to SVORA was *ex post facto* to him under the United States and Montana constitutions because his conviction was before SVORA was enacted and he was released from prison before the 1997 amendments. Mount also argued that the registration and disclosure requirements of SVORA violate Article II, Section 28, of the Montana Constitution and 46-18-801, MCA, addressing restoration of rights following discharge from prison. Specifically Mount argued his right to privacy pursuant to Article II, Section 10, of the Montana Constitution was restored upon discharge.

Mount was convicted in 1984 of sexual intercourse without consent and sentenced to 20 years in prison. He was released on parole from prison in May of 1996. He registered as a sexual offender when he was discharged from prison; however, he did not update his registration as required after his initial registration. In June of 2000, Mount was charged with failing to register as a sex offender for not updating his registration since his release from prison.

Subsequently, Mount moved to dismiss the charge and the District Court granted the motion holding that the registration requirement was *ex post facto* to him because it subjected him to enhanced punishment based on his 1984 conviction. In essence, Mount challenged the retroactive applicability section enacted by the Legislature in 1997 that made SVORA retroactive to offenders who were sentenced or in the custody or supervision of the Department of Corrections (DOC) on or after July 1, 1989. Mount was convicted and released from prison before the 1997 retroactivity amendments were enacted.

The Montana Supreme Court reversed the decision of the District Court, holding that SVORA did not violate the *ex post facto* clause of either the United States or Montana Constitutions. The Court relied on a recent decision from the United States Supreme Court in *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), upholding a similar retroactivity provision in Alaska's Sexual Offender Registration Act under federal *ex post facto* grounds.

The Montana Supreme Court first discussed the "intents-effects" test first adopted in *Frazier v. Montana State Dept. of Corrections*, 277 Mont. 82, 920 P.2d 93 (1996), and ultimately adopted the version of the intents-effects" test utilized in *Smith*, including seven additional factors on the "effects" prong outlined in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963).

After adopting the appropriate test, and in alignment with *Smith*, the Montana Supreme Court turned to the intent of SVORA including both the stated purpose of the law and its structure. *Mount*, ¶ 42. The preamble of SVORA listed a number of legislative concerns including:

(1) the danger of recidivism and protection of the public; (2) the impairment of law enforcement efforts from lack of information; (3) the prevention of victimization and prompt resolution of sexual or violent offenses; (4) the offender's reduced expectation of privacy because of the public's interest in safety; and (5) the protection of specific vulnerable groups and the public in general. *Mount*, ¶ 45.

Noting that the legislative concerns are similar to those identified in the Alaska act analyzed in *Smith*, the Court determined that "nothing on the face of the Act indicates that it is anything other than a civil regulatory scheme intended to protect the public" and is nonpunitive. *Mount* ¶ 45.

Next, the Court considered the structure of the SVORA to determine whether the structure itself was nonpunitive. Specifically, the Court held "that the fact that the Act is codified in the code of criminal procedure does not, in and of itself, transform the Act's nonpunitive, civil regulatory scheme into a criminal one." *Mount* ¶ 46.

The second prong of the test included a discussion of the effect of the SVORA. To do so the Court analyzed the seven factors from *Kennedy v. Mendoza-Martinez*:

(1) whether the law imposes an affirmative restraint or disability; (2) the historical treatment of the law; (3) a finding of scienter; (4) whether the law was traditionally aimed at punishment; (5) whether the law applies to criminal behavior; (6) whether the law has a nonpunitive purpose; and (7) the excessiveness of the law in application.

Ultimately the Court held that the effect of the act was nonpunitive and none of the factors were present, specifically:

-- the registration requirement of SVORA imposed only an indirect restraint;
-- the registration and disclosure requirements do not constitute "historical shaming punishments" because any shame experienced results from the conviction, which is already

public record, and not from disclosure of that fact to the public;

-- because the offense of failure to register is a new crime that simply requires a prior sexual conviction, as an element of the new crime, it cannot be considered *ex post facto*;

-- SVORA does not constitute punishment because while it may have some "incidental deterrent effect" the primary purpose is protecting the public and preventing recidivism, not punishment;

-- SVORA does not constitute additional punishment for past criminal conduct because the crime of failure to register is a new offense;

-- the reporting requirements are not excessive. See *Mount*, ¶¶ 51 - 90.

Finally, Mount argued that when he was discharged from prison his full rights as a citizen, including his right to privacy, were restored. *Mount*, ¶¶ 93. The Court determined that the rights restored consisted of political and civil rights "such as the right to vote, the right to hold public office, the right to serve as a juror in our courts and the panoply of rights possessed by all citizens under the laws of the land". *Mount* ¶ 96. In addition:

While Mount's right to privacy may be implicated by having to register and disclose his whereabouts, we conclude that the State had a compelling interest in enacting the Act. As discussed at length above, the Act was adopted to protect the public from the recidivism of sex offenders; to prevent victimization of vulnerable children; and to assist law enforcement in keeping track of the whereabouts of sex offenders. Also, as discussed above, the Act is narrowly tailored in its registration and disclosure requirements to effect only those purposes in a reasonable manner. *Mount*, ¶ 99.

