

4-3-2018

## *Tipton v. Montana Thirteenth Judicial District Court: Determining the Retroactive Applicability of Montana's DNA Statute to Offenses Time-Barred Prior to the DNA Statute's 2007 Enactment*

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### Recommended Citation

Haley Ford, Oral Argument Preview, *Tipton v. Montana Thirteenth Judicial District Court: Determining the Retroactive Applicability of Montana's DNA Statute to Offenses Time-Barred Prior to the DNA Statute's 2007 Enactment*, 79 Mont. L. Rev. Online 22, [https://scholarship.law.umt.edu/mlr\\_online/vol79/iss1/4](https://scholarship.law.umt.edu/mlr_online/vol79/iss1/4).

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***Tipton v. Montana Thirteenth Judicial District Court: Determining the Retroactive Applicability of Montana’s DNA Statute to Offenses Time-Barred Prior to the DNA Statute’s 2007 Enactment***

**Haley Ford**

Oral arguments are set for April 18, 2018, at 10:30 AM in the Strand Union Building, Ballroom A, Montana State University, Bozeman, Montana.

**I. INTRODUCTION**

This is a case of first impression in Montana.<sup>1</sup> At issue is whether the Montana Legislature’s 2007 amendment to section 45–1–205(9) of the Montana Code Annotated, permitting prosecution within one year following conclusive identification by DNA for specific sexual crimes, can be applied retroactively as to Petitioner Ronald Tipton (“Tipton”) when the applicable statute of limitations ran prior to the amendment’s enactment.<sup>2</sup> Tipton argues in effect that since the applicable statute of limitations ran in 2001, his subsequent prosecution based on the 2007 amendment to § 45–1–205(9) is prohibited because, since the statute of limitations in his case had previously run, he has a vested right to be free from prosecution based on the *ex post facto* clauses in the U.S. and Montana Constitutions.<sup>3</sup>

**II. FACTUAL AND PROCEDURAL BACKGROUND**

On March 20, 1987, a 10-year-old girl was the victim of sexual intercourse without consent.<sup>4</sup> The applicable statute of limitations was five years from the date of the offense.<sup>5</sup> In 1988, following an investigation and prosecution, the State sentenced another man, Jimmy Bromgard, to prison for the crime.<sup>6</sup>

In 1989, prior to the expiration of the statute of limitations, the Legislature amended the relevant statute of limitations to allow for the

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<sup>1</sup> Petition for Writ of Supervisory Control at 1, *Tipton v. Montana Thirteenth Judicial District Court*, <https://supremecourtdocket.mt.gov/view/OP%2017-0678%20Writ%20-%20Supervisory%20Control%20-%20Petition?id={D0E8C05F-0000-C015-9384-F37DEDD1A558}> (Mont. Nov. 15, 2017) (No. OP 17-0678).

<sup>2</sup> MONT. CODE ANN. § 45–1–205(9) (2017).

<sup>3</sup> Petition for Writ of Supervisory Control, *supra* note 1, at 5–9; U.S. CONST. art I, § 10, cl. 1; U.S. CONST. art. I, § 9, cl. 3; MONT. CONST. art. II, § 31.

<sup>4</sup> Response to Writ of Supervisory Control at 2, *Tipton v. Montana Thirteenth Judicial District Court*, <https://supremecourtdocket.mt.gov/view/OP%2017-0678%20Petition%20for%20Writ%20-%20Response/Objection?id={90B04761-0000-CB1A-AB0D-658808F2EAE1}> (Mont. Jan. 29, 2018) (No. OP 17-0678).

<sup>5</sup> *Id.* at 3; § 45–5–503(3) (1985).

<sup>6</sup> Response to Writ of Supervisory Control, *supra* note 4, at 2, 17–18.

commencement of prosecution up to five years after the victim's 18th birthday.<sup>7</sup> Because the victim turned 18 in May of 1996, the statute of limitations conclusively expired in May of 2001, five years later.<sup>8</sup>

In 2001, the Legislature again amended the applicable statute of limitations to allow for the commencement of prosecution up to ten years after the victim's 18th birthday, effective October 1, 2001.<sup>9</sup> This amendment did not affect Tipton because the applicable statute of limitations had expired prior to the amendment's October 2001 effective date.<sup>10</sup>

In 2002, DNA evidence exonerated Bromgard, and the case went unresolved.<sup>11</sup>

