In the Supreme Court of the State of Montana

Supreme Court No. DA 25-0414

WESLEY THOMAS COOPER,

Petitioner and Appellant,

-vs-

MONTANA DEPARTMENT OF JUSTICE,
DIVISION OF CRIMINAL INVESTIGATION,

Respondent and Appellee.

Appellant's Reply Brief

On Appeal from the Nineteenth Judicial District Court,
Lincoln County, Hon. Matthew J. Cuffe, Presiding

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A. Introduction

In reviewing the State's arguments on appeal, a number of things stand out. First, the State concedes that "Montana law does not yet outline a specific procedure for challenging the duty to register as an offender moving to our state[.]" (State's Br. at 14). A second stand-out is the State's choice of words to describe the district court's actions: "Here, the district court *deduced* from the briefing, pleadings, and hearing that the victim was under age 16 and Cooper was 3 or more years older than her at the time of the offense." (State's Br. at 19) (emphasis added). And third, but not finally, the State's apparently argues that an allegation equates to a violation or conviction for purposes of registration. (See State's Br. at 13).

Before de-constructing the State's arguments in detail, it is important to keep in mind some basic constitutional, historic, legal, and linguistic, principles:

- With the exception of the fact of a prior conviction, "facts that increase the prescribed range of penalties to which a criminal defendant is exposed . . . must be established by proof beyond a reasonable doubt." *Apprendi v. New Jersey*, 530, U.S. 466, 490

(2000) (citing and quoting *Jones v. United States*, 526 U.S. 227, 252-253 (Stevens, J., and Scalia, J., concurring).

- Montana SVORA does not require registration of all sexual offenses, only offenses that meet a certain criteria, e.g., "any violation [of] . . . *Mont. Code Ann. § 45-5-502(3)* (if the victim is less than 16 years of age and the offender is 3 or more years older than the victim.")

- Conviction under *Mont. Code Ann. § 45-5-502(3)* carries increased penalties based on certain age-related facts. Therefore, pursuant to *Apprendi* and others, those facts must be established by proof beyond a reasonable doubt whether that proof be established by a unanimous finding of a jury or through an accused's admission during a valid plea colloquy.

- "Criminal conduct is undisputedly the trigger for the [SVORA] registry requirements, and the registry itself, by design, implicates a host of collateral consequences and encourages social stigma." "We conclude that the SVORA structure in place since 2007 is punitive . . . ." *State v. Hinman*, 2023 MT 116, ¶ 24, 412 Mont. 434, 530 P.3d 1271.

- *Article III, Section 1* of the Montana Constitution reserves specific powers to specific branches of government. "A law violates the traditional . . . nondelegation doctrine when it authorizes an agency to legislate." *FCC v. Consumer Research, et al.*, ___ U.S. ___, 145 S. Ct. 2482, 2510 (2025).

- It is also recognized that "Congress may vest discretion in executive agencies to implement and apply the laws it has enacted – for example, by deciding on the details of their execution." *Id. at* 2496-97 (cleaned up, internal citations and quotations omitted).

- To distinguish between the permissible and the impermissible in this sphere, we have long asked whether Congress has set out an

'intelligible principle' to guide what it has given the agency to do. . . . And similarly, we have asked if Congress has provided sufficient standards to establish both the courts and the public to ascertain whether the agency has followed the law." *Id.*

- "Montana law does not yet outline a specific procedure for challenging the duty to register as an offender moving to our state[.]" (State's Br. at 14).

- The "Constitutional-Doubt Canon" "militates against not only those [statutory] interpretations that would render the statute unconstitutional but also those that would even raise serious questions of constitutionality." "Reading Law," Antonin Scalia & Bryan Garner, pp. 247-248, WEST Publishing, 2012.

- "Sexual offenses also include 'any violation of a law of another state . . . that is reasonably equivalent to a violation listed in subsection (9)(a) or for which the offender was required to register as a sexual offender after an adjudication or conviction.'" (State's Br. at 13) (citing and quoting *Mont. Code Ann. § 46-23-502(6)(a)*).

- Neither violation of a criminal law nor adjudication or conviction of a criminal law can occur until the State has proved the elements of the offense charged beyond a reasonable doubt. *See e.g., In re Winship*, 397 U.S. 358, 361 (1970).

As these principles – and those discussed below – dictate, the district court erred in ruling Cooper was required to register as a sexual offender based on the court's deductions that Wesley's unproven and un-admitted conduct were reasonably equivalent to the statutory elements of *Mont. Code Ann. § 45-5-502(3).*

B. Propriety of the Writ

Wesley's use of a writ of prohibition was proper, and the district court's conclusion that there was "an adequate remedy in the ordinary course of the law" was error.

