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State v. Spady: The 24/7 Sobriety Program Might Work, but Is It Legal?

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PRECAP: *State v. Spady*; The 24/7 Sobriety Program Might Work, but Is It Legal?

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No. DA 14–0089
Montana Supreme Court

Oral Argument: Monday, April 27, 2015 at 9:30 AM in the Strand Union Building, Ballroom A on the campus of Montana State University, Bozeman, Montana.

I. QUESTION PRESENTED

Is the Montana 24/7 Sobriety Program 1) void for vagueness; 2) an improper delegation of legislative power; 3) a pretrial punishment; and 4) an improper search and seizure?

II. FACTUAL & PROCEDURAL BACKGROUND[1]

In 2011, the Montana Legislature adopted the Montana 24/7 Sobriety Program Act ("24/7 Sobriety Program"), which gives Montana courts the authority to "condition any bond or pretrial release for an individual charged with a second or subsequent violation of 61–8–401 or 61–8–406 [driving under the influence ("DUI")] upon participation in the sobriety program and payment of fees required by 44–4–1204."[2] The 24/7 Sobriety Program requires a court-ordered participant to appear twice daily in 12-hour intervals to perform a $2 alcohol breath test. The 24/7 Sobriety Program is administered by the Department of Justice ("DOJ"). The DOJ sets the costs for each test and determines the criteria for the testing and procedures used. A violation of the court's order to participate in the 24/7 Sobriety Program results in a misdemeanor charge of criminal contempt.

On April 20, 2013, Robert Earl Spady ("Spady") was arrested and charged with misdemeanor careless driving and misdemeanor DUI. Spady had a prior DUI conviction from 2006–2007. On April 21, 2013, Spady pled not guilty was released on bail. As a condition of his release, Spady was ordered, among other things, to: 1) not consume alcohol; and 2) participate in the 24/7 Sobriety Program. Through April and May of 2013, Spady did not appear or was late for three of his breath tests.

[1] Factual and procedural background, unless specifically cited, is drawn from two documents: 1) Br. of Appellant, June 19, 2014, No. DA 14–0089; and 2) Br. of Appellee, Oct. 20, 2014, No. DA 14–0089.
[2] Br. of Appellant 24. (citing MONT. CODE ANN. § 44–4–1305(3) (2013)).

Spady was charged with three counts of criminal contempt for his failure to appear for testing.

Spady pled not guilty to the charges of criminal contempt and moved to dismiss the charges, arguing the 24/7 Sobriety Program violated various constitutional protections. The justice court denied the motion. On September 23, 2013, Spady and the State entered a plea agreement. Spady pled *nolo contedere* to the criminal contempt charges and the State dismissed the DUI and careless driving charges. Spady specifically reserved the right to appeal the justice court's denial of his motion to dismiss the criminal contempt charges.

On appeal, the district court reversed the justice court and found the 24/7 Sobriety Program was 1) void for vagueness, 2) an unconstitutional delegation of legislative authority, and 3) an unconstitutional pretrial punishment in violation of due process. The district court refused to reach the issue of whether the 24/7 Sobriety Program implicated the Fourth Amendment. The State appealed.

The State's brief raised several procedural issues[3] and in response, the Court, "in light of the procedural circumstances of this case," exercised sua sponte supervisory control and requested briefing from both parties specifically on: 1) the constitutional issues the district court raised in declaring the 24/7 Sobriety Program unconstitutional; and 2) the 24/7 Sobriety Program's 4th Amendment search and seizure implications.[4] Due to the Court's unusual decision to grant sua sponte supervisory control, this article will focus largely on the two specific issues the Court requested the parties brief.

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[3] The State argues that procedural issues should decide this case and has continued to raise those issues in supplemental briefing. Procedurally, the State has two primary arguments. First, the collateral bar rule applies. Spady did not challenge the 24/7 Sobriety Program under his DUI charge, but rather in the contempt proceedings, which is an "improper collateral attack." Second, the district court did not have authority to decide issues not properly before it. Spady entered a *nolo contendere* plea to his DUI/careless driving charges in justice court and only reserved his right to appeal the justice court's decision on his motion to dismiss. On appeal, however, Spady raised two new constitutional issues: 1) improper delegation; and 2) unconstitutional search and seizure. As such, those two additional claims ought not be heard because they were not properly before the district court.

Spady responds that the State waived its collateral bar argument because it did not raise this argument before the justice or district courts. Further, Spady argues that the State agreed to an appeal of the instant issues in the Spady's plea agreement. The plea agreement acknowledged Spady's right to appeal the motion to dismiss on constitutional grounds. The order in question specifically referred to the defense's arguments regarding excessive bail, the defendant's right to privacy, and due process violations. Finally, even if the collateral bar rule does apply, Montana has not followed the federal rule and should decline to do so.

[4] Order 1, Feb. 19, 2015, No. DA 14–0089.

III. ARGUMENT

A. Constitutional Issues Raised by the District Court

The district court raised three specific constitutional issues with the 24/7 Sobriety Program: 1) it is void for vagueness; 2) the program impermissibly delegates legislative authority; and 3) it is a pretrial punishment of an individual deemed to be innocent until proven guilty.