In 2007, the Legislature added a section pertaining to DNA evidence to the general statute of limitations.<sup>12</sup> It provided that:

If a suspect is conclusively identified by DNA testing after a time period prescribed [for sexual intercourse without consent with a minor victim] has expired, a prosecution may be commenced within 1 year after the suspect is conclusively identified by DNA testing.<sup>13</sup>

In 2015, the State matched Tipton's DNA, collected in an unrelated matter, to the DNA evidence preserved from the unresolved 1987 rape.<sup>14</sup> The State commenced prosecution within one year.<sup>15</sup>

Tipton moved to dismiss all charges, arguing that the statute of limitations had expired.<sup>16</sup> On November 6, 2017, the district court denied Tipton's motion.<sup>17</sup> Tipton then petitioned for a Writ of Supervisory Control requesting dismissal of his charges.<sup>18</sup>

### III. SUMMARY OF ARGUMENTS

#### A. *Petitioner Tipton*

Tipton rests his argument on the long-established principle that when the statute of limitations expires, it confers a vested right to be free from subsequent prosecution.<sup>19</sup> Tipton argues that once a prosecution is time-barred, it cannot be revived through amendment of the statute of

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<sup>7</sup> *Id.* at 3; § 45-1-205(1)(b) (1989).

<sup>8</sup> Petition for Writ of Supervisory Control, *supra* note 1, at 1.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 2.

<sup>11</sup> Response to Writ of Supervisory Control, *supra* note 4, at 2.

<sup>12</sup> Petition for Writ of Supervisory Control, *supra* note 1, at 2.

<sup>13</sup> *Id.*; § 45-1-205(9) (2017).

<sup>14</sup> Response to Writ of Supervisory Control, *supra* note 4, at 19.

<sup>15</sup> *Id.* at 2.

<sup>16</sup> Petition for Writ of Supervisory Control, *supra* note 1, at 2.

<sup>17</sup> *Id.* at 4-5.

<sup>18</sup> *Id.* at 9.

<sup>19</sup> *Id.* at 7.

limitations.<sup>20</sup> Tipton asserts that he was free from prosecution after May, 2001, when the applicable statute of limitations had conclusively run.<sup>21</sup> The Legislature's later amendment to the statute of limitations in 2007 extending the time for prosecution following the discovery of DNA evidence did not impact Tipton's vested right to be free from prosecution after May, 2001.<sup>22</sup>

To support his argument, Tipton points to the prohibition against *ex post facto* laws found in similar provisions in the U.S. and Montana Constitutions.<sup>23</sup> The latter provides, "[n]o *ex post facto* law nor any law impairing the obligation of contracts, or making any irrevocable grant of special privilege, franchises, or immunities shall be passed by the legislature."<sup>24</sup> Tipton agrees that the clauses' prohibitions against *ex post facto* laws permit prosecution when the Legislature extends a statute of limitations *before* the statute has expired. However, he asserts that when the Legislature does so *after* the statute has expired, the clauses prohibit prosecution.<sup>25</sup> This is because "'to resurrect a prosecution after the relevant statute of limitations has expired, it is to eliminate a currently existing conclusive presumption from forbidding prosecution.'"<sup>26</sup>

*B. Respondents Montana Thirteenth Judicial District Court and  
Honorable Mary Jane Knisely*

Respondents begin by asserting that § 45-1-205(9) can be applied retroactively because it meets the standard set forth under § 1-2-109, which provides that "[n]o law contained in any of the statutes of Montana are retroactive unless expressly so declared."<sup>27</sup> Respondents argue that because § 45-1-205(9) permits prosecution after the original statute of limitations has run following the discovery of new DNA evidence, it is inherently retroactive under the meaning of § 1-2-109 based on its plain language.<sup>28</sup> Respondents then state that a statute is impermissibly retroactive under § 1-2-109 only when it "'takes away or impairs vested rights, acquired under existing laws.'"<sup>29</sup> Thus, Respondents conclude that because an amendment of a statute of limitations "affects only procedural matters and does not relate to substantive rights of a party,"<sup>30</sup> the 2007

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 1.

<sup>22</sup> *Id.* at 8-9.

<sup>23</sup> *Id.* at 6; U.S. CONST. art I, § 10, cl. 1; U.S. CONST. art. I, § 9, cl. 3; MONT. CONST. art. II, § 31.

