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## PREVIEW; State v. Smith: Constitutionality of Lifetime Satellite Location Monitoring Sentencing Conditions

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**PREVIEW; State v. Smith: *Constitutionality of Lifetime Satellite  
Location Monitoring Sentencing Conditions***

**Forrest Graves\***

Oral argument is scheduled for Wednesday, February 17, 2021, at 9:30 a.m. in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, in Helena, Montana. Deborah S. Smith is expected to argue on behalf of Appellant Wesley Smith (“Smith”), and Jonathan M. Krauss is expected to argue on behalf of Appellee State of Montana (“State”).

**I. INTRODUCTION**

The issue before the Court is whether Montana Code Annotated § 45-5-625(4)(b), which mandates lifetime satellite location monitoring (“GS monitoring”) for certain classes of sexual offenders, violates the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution and Article II, sections 10, 11, 22, and 28 of the Montana Constitution. This oral argument presents an opportunity for the Court to rule on an issue that has been the subject of several recent court decisions in other states.

**II. FACTUAL AND PROCEDURAL BACKGROUND**

A jury convicted Smith in June 2017 of felony sexual abuse of children<sup>1</sup> pertaining to his 9-year-old stepdaughter.<sup>2</sup> The district court sentenced Smith to 100 years in the Montana State Prison with 80 of those years suspended<sup>3</sup> and designated Smith as a Level I sexual offender with a low risk of re-offending.<sup>4</sup>

No parole restrictions were imposed.<sup>5</sup> After serving his 20-year prison sentence, if he has not been paroled, Smith will be discharged to probation, during which time his remaining 80-year suspended sentence may be discharged under certain circumstances.<sup>6</sup>

Montana’s Sexual Abuse of Children law establishes sentencing guidelines for sexual crimes involving children.<sup>7</sup> If the victim was 12 years old or younger, the guidelines provide that offenders released after the statutory minimum jail time are subject to supervision by the department of corrections and are required to participate in continuous GPS monitoring as set forth under § 46-23-1010 for the remainder of the offender’s life.<sup>8</sup> The district court found these statutes required lifetime GPS monitoring as a condition of Smith’s eventual parole or probation and included it in his sentence.<sup>9</sup>

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<sup>1</sup> MONT. CODE ANN. §§ 45-5-625(1)(a), 45-5-625(5)(b)(ii) (2015).

<sup>2</sup> Appellant’s Opening Brief at 1–2; Appellee’s Response Brief at 1 (The jury found that Smith knowingly made his stepdaughter dance on a “stripper pole” in her underwear.).

<sup>3</sup> *Id.* at 3

<sup>4</sup> *Id.* at 41.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 42.

<sup>7</sup> See MONT. CODE ANN. § 45-5-625.

<sup>8</sup> *Id.* § 45-5-625(4)(b).

<sup>9</sup> Appellant’s Opening Brief, *supra* note 2, at 41.

Smith did not object to this condition at sentencing but challenged the constitutionality of the condition in the present appeal.<sup>10</sup> Smith requested that the Court strike the lifetime GPS monitoring condition from his sentence.<sup>11</sup>

### III. SUMMARY OF ARGUMENTS

#### A. Appellant Wesley Smith

Smith argues that § 45-5-625(4)(b) facially violates the Fourth, Eighth, and Fourteenth amendments of the United States Constitution and sections 10, 11, 22, and 28 of Article II of the Montana Constitution.

##### 1. Unreasonable Searches and Right to Privacy

Smith argues that lifetime GPS monitoring constitutes an ongoing unreasonable search without probable cause, which violates the Fourth and Fourteenth Amendments of the United States Constitution and violates Montana’s right to individual privacy as set forth in Article II, section 10 of the Montana Constitution. Smith contends that Article II, section 10 provides “broader protection than the Fourth Amendment.”<sup>12</sup>

Smith relies on *State v. Siegal*,<sup>13</sup> which established that the right to privacy in Montana extends to the government’s use of technology in searches, to argue GPS monitoring equates to an unlawful search.<sup>14</sup> Smith also cites *Grady v. North Carolina*<sup>15</sup> in which the United States Supreme Court defined GPS monitoring as a Fourth Amendment “search,” then moves on to discuss GPS monitoring sentencing statutes that were found unconstitutional in North Carolina,<sup>16</sup> Georgia,<sup>17</sup> and South Carolina.<sup>18</sup>