It may be true this Court has "expressed its strong disinclination to grant writs of prohibition." (State's Br. at 13) (citing *Kimble Properties v. Dept. of State Lands*, 231 Mont. 54, 56, 750 P.2d 1095, 1096 (1998)). But, the writ has not been abolished. *Mont. R. App. P. 14; Mont. R. Civ. P. 60(e)*. It is both available and proper when "[n]ecessity alone justifies it." *Malta Irrigation Dist. v. Mont. Board of Health and Enviro. Sciences*, 224 Mont. 376, 381, 729 P.2d 1323 (1986). In Wesley's case it was necessary, and there was no reasonable remedy to address the argument he sought to raise in response to the Department of Justice's declaration that he must register as a sexual offender.

The State's and the district court's proposed "proper remedy for relief from the duty to register as a sexual offender in Montana," (State's Br. at 1), was *Mont. Code Ann. § 46-23-506*, a petition for

removal as a sexual offender. The problem with that logic is that it presumes Wesley had a "duty" to register in the first place. The statute begins with an introductory requirement: "A sexual offender required to register under this part . . . ." *Mont. Code Ann. § 46-23-506(1)*.

Setting aside the nature of Wesley's argument that he was not a "sexual offender required to register" in the first place, he would have had to register and wait for 10 years before he could avail himself of that so-called proper remedy. It does not take a soothsayer to foresee that, had Wesley gone that route, both the State and the court could have leveled a claim that he sat on his rights to challenge his underlying obligation to register for ten years, and he should have challenged the Department's decision at the time it was made.

Additionally, as the State points out, "Montana law does not yet outline a specific procedure for challenging the duty to register as an offender moving to our state[.]" (State's Br. at 14). That concession cannot be true if the proper remedy is via *Mont. Code Ann. § 46-23-506*. Consequently, Wesley's case marks a case of first impression for this Court. Between the lack of statutory guidance and the punitive nature

of sexual offender registration, necessity required a writ of prohibition. That Wesley filed the writ in a district court, rather than filing an original proceeding in this Court, should also mitigate against this Court's general disinclination to grant a writ. Wesley began his writ in the district court, which undertook that court's traditional role of fact finding.

Given these circumstances and the fact that this is an issue of first impression for the district court and for this Court, this Court should not affirm the district court's denial of the writ on the grounds that there was an otherwise adequate remedy in the course of law available.

C. The Merits of the Lower Court's Decision and the State's Argument on Appeal

The State devotes much of its briefing to federal decisions involving SORNA, a distinct piece of legislation from the SVORA. Certainly appropriate analogies can be drawn from SORNA litigation; Wesley relied on some in the opening brief. However, it is critical to recognize a significant distinction between SORNA and the SVORA in light of *Hinman*. SORNA is a civil, nonpunitive, regulatory scheme. *See: United States v. Elkins*, 683 F.3d 1039, 1044-45 (9th Cir. 2012)

(analyzing cases). Numerous federal courts have held that requiring a person to register under SORNA based on a conviction entered prior to SORNA's enactment does not violate the *Ex Post Facto* Clause. *Id.* (see also *Smith v. Doe*, 538 U.S. 84 (2002) (Alaska's Sexual Offender Act did not violate federal *ex post facto* principles)).

Post-*Hinman*, the same cannot be said for Montana's SVORA analyzed under the state *ex post facto* provisions of *Article II, Section 31* of the Montana Constitution. While not dispositive, the distinction and recognition that SVORA is punitive is critical.

The State also points the Court to *United States v. Kent*, 440 Fed. Appx. 580 (9th Cir. 2011). While *Kent* is an unpublished decision governed by *Fed. R. App. P. 32.1*, it is indeed instructive. In *Kent*, the "threshold dispute [was] whether Kent's conviction for possession of lewd and lascivious materials falls into the catchall category of 'conduct that, by its very nature, is a sex offense against a minor." *Id.* at 582. For Wesley's case, the critical term is "conviction." Adopting a "non-categorical" approach, the Ninth Circuit looked to the underlying facts of the offense. For example, the Court looked to an uncontested fact:

"At the sentencing hearing, Kent agreed that the lewd and lascivious photos depicted 'very young girls in sexually provocative poses.'" *Id.* The Court also looked to other evidence, "such as a graphic letter found in Kent's computer and Kent's acceptance of responsibility for explicit images of young girls, show that he harbored disturbing views on young girls, sex and violence." *Id.*

This evidence is consistent with the narrow scope of material to which a reviewing court may look under the modified categorical approach. In applying a modified categorical approach to determine if the prior offense warrants a sentencing enhancement[1], "a court is generally limited to examining the statutory definition, a charging document, written plea agreement, transcript of plea colloquy, and any explicit factual findings by the trial judge to which the defendant assented." *United States v. Austin*, 426 F.3d 1266, 1270-21 (10th Cir. 2005).