<sup>24</sup> MONT. CONST. art. II, § 31.

<sup>25</sup> Petition for Writ of Supervisory Control, *supra* note 1, at 7-9.

<sup>26</sup> *Id.* at 8 (quoting *Stogner v. California*, 539 U.S. 607, 616 (2003)).

<sup>27</sup> Response to Writ of Supervisory Control, *supra* note 4, at 6-7.

<sup>28</sup> *Id.* at 7.

<sup>29</sup> *Id.* at 8 (quoting *Allen v. Atlantic Richfield Co.*, 124 P.3d 132, 135 (citations omitted)).

<sup>30</sup> *Id.* (citing *State Comp. Ins. Fund v. Sky Country*, 78 P.2d 1135, 1137 (1989)).

amendment to § 45–1–205(9) is permissibly retroactive as applied to Tipton.<sup>31</sup>

Respondents then turn to the *ex post facto* provisions in both the U.S. and Montana Constitutions.<sup>32</sup> First, Respondents concede that § 45–1–205(9) is “technically unconstitutional as applied to Tipton,” citing *Mordja v. Montana Eleventh Judicial District Court*,<sup>33</sup> which references *Stogner v. California*<sup>34</sup> and holds that “[t]he prohibition against *ex post facto* laws found in both the United States and Montana Constitutions would prevent an amended statute of limitations from reviving a previously time-barred prosecution.”<sup>35</sup> Astonishingly, Respondents then “request[] this Court to find an exception” to the constitutional principle described in *Stogner*.<sup>36</sup>

To support this request, Respondents point to the policy behind the DNA statute, that society has a great interest in prosecuting individuals identified conclusively by DNA evidence for sexual crimes.<sup>37</sup> Respondents initially cite the four categories of *ex post facto* laws described in *Stogner*,<sup>38</sup> but then they confuse the issues by inaccurately treating the four categories as factors when only the second category is presently at issue.<sup>39</sup> Respondents assert that the second factor (category) asks whether “the law makes the punishment for the crime more burdensome,” claiming that the punishment here is not more burdensome because Tipton was charged under the 1987 law.<sup>40</sup>

In conclusion, Respondents summarize that, since the intent of the Legislature in amending § 45–1–205(9) was to “allow the State to prosecute unsolvable sexually violent crimes with the power of DNA” if the State commenced prosecution within one year following DNA identification, “fairness for the victim” justifies Respondents’ request to except the present constitutional violation.<sup>41</sup>

#### IV. ANALYSIS

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<sup>31</sup> *Id.* at 8–9.

<sup>32</sup> *Id.* at 11.

<sup>33</sup> 177 P.3d 439 (2008).

<sup>34</sup> 539 U.S. 607 (2003).

<sup>35</sup> Response to Writ of Supervisory Control, *supra* note 4, at 12–13 (quoting *Mordja*, 177 P.3d at 443 (citations omitted)).

<sup>36</sup> *Id.* at 13.

<sup>37</sup> *Id.* at 13–14.

<sup>38</sup> *Id.* at 10–11 (quoting *Stogner*, 539 U.S. at 612 (the four categories are “1st Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.”)).

<sup>39</sup> *Id.* at 15–16.

<sup>40</sup> *Id.* at 15.

<sup>41</sup> *Id.* at 19–20.

Respondents misconstrue the meaning of “retroactive” under § 1–2–109 by implying that since § 45–1–205(9) is permissibly retroactive-looking under the 2007 amendment, it must permissibly apply retroactively to Tipton.<sup>42</sup> However, Respondents’ interpretation glances over the fact that the applicable statute of limitations for Tipton had already run in 2001, six years before the amendment was enacted.