##### 2. Cruel and Unusual Punishment

Smith next shifts into a discussion of constitutional prohibitions against cruel and unusual punishment under Article II, section 22 of the Montana Constitution and the Eighth and Fourteenth Amendments to the United States Constitution. Smith notes the Montana sentencing statute at

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<sup>10</sup> Appellee’s Response Brief, *supra* note 2, at 37, 41.

<sup>11</sup> Appellant’s Opening Brief, *supra* note 2, at 44.

<sup>12</sup> *Id.* at 35.

<sup>13</sup> 934 P.2d 176, 180 (1997) (holding that thermal imaging in a criminal investigation constitutes a “search” and that the use of thermal imaging technology by the government without a search warrant implicates individual privacy interests and requires a showing of a compelling state interest).

<sup>14</sup> Appellant’s Opening Brief, *supra* note 1, at 37.

<sup>15</sup> 575 U.S. 306 (2015) (holding that attaching location monitoring devices to individuals without their consent constitutes a search).

<sup>16</sup> *North Carolina v. Grady*, 831 S.E.2d 542 (N.C. 2019) (holding that lifetime GPS monitoring of defendant based on their recidivist offender status was an unconstitutional Fourth Amendment search).

<sup>17</sup> *Park v. Georgia*, 825 S.E.2d 147, 152–53 (Ga. 2019) (holding that a law mandating GPS monitoring for “sexually dangerous predators” after they completed their sentences violated the Fourth Amendment).

<sup>18</sup> *South Carolina v. Ross*, 815 S.E.2d 754, 755, 758 (S.C. 2018) (holding that GPS monitoring for sexual offenders who fail to register must be analyzed case-by-case, rather than being an automatic consequence of failure to register); Appellant’s Opening Brief, *supra* note 2, at 38–39.

issue does not provide for any “individualized determination” before a defendant is sentenced to lifetime GPS monitoring.<sup>19</sup>

Smith emphasizes several “mitigating circumstances”—this was his first sexual offense, the offense did not involve touching, and he has not exhibited patterns of sexual abuse, *inter alia*—that led to his designation as a Level 1 sex offender.<sup>20</sup> He argues that despite the mitigating factors and his Level 1 designation, under the law, the statute mandated the district court to impose the lifetime GPS monitoring condition.<sup>21</sup> Smith does not directly state that this sentencing condition constitutes cruel and unusual punishment. In his reply to the State’s Opening Brief, Smith contends that the facts and circumstances of his own case do not change the fact that the statute is overbroad and allows no judicial discretion over whether lifetime GPS monitoring is excessive or grossly disproportionate in certain cases.<sup>22</sup>

### 3. *Restoration of Rights*

Smith then attacks the sentence itself. He notes that his probation and parole officers could recommend a conditional discharge of his post-release supervision, but that even then, the lifetime GPS monitoring requirement would remain in effect.<sup>23</sup> Smith asserts that the monitoring requirement subjects defendants who have had their sentences fully discharged to continued punishment and invasions of privacy in violation of Article II, section 28 of the Montana Constitution.<sup>24</sup> He also argues it violates § 46-18-801(2) which mandates that “all civil rights” be restored once a sentence expires so that defendant is left in the same position as “if the conviction had not occurred.”<sup>25</sup>

#### B. *Appellee State of Montana*

The State contends that Smith’s claim should be dismissed whether it is deemed to be a facial or an as-applied constitutional challenge. The State argues Smith failed to meet his burden of proving beyond a reasonable doubt that the sentencing statute in question is unconstitutional.<sup>26</sup> The State notes that Smith must prove that either no set of circumstances exist under which the statute would be constitutional or that the statute “lacks a ‘plainly legitimate sweep’” to succeed as a facial challenge.<sup>27</sup>

The State argues that Smith failed to sufficiently explain how Montana’s right of privacy and search and seizure protections make this sentencing condition unconstitutional and how the condition qualifies as cruel and unusual punishment.<sup>28</sup> The State contends that to establish the statute’s unconstitutional reach, Smith must prove that lifetime GPS monitoring “would be an unreasonable and constitutionally impermissible

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

<sup>20</sup> *Id.* at 40–41.