The modified categorical approach is not, however, a mechanism by which a sentencing court may consider every unproven parade of

[1]See the United States Sentencing Guidelines.

horrors leveled against a defendant. Rather, its purpose "is to enable the sentencing court to identify those facts that necessarily supported a prior conviction," including "whether the jury necessarily had to find or the defendant necessarily admitted, facts" satisfying the definition or elements of the offense for which a sentencing enhancement is sought. *United States v. Venzor-Granillo*, 668 F.3d 704, 1229, 1231 (10th Cir. 2018) (overruled on other grounds).

This Court should take caution before relying too much on *Kent*, which used a "non-categorical approach" in 2011 when, in 2014, the Ninth Circuit's published decision in *United States v. Cabrera-Gutierrez*, concluded the lower court erred in applying the modified categorical approach in determining whether a defendant's prior conviction from Oregon served as prior predicate offense for SORNA purposes.

> [W]e must decide whether the conviction is comparable to or more severe than the federal crime of sexual abuse.
>
> In making this comparison, we follow the categorical approach established in *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990), as recently refined in *Descamps*. Under that approach, a sentencing court must begin by comparing the statutory definition of the

> prior offense with elements of the 'generic' federal offense specified as a sentencing predicate.

United States v. Cabrera-Gutierrez, 756 F.1125, 1133 (9th Cir. 2014).

Cabrera-Gutierrez was also decided after the other two cases the State relies on: *United States v. Mi Kyung Byun*, 539 F.3d 982 (9th Cir. 2008) and *United States v. Dodge*, 597 F.3d 1347 (11th Cir. 2010). In fact, both cases were also decided before the United States Supreme Court's decision in *Descamps v. United States*, 570 U.S. 254 (2013), which explained the modified categorical approach was limited to situations in which an offense of conviction was divisible and, in such a case, the sentencing court was permitted to review "extra-statutory materials" so "courts could discover 'which statutory phrase,' contained within the statute listing 'several different' crimes, 'covered a prior conviction.'" *Descamps*, 570 U.S. at 263.

The State does cite a decision by United States District Court Judge Watters, *United States v. Ballantyne*, No. CR 19-42-BLG-SPW, 2019 U.S. Dist. LEXIS 140130 (D. Mont., Aug. 19, 2019). Judge Watters appropriately applied the categorical approach to Ballantyne's Colorado conviction. It is unlikely Judge Watters would have used the

categorical approach if the "non-categorical" approach referenced in *Kent* was existing law in the Ninth Circuit.

The State also does not argue that Wesley's conviction for Sexual Assault, *N.D. Cent. Code § 12.1-20-07,* is divisible and thus warrants the application of the modified categorical approach. In fact, it does not appear any court has ever suggested the statute is divisible. What *is* subject to the modified categorical approach, at least in an immigration context, is North Dakota's Gross Sexual Imposition statute. *Saavedra-Figueeroa v. Holder*, 625 F.3d 621 (9th Cir. 2010).

Unfortunately for the State's argument and the district court's holding, Gross Sexual Imposition was not Wesley's crime of conviction. Consequently, it was neither "fair" nor legal for the district court to "rely on the complaint," (State's Br. at 9), especially for an offense to which Wesley did not plead guilty and for sentencing-enhancing facts (age) that were not established by proof beyond a reasonable doubt.

The State urges this Court to adopt an approach consistent with *Byun*. (State's Br. at 20). Notwithstanding *Byun*'s questionable invocation of the modified categorical approach in light of *Cabrera-*

Gutierrez, *Byun* is actually of little assistance to the State.

Byun's crime of conviction arose as the result of a guilty plea to "importation into the United States of any alien for the purposes of prostitution." The Ninth Circuit concluded that "Byun's conviction under *8 U.S.C. § 1328* – which the plea agreement revealed was committed against a minor – is a specified offense against a minor and therefore a sex offense." *Byun*, 539 F.3d at 986. Additionally, the Ninth Circuit engaged in an analysis that is critically absent from the district court's analysis in Wesley's case: it analyzed the statute of conviction to determine if it was divisible and thus warranted application of the modified categorical approach. *Id.* at 991-992.