As the Montana Supreme Court explains in *Mordja*, under § 1–2–109, “a statute is *not* ‘retroactive’ merely because it draws upon antecedent facts for its operation,” but that “a statute is ‘retroactive’ in a legal sense ‘which takes away or impairs vested rights acquired under existing laws or creates a new obligation.’”<sup>43</sup> Thus, whether a statute is “retroactive” under § 1–2–109 depends on first, whether a defendant “has any vested right in the statute of limitations,” and second, whether the amendment in question “impairs or strips [the defendant’s] vested rights.”<sup>44</sup>

The Montana Supreme Court answers the first question by confirming whether the applicable statute of limitations has run; where it has, the defendant has a vested right to be free from prosecution.<sup>45</sup> The Court answers the second question by referencing *Stogner*, where a defendant’s vested right in an expired statute of limitations was impermissibly impaired by an amendment to the statute of limitations which revived previously time-barred prosecutions.<sup>46</sup> There, the amendment “violated the *ex post facto* clause because it inflicted punishment upon [the defendant] where, by law, he was not liable to any punishment,” falling under the second category of *ex post facto* laws.<sup>47</sup> Notably, this directly contradicts Respondents’ “more burdensome” interpretation of the second category, despite Respondents having used the same case for their argument.<sup>48</sup> To be clear, this second category of *ex post facto* laws includes “[e]very law that aggravates a crime, or makes it greater than it was, when committed,” or in other words, a law that “inflicts *punishments*, where the party was not, by *law*, liable to *any punishment*.”<sup>49</sup> Under this category, the Court concluded that “[t]he prohibition against *ex post facto* laws...prevent[s] an amended statute of limitations from reviving a previously time-barred prosecution,” because a defendant has a vested right in the expiration of a statute of limitations.<sup>50</sup>

Thus, a statute can be “retroactive” under § 1–2–109 as applied to a defendant when first, the applicable statute of limitations has

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<sup>42</sup> *Id.* at 6–9.

<sup>43</sup> *Mordja v. Montana Eleventh Judicial District Court*, 177 P.3d 439, 442 (2008) (quoting *State v. Coleman*, 605 P.2d 1000, 1012 (1979) (reversed in part on other grounds)).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 443.

<sup>46</sup> *Id.* (referencing 539 U.S. 607).

<sup>47</sup> *Id.* (citing *Stogner v. California*, 539 U.S. 607, 613 (2003)).

<sup>48</sup> Response to Writ of Supervisory Control, *supra* note 4, at 15–16.

<sup>49</sup> Petition for Writ of Supervisory Control, *supra* note 1, at 8; *Stogner*, 539 U.S. at 613 (quoting and adding emphasis to *Calder v. Bull*, 3 U.S. 386, 389 (1798)).

<sup>50</sup> *Mordja*, 177 P.3d at 443.

conclusively run, and second, the statute is later amended and prosecution commenced against the defendant when by law, the defendant is no longer liable to any punishment.<sup>51</sup> This is exactly Tipton's situation: in May, 2001, the applicable statute of limitations conclusively ran and Tipton was no longer liable under law to punishment for the 1987 rape. Therefore, § 1-2-109 is "retroactive" as applied to Tipton under established Montana precedent.<sup>52</sup>

This is distinguishable from a hypothetical situation where, before a statute of limitations has expired in a given case, the statute is amended to extend to a later point in time.<sup>53</sup> This is because "the amendment of an unexpired statute of limitations does not affect a vested right, and therefore does not violate due process or the prohibition against *ex post facto* laws."<sup>54</sup> In summary, the Montana Supreme Court has held that "where a statute is amended to extend the limitations period for a criminal offense, the extended limitations period applies to all offenses not barred at the time the amendment was enacted."<sup>55</sup> Conversely, the extended limitations period *does not apply* to any offense already time-barred on the date the amendment was enacted.

Tipton was vested with the right to be free from prosecution when the applicable statute of limitations ran in 2001. The Legislature's amendment of § 45-1-205(9) in 2007 did not affect Tipton's constitutionally provided right to be free from prosecution conferred by the *ex post facto* clauses of the U.S. and Montana Constitutions.<sup>56</sup> Thus, the Court will all but certainly reverse the district court and remand for dismissal.

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<sup>51</sup> *Id.* at 442; *Stogner*, 539 U.S. at 610.

<sup>52</sup> Petition for Writ of Supervisory Control, *supra* note 1, at 8-9; *Mordja*, 177 P.3d at 443.

<sup>53</sup> Petition for Writ of Supervisory Control, *supra* note 1, at 8-9.

<sup>54</sup> *Id.* at 6-7; *Mordja*, 177 P.3d at 443.

<sup>55</sup> *Mordja*, 177 P.3d at 443-44.

<sup>56</sup> U.S. CONST. art I, § 10, cl. 1; U.S. CONST. art. I, § 9, cl. 3; MONT. CONST. art. II, § 31.