Further discussion of SVORA and the individual right of privacy under Article II, Section 10, of the Montana Constitution is below.

III. Right to Privacy

The decision in *State v. Brooks*, 2012 MT 263, involved an arson conviction that carried with it the requirement to register as a violent offender under SVORA following the 1995 amendments. Brooks was charged with arson after setting fire to a car and two dumpsters in Billings while intoxicated. Brooks pled guilty and was sentenced to a four-year suspended term to the Department of Corrections. His sentencing conditions included a requirement to register as a violent offender. On appeal, Brooks argued that the requirement to register as a violent offender violated his constitutional right of privacy.

Article II, Section 10, of the Montana Constitution provides the fundamental right of individual privacy:

The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

A privacy interest may be protected when:

(1) the individual had a subjective or actual expectation of privacy and (2) society is willing to recognize that expectation as reasonable. *Brooks*, ¶ 14.

Alleged violations of fundamental rights, such as the right of individual privacy, are analyzed under strict scrutiny which requires a showing that "the law is narrowly tailored to serve a compelling state interest". *Brooks*, ¶ 17.

Following the analysis of the applicability of the individual right of privacy to sexual offenders who must register under SVORA in the *Mount* decision, the Montana Supreme Court broadened the *Mount* decision finding a compelling state interest in the registration of violent offenders in *Brooks*:

While society may generally recognize individuals' expectation of privacy in their whereabouts and residential address as reasonable, Brooks is not the average individual—he is a convicted felon and violent offender. The Legislature determined, as a matter of public policy, that the registration laws are necessary because "persons who have committed a sexual or violent offense have a reduced expectation of privacy because of the public's interest in safety." Section 46-23-501, MCA. As a result of Brooks' conviction of felony arson, he has a diminished privacy interest in the personal information required at his registration. *Brooks*, ¶ 15.

While we acknowledged that *Mount*'s privacy rights may be implicated by the registration requirement, we cited to the SVORA's Preamble, which lays out the concerns that prompted the adoption of the Act, to support our conclusion that the State had a compelling interest in enacting the legislation. Further, we determined that the registration requirements are tailored to disclose only the information necessary to further the Act's purpose. *Brooks*, ¶ 17 (citing *Mount*, at ¶ 99).

Thus, the registration and disclosure requirements for sexual and violent offenders found in SVORA do not implicate an offender's right of individual privacy.

IV. Due Process Concerns

All Montana citizens have a right of due process guaranteed under the Fourteenth Amendment of the United States Constitution, and Article II, Section 17, of the Montana Constitution. The right of due process provides that "No person shall be deprived of life, liberty, or property without due process of law". Art. II, Sec. 17., Mont. Const.

In particular, due process includes both a procedural right and a substantive one. Regarding procedural due process:

If there is a property or liberty interest at stake, procedural due process requires that a person "must be given an opportunity to explain, argue and rebut any information that may lead to a deprivation of life, liberty, or property." *State v. Samples*, 2008 MT 416, ¶ 29 (citing *State v. McLeod*, 2002 MT 348, ¶ 18).

The Montana Supreme Court addressed whether a due process right is implicated when an offender's tier level is determined in *State v. Samples*, 2008 MT 416. Since this was an issue of first impression in Montana, the Court looked to decisions from other states interpreting statutory schemes similar to SVORA and whether a protected liberty interest was implicated at the time of risk designation. The Court first turned to a decision of the Iowa Supreme Court in *Brummer v. Iowa Dep't of Corrections*, 661 N.W.2d 167, 175 (Iowa 2003), which stated:

[T]he risk of an erroneous assessment and the associated opprobrium arising from such an assessment implicate a liberty interest protected [****12] by the Due Process Clauses. We are mindful that a record of conviction for a sex offense is a public record readily accessible, under statutory guidelines, to the general populace However, sex offender risk assessment and the resulting public notification go far beyond the mere redisclosure of an offender's conviction. Instead, a Corrections agent takes the additional step of assessing an offender based on a limited documentary record Then, after completing the assessment and notifying an offender of the results, and pending limited appellate procedures, the individual's status as a convicted sex offender together with an additional classification of his risk to reoffend, can be transmitted, in varying extent and degree, to different members of the public. This entire process clearly implicates a liberty interest in that it threatens the impairment and foreclosure of the associational or employment opportunities of persons who may not truly pose the risk to the public that an errant risk assessment would indicate*Brummer*, 661 N.W.2d at 174-75.