The Ninth Circuit's analysis found its support in the "legislative history of the statute," which "fully supports this conclusion. This history shows that Congress intended to include all individuals who commit sex crimes against minors, not only those were convicted under a statute having the age of the victim as an element." *Id.* at 992-993. Obviously, the legislative history behind the enactment of SORNA is different than the legislative history behind the enactment of the

SVORA. The plain text of the SVORA indicates the Montana Legislature specifically intended to exempt certain sexual offenses based on the age of the victim. *See e.g.,*, *Mont. Code Ann. § 46-23-502(10)(a)(i), (ii), (iii), (iv), (vi), (vii), etc.*. The State acknowledges these "caveats" on page 20 of its brief. These "caveats," typically – but not always[2] – coincide with age elements that, if proven beyond a reasonable doubt require registration.

Finally, policy and constitutional considerations must be applied to the final arguments raised by the State in its brief, namely that "[r]egistration requirements vary by state and requiring statutes to be identical in order to be reasonably equivalent would frustrate the purpose of the sexual offender registries." (State's Br. at 21-22). The State's argument is that the Department is allowed to determine what is or what is not "reasonably equivalent," a term undefined in the SVORA.

The State's argument raises significant and contemporary constitutional issues recently addressed in *Loper Bright Enterprises v.*

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[2]Unlawful restraint, *Mont. Code Ann. § 45-5-301*, as referenced in the State's Brief.

Raimondo, 603 U.S. 369 (2024) (overruling *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984)). The crux of the United States Supreme Court's holding in *Loper Bright* is the conclusion that courts may not defer to an agency interpretation of law simply because a statute is ambiguous, and that under the federal Administrative Procedures Act, courts must still exercise their independent judgment in deciding whether an agency has acted within its statutory authority.

This Court has previously adopted a "two step analysis similar to *Chevron* deference, but must less deferential." *Mont. Evtl. Info. Ctr. v. Mont. Dep't of Envtl Quality*, 2019 MT 213, ¶ 24 n.9, 397 Mont. 161, 451 P.3d 493 (citing Court's past cases). Under this Court's process – which must now be called into question post-*Loper Bright* – the first step in Montana's analysis is to determine whether the language of the statute is ambiguous, i.e., "if 'the intent of the Legislature can be determined from the plain meaning of the words used in the statute, the plain meaning controls.'" *Id.* (citing and quoting *Clark Fork Coal v. Tubbs*, 2016 MT 229, ¶ 20, 384 Mont. 503, 380 P.3d 771). If the intent

cannot be determined from the plain language, courts proceed to the second step: giving "respectful consideration" to the agency interpretations of the statute. *Id.*

In the absence of a plain statutory definition of what out-of-state offenses are "reasonably equivalent" to a Montana offense requiring registration, and in the absence of any clear Legislative process to challenge the Department's determination of "reasonable equivalency," the Department is asking the Court to give deference to its conclusion that Wesley's prior conviction qualifies as a predicate offense under the SVORA. In the wake of *Loper Bright*, not even this Court's "respectful consideration" is warranted.

Certainly both the State and Wesley present reasonable arguments but, *Loper Bright* instructs "[w]hen the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the [Administrative Procedures Act] is, as always, to independently interpret the statute and effectuate the will of Congress *subject to constitutional limits*." *Loper Bright*, 603 U.S. at 394 (emphasis added). To allow the Department unfettered and

unguided discretion to determine what convictions are and are not reasonably equivalent, or what actions – proven or not – warrant the punishment of registration under the SVORA is beyond the constitutional limits of what the Legislature may permissively delegate to the Department and beyond what this Court should allow.

This Court should rebuff the State's implicit argument on the last pages of its brief in Wesley's case.

Conclusion

Given the arguments in the opening brief, the absence of legislative guidance, and the arguments in this Reply Brief, Wesley respectfully requests this Court reverse the district court's holding denying Wesley's Writ of Prohibition as well as the district court's conclusion that Wesley is required to register pursuant to the SVORA.

Respectfully submitted this 11th day of September, 2025.

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Certificate of Compliance

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that the Appellant's Opening Brief is printed with proportionately-spaced Century Schoolbook typeface of 14 points; is double-spaced except for lengthy quotations or footnotes; and does not exceed 5,000 words. The exact word count, as calculated by my WordPerfect software and excluding tables and certificates, is 3,132.

Dated this 11th day of September, 2025.

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CERTIFICATE OF SERVICE

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