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

<sup>22</sup> Appellant’s Reply Brief at 9.

<sup>23</sup> Appellant’s Opening Brief, *supra* note 2, at 42–43.

<sup>24</sup> *Id.* at 43.

<sup>25</sup> MONT. CODE ANN. § 46-18-801(2).

<sup>26</sup> Appellee’s Response Brief, *supra* note 2, at 36.

<sup>27</sup> *Id.* at 36 (quoting *In re S.M.*, 403 P.3d 324, 326 (Mont. 2017)).

<sup>28</sup> *Id.* at 38–39.

search in every case, for every type of offense, and for every offender” under every type of criminal conduct captured by the act.<sup>29</sup> The State argues that instead of doing that, Smith has merely described his own facts and mitigating circumstances and argued about why the statute is unreasonable as it is applied to him.<sup>30</sup>

As such, the State describes Smith’s claims as a “thinly veiled ‘as-applied’ challenge.”<sup>31</sup> The State argues that under the *State v. Lenihan*<sup>32</sup> rule, Smith cannot bring the claim on appeal without having first objected to the sentencing condition at the sentencing hearing.<sup>33</sup> The State contends that because Smith’s claim should be considered an as-applied challenge, Smith waived the challenge by not objecting at sentencing, so his claim is not reviewable by the Court.<sup>34</sup>

The State asks the Court to dismiss the challenge.<sup>35</sup>

#### IV. ANALYSIS

Two issues raised by the parties likely merit most of the attention during the oral argument: (1) whether or not Smith raises an as-applied challenge or a facial challenge to the statute, and (2) whether or not continued GPS monitoring is an unconstitutional restriction on individuals who have completely served their sentences.

##### A. *As-Applied or Facial Challenge*

The Court could make quick work of Smith’s claim if it believes that Smith’s challenge is an as-applied challenge as the State contends. As-applied challenges are not reviewable without prior objection at sentencing, while facial claims may be raised on appeal without first objecting.<sup>36</sup> A facial claim asserts that a statute is unconstitutional on its face by attacking the constitutionality of the statute itself.<sup>37</sup> As-applied challenges, on the other hand, attack the constitutionality of the individual sentence in question.<sup>38</sup>

The State’s argument that Smith’s cruel and unusual punishment assertions look like an as-applied challenge has merit. Smith’s short discussion of cruel and unusual punishment revolves around the mitigating circumstances the district court analyzed when designating Smith a low-risk Level 1 sexual offender.<sup>39</sup> Although not expressly stated, Smith’s position appears to be that because he, individually, has been deemed to be a low-risk offender, lifetime GPS monitoring is disproportionate to his crime and is therefore cruel and unusual. This looks like a challenge to the sentence rather than the statute, so it is more “as-applied” than “facial” in nature. If the Court follows this logic, then it should find that Smith waived

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<sup>29</sup> *Id.* at 39.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 40.

<sup>32</sup> 602 P.2d 997, 1000 (Mont. 1979).

<sup>33</sup> Appellee’s Response Brief, *supra* note 2, at 40.

<sup>34</sup> *Id.* at 41.

<sup>35</sup> *Id.* at 41.

<sup>36</sup> *State v. Yang*, 452 P.3d 897, 900 (Mont. 2019).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Appellant’s Opening Brief, *supra* note 2, at 39–41.

this cruel and unusual punishment claim when he did not object to the condition at sentencing.

Smith's other constitutional assertions, however, are more broadly tailored toward the sentencing statute and are not directed at Smith's individualized circumstances. For example, Smith does not mention his own facts or circumstances when arguing that the sentencing condition is an unequivocally unreasonable search and infringement on the restoration of rights post-sentence completion. These claims will likely be found to be facial challenges to the sentencing statute and, thus, valid on appeal. Additionally, given that the Court granted oral argument on this constitutional issue, it is unlikely that it views the entirety of Smith's argument as being an as-applied challenge.