In finding protected liberty interest and a violation of due process, the Montana Supreme Court held:

We agree with those jurisdictions that have concluded there is a liberty interest at stake when a person is designated as a particular risk level under the Act. . . This Court determined in *State v. Mout*, 2003 MT 275, ¶ 89, that the Act is non-punitive and functions as a regulatory measure to assist law enforcement and protect the public. Still, the Act places a burden on offenders to update their registration or face criminal sanctions. The extent of that burden depends on their offense risk level. For example, a level 3 offender must complete a registration verification form every 90 days, while a level 1 or level 2 offender must verify annually. Section 46-23-504(4), MCA (1999). Acting pursuant to § 46-23-509(5), MCA (1999), DOC set Samples's risk level based on information unknown to

him, and he had no chance to argue for a lesser risk level designation. The risk of an erroneous assessment and the associated opprobrium arising from such an assessment implicate a liberty interest protected by Article II, Section 17, of the Montana Constitution. We conclude that Samples was denied his right to due process of law when DOC designated him a level 3 sex offender, because he did not have the opportunity to know what information was used to designate his risk level, he had no right to contest that information, and he had no ability to argue for a different designation. Therefore, we must remand so Samples has the "opportunity to explain, argue and rebut any information" used in the designation of his sexual offender risk level. *Samples*, ¶ 34.

However, while Samples designation as a level 3 sex offender was vacated and remanded to the District Court to allow Samples to exercise his due process rights in determination of tier designation, his conviction for failure to register was upheld. In addition, the holding of the *Samples* decision is likely to be narrowly construed. In 2012, in *State v. Claassen*, 2012 MT 313, the Montana Supreme Court declined to extend the reasoning of *Samples*. At issue was a situation where during a revocation proceeding the District Court did not order a new psychosexual report before raising the offender's tier level from Level 1 to Level 3 when the offender was found in possession of child pornography in violation of his sentence.

V. Registration of Comparable Convictions and Convictions That Require Registration From Other Jurisdictions

Since the enactment of SVORA in 1989, sexual offenders convicted in other jurisdictions have been required to register for offenses that are reasonably equivalent to Montana offenses listed in 46-23-502(9)(a), MCA. *See* Section 2, Ch. 293, L. 1989.

In addition, an Attorney General Opinion from 1998 stated:

To fully implement the policy of the SORA [now SVORA] the legislature extended its application not only to sex offenders convicted and sentenced in this state, but also to out-of-state offenders who reside in Montana. Montana Code Annotated §46-23-504 designates those persons who must register under the SORA. . . . In answer to your first question, the SORA explicitly requires registration by an offender who is convicted of a sexual offense, as defined by §46-23-502(6), and who is sentenced on or after July 1, 1989, upon setting up residence or temporary domicile in Montana. This requirement applies whether or not the state in which the offender was convicted has a registration program. 47 A.G. Op15 (1998).

In 2005, the Legislature broadened the definition of "sexual offense" to include any violation of a law of another jurisdiction for which a person was required to register as a sex offender after conviction in that jurisdiction. § 46-23-502(9)(b), MCA; *See* Section 1, Ch. 313, L.

2005. The definition of "sexual offense" was broadened again in 2007 to include youth court adjudications for sexual offenses. Section 19, Ch. 483, L. 2007.

The case of *State v. Hamilton*, 2007 MT 167, involved a 16-year-old who pled guilty to communication with a minor for immoral purposes (CMIP) in violation of Wash. Rev. Code § 9.68A.090 and was ordered to register as a sex offender under Washington law.

Hamilton moved to Texas in 1999 and was told by Texas authorities that he did not need to register as a sex offender. Hamilton moved to Montana in early 2000. In July 2001, the Washington Legislature removed the offense of CMIP from the list of offenses requiring registration, but added CMIP back to the list in 2002. In October 2005, the Montana Legislature amended Montana's Sexual or Violent Offender Registration Act so that offenders had to register in Montana if they had to register for an offense in some other jurisdiction where they were convicted. The 2005 amendments to SVORA did not include a retroactive applicability section.

In November 2005, when Missoula police detectives investigated an assault with a weapon complaint implicating Hamilton, they discovered that although Hamilton had been ordered to register as a sex offender in Washington, he had not done so in Montana. He was charged with failure to register as a sexual offender. The legislative history of the 2005 amendments to SVORA indicates that the amendments were intended to clarify administrative issues particularly in the area of public safety by requiring "persons who were required to register as sex offenders in another state to register in Montana as sex offenders as well, regardless of the specific sexual crime in the other state." *Hamilton*, ¶ 14-15 (citing, Mont. Sen. Jud. Comm., Hearing on HB 49, 2005 Reg. Sess. (Mar. 14, 2005)).

