
STATE OF MONTANA,

Plaintiff and Appellee,

v.

RICHARD DENVER HINMAN,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Second Judicial District Court,
Silver Bow County, the Honorable Robert J. Whelan, Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
KRISTINA L. NEAL
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
krneal@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

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

EILEEN JOYCE
Silver Bow County Attorney
SAMM T. COX
Deputy County Attorney
155 West Granite
Butte, MT 59701

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIES.....ii

I. Montana’s Sexual Offender Registration Act (SORA) serves as punishment as the law is excessive in relation to its remedial purpose. 1

 A. Montana’s SORA, with its increasingly invasive and restrictive amendments, is punitive. 1

 B. Debate exists among scholars whether the SORAs protect the public..... 6

II. This Court can properly consider Mr. Hinman’s due process argument. 9

CERTIFICATE OF COMPLIANCE..... 11

TABLE OF AUTHORITIES

Cases

<i>Cutshall v. Sundquist</i> , 193 F. 3d 466 (6th Cir. 1999).....	1
<i>Doe v. Snyder</i> , 834 F. 3d 696 (6th Cir. 2016).....	passim
<i>Kennedy v. Mendoza-Martinez</i> , 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)	4
<i>Marks v. United States</i> , 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977)	9, 10
<i>Reid v. Lee</i> , 476 F. Supp. 3d 684 (M.D. Tennessee 2020)	2, 3
<i>Smith v. Doe</i> , 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003)	3, 4, 7, 8
<i>Snyder v. John Does #1-5</i> , ---U.S.---, 138 S. Ct. 55, 199 L. Ed. 2d 18 (2017).....	3
<i>State v. Coleman</i> , 165 Mont. 299, 605 P. 2d 1000 (1979)	9, 10
<i>State v. Mount</i> , 2003 MT 275, 317 Mont. 481, 78 P. 3d 829.....	1, 6, 9, 10
<i>United States v. Halper</i> , 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989)	1

Statutes

Mont. Code Ann. § 46-23-504.....	5, 6
Mont. Code Ann. § 46-23-508.....	5

Constitutional Authorities

United States Constitution

Amend. V..... 10

Other Authorities

Bureau of Justice Statistics, U.S. Dept. of Justice,
*Recidivism of Sex Offenders Released from State Prison: A 9-Year
Follow-Up (2005-14)* 5 (2019) 7

Catherine L. Carpenter & Amy E. Beverlin,
The Evolution of Unconstitutionality in Sex Registration Laws, 63
Hastings L.J. 101, 140-145,159 (2012) 8

J.J. Prescott and Jonah E. Rockoff,
*Do Sex Offender Registration and Notification Laws Affect Criminal
Behavior?*, 54 J.L. & Econ. 161 (2011) 8

Langan, Schmitt and Durose,
Recidivism of Sex Offenders Released from Prison in 1994, at
2 (2003)..... 7

I. Montana’s Sexual Offender Registration Act (SORA) serves as punishment as the law is excessive in relation to its remedial purpose.

A. Montana’s SORA, with its increasingly invasive and restrictive amendments, is punitive.

Recent precedent has found the fact that is often considered the most critical in determining whether a new law in fact punishes past criminal behavior is whether the law is excessive in relation to the remedial purpose. *See, United States v. Halper*, 490 U.S. 435, 449, 109 S. Ct. 1892, 1902, 104 L. Ed. 2d 487 (1989) (“a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment....”). Contrary to the Montana SORA statute in place at the time of *State v. Mout*, 2003 MT 275, 317 Mont. 481, 78 P. 3d 829, SORA statutes across the country, including Montana, have increasingly become more punitive.

For example, the State cites to *Cutshall v. Sundquist*, 193 F. 3d 466, 477 (6th Cir. 1999), a Sixth Circuit decision in which the Court held Tennessee’s SORA was not punitive. (*See*, App. Br. p. 30.) However, courts have found that subsequent amendments to Tennessee’s SORA,

now render it potentially unconstitutional. *Reid v. Lee*, 476 F. Supp. 3d 684, 710 (M.D. Tennessee 2020). In *Reid*, a sexual offender brought an action in which he argued enforcement of Tennessee's SORA requirements violated his right pursuant to the *ex post facto* clause, and the Court granted an injunction in favor of the offender. *Reid*, 476 F. Supp. 3d at 710. The Court noted the initial SORA was relatively undemanding but, over the decades, the statute had changed with regard to what was required of an offender and how much protection was offered to a registered offender's privacy. *Reid*, 476 F. Supp. 3d at 688-689.