### B. *Unreasonable Searches and Restoration of Rights*

The heart of the oral argument will likely lie in discussing the developing body of caselaw surrounding GPS monitoring and its applicability and persuasiveness in Montana. In his Opening Brief, Smith did not establish a clear argument as to why the sentencing condition should be considered an unreasonable search, but he will likely elaborate on that contention in his oral argument by analogizing § 45-5-625(4)(b) to the statutes struck down by other state courts.

The State will likely counter by distinguishing the other statutes from § 45-5-625(4)(b) and reiterating that regardless of what other states are doing, Smith failed to meet his burden to show that “no set of circumstances exists” under which the statute would be valid or that the statute lacks a “plainly legitimate sweep.”<sup>40</sup>

The Court might look favorably on the state cases and follow the burgeoning movement to strike down unqualified lifetime GPS monitoring statutes, but the Court's interest in these out-of-state decisions is unclear. If the Court focuses on whether or not Smith has met his burden under the *In re S.M.* test cited by the State, Smith may have trouble in proving that lifetime GPS monitoring is never under any circumstances acceptable (i.e., consider the case of a high-risk violent Level 3 sexual offender). Unless Smith can establish that GPS monitoring constitutes an ongoing and unreasonable search at all times, Smith will not likely have met his burden.

Smith's final constitutional argument—one that went entirely unaddressed in the State's response—is his most salient. Article II, section 28 requires that “[f]ull rights are restored by termination of state supervision for any offense against the state.”<sup>41</sup> Montana statutory law doubles down on that premise by establishing that an individual who serves their sentence is to have all of their rights returned “as if the conviction had not occurred.”<sup>42</sup>

The Court has established that the restoration of rights is not all-encompassing and only applies to “those rights commonly considered to be political and civil rights” like the right to vote, serve as a juror, and hold

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<sup>40</sup> See Appellee's Response Brief, *supra* note 2, at 38 (quoting *In re S.M.*, 403 P.3d 324, 326 (Mont. 2017)).

<sup>41</sup> MONT. CONST. art. II, § 28.

<sup>42</sup> MONT. CODE ANN. § 46-18-801(2).

public office.<sup>43</sup> Pertinently, the Court has found that post-sentence sex offender registration requirements that effect an individual's "right to exist free from state regulation, to travel, and to pursue employment" do not violate Article II, section 28.<sup>44</sup>

Here, § 45-5-625(4)(b) mandates lifetime GPS monitoring regardless of whether or not a sentence is discharged. Smith might argue that Montana's individual right to privacy is a civil right in the state of Montana that should be fully restored to people who have served their sentences. That argument holds weight, as the Court and the Montana Constitution recognize the right of privacy as being one that can be overcome only by a compelling state interest.<sup>45</sup>

Given the broad, indiscriminatory nature of the GPS monitoring requirement and its applicability to all defendants, regardless of the seriousness of their crimes, the State may struggle to assert a compelling interest sufficient to overcome the right of privacy. If Smith makes this argument and the State does not provide a sufficient governmental interest in perpetually limiting privacy rights for all sex offenders subject to § 45-5-625(4)(b), the Court should hold the statute unconstitutional under Article II, section 28.

## V. CONCLUSION

The Court is unlikely to dismiss all of Smith's claims on the basis that they are as-applied constitutional challenges. Smith might not persuade the Court he met his burden of showing that the statute is unconstitutional under all circumstances based solely on his discussion of out-of-state case law. It is possible, however, that the Court will determine that the unqualified lifetime GPS monitoring requirement in § 45-5-625(4)(b) is unconstitutional under Article II, section 28 because it continues to restrict the fundamental right to privacy of individuals even after they have served their sentence. No matter how the Court decides this case, the decision will set a precedent for Montana on GPS monitoring as a sentencing condition moving forward.

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<sup>43</sup> State v. Gafford, 563 P.2d 1129, 1134 (Mont. 1977).

<sup>44</sup> Wagner v. State, 85 P.3d 750, 752-53 (Mont. 2004).

<sup>45</sup> MONT. CONST. art. II, § 10.