Despite the absence of a specific retroactive applicability clause to the 2005 amendments and considering the complicated legislative history in Washington, the 2005 amendments were held to apply retroactively to require Hamilton to register under SVORA. The stated reason was to provide administrative efficiency. The Court noted that "if the amendments were applied only to offenses committed after October 1, 2005, the result would be administrative chaos rather than efficiency." This was true even though when Hamilton was convicted of CMIP in Washington in 1998 he would not have been required to register in Montana.

VI. Application of Registration Requirement for Convictions From Other Jurisdictions to Federal Convictions

In 2011 the Montana Supreme Court issued an opinion in *United States v. Juvenile Male*, 2011 MT 104, involving a juvenile male who was adjudged delinquent in the United States District Court for the District of Montana for knowingly engaging in sexual acts with a person under 12 years of age, which would have been a crime under 18 U.S.C.S. §§ 1153(a), 2241(c), or 2246(2) if committed by an adult. He appealed conditions requiring him to register as a sex offender and to keep his registration current. After his term of federal supervision expired, he was not required to maintain his registration under federal law. The opinion arose out of the

following certified question from the United States Supreme Court:

Is respondent's duty to remain registered as a sex offender under Montana law contingent upon the validity of the conditions of his now-expired federal juvenile-supervision order that required him to register as a sex offender, see Mont. Code Ann. §§46-23-502(6)(b), 41-5-1513(1)(c) (2005); *State v. Villanueva*, 2005 MT 192, 328 Mont. 135, 138-140, 118 P. 3d 179, 181-182 (2005); see also §46-23-502(9)(b) (2009), or is the duty an independent requirement of Montana law that is unaffected by the validity or invalidity of the federal juvenile-supervision conditions, see §46-23-502(10) (2009); 2007 Mont. Laws ch. 483, §31, p. 2185? *U.S. v. Juvenile Male*, ¶ 1.

The respondent argued that the 2005 or 2007 amendments to SVORA are *ex post facto* to him as argued by numerous other offenders. In rendering its decision the Court made short work of this argument harkening back to previous decisions cited in this memo:

In *State v. Mout*, 2003 MT 275, ¶ 37, 317 Mont. 481, 78 P.3d 829, we adopted the "intents-effects" test articulated by the United States Supreme Court in *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), and concluded that retroactive application of the 2001 version of SVORA did not violate the *ex post facto* clauses of the United States and Montana Constitutions. *Mout*, ¶¶ 89-90; *Hamilton*, ¶ 12. We rejected a similar challenge in *Hamilton*, concluding the 2005 SVORA amendments were not *ex post facto* based upon our conclusion in *Mout* that the registration requirement was regulatory, not punitive. *Hamilton*, ¶¶ 12, 17 (citing *Mout*, ¶¶ 89-90). We reach the same conclusion here. *U.S. v. Juvenile Male*, ¶ 11.

Turning next to the certified question before the Court, the analysis turned on a comparison of the federal definition of a "sexual act" and the Montana definition of "sexual contact" required for a conviction of sexual assault. In determining that Respondent had an independent requirement under SVORA to register as a sex offender separate from his federal registration conditions, the Court stated:

While not identical, Respondent's federal offense clearly constitutes a "violation of a law of . . . the federal government that is reasonably equivalent" to the listed state offense of sexual assault on a child. Section 46-23-502(9)(b), MCA. Respondent is a "sexual offender" because he was "in youth court, found to have committed or been adjudicated for" such a sexual offense. Section 46-23-502(10), MCA. Thus, SVORA directly applies to Respondent, and he has a continuing duty to register under Montana law which is entirely independent from the registration conditions imposed by his federal supervision order. *U.S. v. Juvenile Male*, ¶ 15.

It is interesting to note while a strong presumption exists under Montana law against

applying statutes retroactively, and, in the construction of a statute, not to insert what has been omitted or to omit what has been inserted, regarding the overall issue of the validity and enforceability of SVORA, the Court has done both. *Hamilton*, ¶ 14-15; 1-2-101, MCA; *U.S. v. Juvenile Male*, ¶ 11. (citing *Neel v. First Fed. Sav. & Loan Assoc. of Great Falls*, 207 Mont. 376, 386, 675 P.2d 96, 102 (1984); 1-2-109, MCA). In each case the reasons for departing from the normal presumptions are carefully analyzed, indicating perhaps the importance of the issue.

VII. Conclusion

In summary, SVORA requires offenders convicted of sexual and violent crimes under Montana law, federal law, and the laws of other states to maintain registration with the Montana Department of Justice. This is true regardless of whether the requirement to register in the jurisdiction has expired. While SVORA has evolved over the years since its inception in 1989, each of the cases in this memo remain valid authority.

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