Tennessee now requires offenders to provide their complete name and aliases, their date and place of birth, their social security number, a photocopy of a state issued identification, the date of their offenses, the names of their current employers and length of employment, their current physical address and length of time at that address, their vehicle description, the names and address of any colleges attended or employed by, their race and gender, the names and addresses of their closest living relatives, a DNA sample, electronic mail addresses, including usernames, all social media accounts or internet

communication platforms and usernames, fingerprints, copies of all passports and immigration documents, and their professional licensing information. *Reid*, 476 F. Supp. 3d at 690-691. The Tennessee SORA has also been amended to require sexual offenders to report in person once a year. *Reid*, 476 F. Supp. 3d at 691. Further amendments to the Tennessee SORA included restrictions on where a registrant can live or work, restrictions on the registrant's movements, and restrictions related to children. *Reid*, 476 F. Supp. 3d at 692-693. In granting an injunction for Reid, the Court, citing to *Doe v. Snyder*, 834 F. 3d 696 (6th Cir. 2016)¹, recognized the statute the courts had considered years earlier "is not the same as the statute in effect today." *Reid*, 476 F. Supp. 3d at 706.

In *Snyder*, the Court re-visited Michigan's SORA and drew a distinction between the Alaska statute in *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) and the modern SORA laws. *Snyder*, 834 F. 3d at 700-702. Analyzing the test derived by the Supreme Court in *Smith* and the factors set forth by the Supreme Court

¹ Cert. denied, *Snyder v. John Does #1-5*, ---U.S.---, 138 S. Ct. 55, 199 L. Ed. 2d 18 (2017).

in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), the Sixth Circuit Court held amendments to Michigan's SORA violated the *ex post facto* clause because they were punitive in their effects on the registrants. *Snyder*, 834 F. 3d at 701-705.

Compared to the Alaskan statute in *Smith*, which limited disclosure of non-public information, the Sixth Circuit found Michigan's amended SORA, and the notification of nonpublic information, such as tier classifications, functioned to shame registrants. *Snyder*, 834 F. 3d at 702-704. The Court also compared Michigan's SORA's residency restrictions and in-person reporting requirement to parole and probation. *Snyder*, 834 F. 3d at 703.

The *Snyder* Court found these restrictions and impositions as "direct restraints on personal conduct." *Snyder*, 834 F. 3d at 703. Even though registrants are not placed in physical handcuffs, "these irons are always in the background" as failure to comply with the provisions could result in imprisonment. *Snyder*, 834 F. 3d at 703. The Court cautioned *Smith* should not be a "blank check" for states to expand sex offender legislation. *Snyder*, 834 F. 3d at 705. The Court warned, "as dangerous as it may be not to punish someone, it is far more dangerous

to permit the government under guise of civil regulation to punish without prior notice.” *Snyder*, 834 F. 3d at 706.

Similar to Tennessee and Michigan, the expansions to Montana’s SORA have rendered it in violation of the *ex post facto* clause.

Comparable to the restrictions found unconstitutional by the Sixth Circuit, beyond public information, Montana now disseminates a registrant’s date of birth and an offender’s license plate number and a description of any motor vehicle owned or operated by the offender. Mont. Code Ann. §46-23-508 (2017).

Additionally, Montana now collects additional private information from registrants such as DNA, the name of the offender and any aliases, the offender’s social security number, the offender’s residence information, the name and address of any business or other place where the offender is or will be an employee, the name and address of any school where the offender will be a student, the offender’s driver’s license number, the description and license number of any motor vehicle owned and or operated by the offender, and all of the offender’s e-mail addresses and social medial screen names. Mont. Code. Ann. §46-23-504 (2017). Additionally, similar to the probation/parole analogy recognized

by the Court in *Snyder*, registrants such as Mr. Hinman, must now appear in person and be photographed on a yearly basis. Mont. Code Ann. §46-23-504 (2017).

The State, citing the concept of *stare decisis*, has argued this Court's should not reconsider *Mount*. (See, App. Br. pp. 29-30.) However, the fallacy to the State's argument is that the SORA applied to *Mount* and the current Montana SORA are different. Montana's expansion of its SORA has a punitive effect on the registrants and violates both the United States Constitution and Montana Constitution *ex post facto* clauses.

B. Debate exists among scholars whether the SORAs protect the public.

"A lie told often enough becomes truth." Vladimir Lenin.

Montana's initial SORA was drafted to address legislative concerns regarding the perceived dangers posed by sexual offender recidivism, wanting to provide safety to the public and to help with law enforcement investigations. *Mount*, ¶44. As the State has argued, the continued intent behind Montana's current SORA is to promote public safety from repeat sexual offenders. (See, App. Br. pp. 6, 37.) However, the flaw in the State's argument is that 92.3% of released sexual

offenders do not commit another sexual offense. Bureau of Justice Statistics, U.S. Dept. of Justice, *Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow-Up (2005-14)* 5 (2019). (Compare, *Smith*, sex-offender-registration laws are properly based on an understanding that ‘the risk of recidivism posed by sex offenders is ‘frightening high.’” *Smith*, 538 U.S. at 103 (citation omitted.))

Additional research has suggested that sex offenders reoffend at much lower rates than previously thought. For example, another study by the United States Department of Justice, that involved following the progress of every sex offender released in fifteen states for three years, found that the reconviction rate for a new sex offense was just 3.5 percent. Langan, Schmitt and Durose, *Recidivism of Sex Offenders Released from Prison in 1994*, at 2 (2003), available at <https://bjs.ojp.gov/content/pub/pdf/rsorp94.pdf>. (accessed December 22, 2021). Further, the Court in *Snyder* noted that evidence suggests “offense-based public registration has, at best, no impact on recidivism” and may “actually *increase* the risk of recidivism, probably because they exacerbate risk factors for recidivism by making it hard for registrants to get and keep a job, find housing, and integrate into their

communities.” *Snyder*, 834 F. 3d at 704-705 *citing* J.J. Prescott and Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & Econ. 161 (2011) (emphasis in original). *See also*, Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Registration Laws*, 63 Hastings L.J. 101, 140-145,159 (2012) (describing a community of offenders living under a causeway in Miami, Florida because they are unable to find housing, describing how the shame of reporting has led people to commit suicide, and describing how those subject to reporting have been murdered by vigilantes).

Mr. Hinman’s conviction was in 1994. He has not been convicted of any new offense, other than failure to register, in the ensuing twenty-eight years. The premises set forth in *Smith*, almost two decades ago, that vigilant registration requirements prevent the public from recidivist sexual offenders, has not been fully supported by the social data from the last two decades. Montana’s current SORA, when balanced with this emerging social data, is excessive punishment in relation to any remedial purpose.

II. This Court can properly consider Mr. Hinman’s due process argument.

Mr. Hinman filed a motion to dismiss in which he challenged the legality of this Court’s decision in *Mount*. (District Court document (DC) 27.) As part of his argument, Mr. Hinman argued the duration of the lifetime registration requirement was excessive and punitive, and he argued *Mount*, needed “to be relitigated.” (DC 27.) Although he did not specifically argue a due process violation, he did argue the sex offender registration statute violated his *ex post facto* constitutional protections. (DC 27.) In analyzing the two protections, courts have found the underlying principles behind the *ex post facto* violation and a due process violation are similar.

In *State v. Coleman (rehearing)*, 165 Mont. 299, 320, 605 P. 2d 1000, 1013 (1979), this Court explained, “[a] fundamental concept of our constitutional liberty is that the *ex post facto* clause is based upon the principle that persons have the right to fair warning of conduct which will give rise to criminal penalties.” *citing Marks v. United States*, 430 U.S. 188, 191, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977). The *Marks* Court explained, the principle on which the *ex post facto* clause is based is the notion that a person has a right to a fair warning that conduct will

result in criminal penalties. *Marks*, 430 U.S. at 191, 97 S. Ct. at 992-993. Therefore, the right to be protected from *ex post facto* violations “is protected against judicial action by the Due Process Clause of the Fifth Amendment.” *Marks*, 430 U.S. at 192, 97 S. Ct. at 993.

Mr. Hinman challenged the retroactive application of Montana’s sexual offender registration statute, and specifically contended this Court’s decision in *Mount*, and *Mount*’s application to his case, needed to be re-examined. In rejecting Mr. Hinman’s counsel’s motion to withdraw, this Court expressed its intent to reconsider *Mount*.

Although the focus of Mr. Hinman’s argument is that the retroactive application of Montana’s SORA violated his constitutional *ex post facto* protections, the underlying principles apply equally as a Due Process violation. *Coleman* and *Marks* set forth precedent enabling this Court to consider Mr. Hinman’s due process challenge.

Respectfully submitted this 10th day of January 2022.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Kristina L. Neal
KRISTINA L. NEAL
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Century Schoolbook 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 1,964, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Kristina L. Neal
KRISTINA L. NEAL

CERTIFICATE OF SERVICE

I, Kristina L. Neal, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 01-10-2022:

Eileen Joyce (Govt Attorney)
155 W. Granite Street
Butte MT 59701
Representing: State of Montana
Service Method: eService

Mardell Lynn Ployhar (Govt Attorney)
215 N. Sanders
Helena MT 59620-1401
Representing: State of Montana
Service Method: eService

Electronically signed by Kim Harrison on behalf of Kristina L. Neal
Dated: 01-10-2022