1. Vagueness

The district court held that the 24/7 Sobriety Program was vague because it was unclear whether "second or subsequent violation" includes convictions outside the five-year look-back period as noted in the statutes defining a conviction during DUI sentencing.[5]

Arguments

The State contends the 24/7 Sobriety Program is neither vague facially or as applied to Spady. To be facially vague, a statute must provide no standard of conduct and be impermissibly vague in all its applications.[6] The district court noted some instances where the statute would be vague (when an arrestee has a prior DUI charge), not that it was vague in every instance.[7] Therefore, a ruling that it is facially vague is improper. Second, the State argues the statute is not vague as applied to Spady because the plain reading of the code (applies to "persons 'charged with a second or subsequent violation' of the DUI laws") has no dates or periods of time and therefore clearly means their entire lifetime, not whether their prior DUI charges were convictions under the sentencing statutes, which, the State argues, is a "highly legalistic (and incorrect) reading."[8]

Spady agrees with the district court's findings and notes statutes are considered vague and, therefore, void, when they "fail to give sufficient notice of what is prohibited."[9] The statute does not clarify how it interacts with the DUI sentencing statutes which determine the number of prior DUI convictions for purposes of sentencing: a defendant cannot know if he would fit into the 24/7 Sobriety Program requirements

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[5] Appellee's Supp. Br. 11, Mar. 23, 2015, No. DA 14–0089 (the conviction statute is MONT. CODE. ANN. § 61–8–734).
[6] Appellant's Supp. Br. 2–3, Mar. 23, 2015, No. DA 14–0089 (citing State v. Watters, 208 P.3d 408, 470 (Mont. 2009)).
[7] *Id.* at 3–4.
[8] *Id.* at 5.
[9] Appellee's Supp. Br. 10.

depending how long ago his prior DUI conviction had been.[10] The statute could mean lifetime DUIs or it could be just those DUIs included in the sentencing provisions for DUIs.

Analysis

To be void for vagueness, a statute must not give ordinary people enough information to understand what is prohibited.[11] On its face, it seems clear that the 24/7 Sobriety Statute applies to individuals charged with a "second or subsequent" DUI conviction, regardless of the lookback period.[12] The provision reads in full:

> Upon an offender's participation in the sobriety program and payment of the fees required by 44–4–1204:
>
> (a) the court may condition any bond or pretrial release for an individual charged with a violation of 61-8-465, a second or subsequent violation of 61-8-401 or 61-8-406, or a second or subsequent violation of any other statute that imposes a jail penalty of 6 months or more if the abuse of alcohol or dangerous drugs was a contributing factor in the commission of the crime.[13]

The State's argument that the lookback provisions apply only to sentencing is persuasive. The 24/7 Sobriety Program and actual sentencing upon conviction for a DUI are two separate code sections and used at two different timeframes. One is used prior to conviction and the other is upon conviction when deciding a convict's sentence. The statute clearly notes it applies upon "any bond or pretrial release" —not sentencing—and therefore would seem to give an ordinary person notice of its applicability.

2. Legislative Delegation

The district court held that the Montana Legislature's delegation of authority to the DOJ was impermissible because it did not provide criteria for what "reasonable" meant when the DOJ set the 24/7 Sobriety Program's fees.[14]

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[10] *Id.* at 11–12.
[11] State v. Knudson, 174 P.3d 469, 472 (Mont. 2007).
[12] In 2013, the Montana Legislature amended MONT. CODE. ANN. § 44–4–1205 and moved (3) to (2)(a).
[13] MONT. CODE ANN. § 44–4–1205(2)(a) (2013) (emphasis added).
[14] Appellee's Supp. Br. 12.

Arguments

The State argues the delegation was not without guidance because the DOJ was instructed to establish a "reasonable" fee, which includes the "fees to pay the cost of installation, monitoring, and deactivation of any testing device."[15] The costs are linked to the cost to administer the program. In 2013, just after Spady was arrested, the Montana Legislature enacted further guidelines noting the program had to "best facilitate[] the ability to apply immediate sanctions for noncompliance at an affordable cost."[16] The State argues this provides enough guidance. The "reasonable" language is not an arbitrary grant of power to the DOJ.

Spady counters that the district court was correct because Spady was charged under the 2011 law, which did not have the additional language requiring it to be "affordable." Further, the DOJ could choose any fee structure it felt was "reasonable" because the statute does not require that the fees be limited *only* to the costs of administering the program.[17] Therefore, the DOJ has unfettered, arbitrary power to decide what is "reasonable."

Analysis

Legislative delegations must "prescribe a policy, standard, or rule for their guidance and must not vest them with an arbitrary and uncontrolled discretion with regard thereto, and a statute or ordinance which is deficient in this respect is invalid."[18] The Montana Supreme Court has determined that "worthwhile" and "based upon the effects" were impermissible delegations of authority because there was no associated criteria for evaluating what they actually meant.[19] It is not perfectly clear that "reasonable" would fit into the "worthwhile" category. First, there were *some* criteria given to the DOJ in the 2011 version of the statute. The fees had to include, reasonably, the various costs of the program. The DOJ could add up the costs to run the program and determine what it cost, per test, to operate. This would be a "reasonable" fee structure and one that is not arbitrary and solely within the DOJ's control and one that the Legislature could verify. On the other

[15] Appellant's Supp. Br. 10–11.
[16] *Id.* at 7.
[17] Appellee's Supp. Br. 12–14.
[18] Williams v. Bd. of Cnty. Com'rs of Missoula Cnty., 308 P.3d 88, 97 (Mont. 2013)
[19] Appellee's Supp. Br. 13 (citing In re Authority to Conduct Savings & Loan Activities, 597 P.2d 84 (Mont. 1979); In re Petition to Transfer Territory from High School Dist. No. 6, 15 P.3d 447 (Mont. 2000)); Reply Br. of Appellant 17.

hand, there was no limiting language on "reasonable" itself requiring it to be, for instance, a percentage of a monthly budget for someone at the poverty line, or, as Spady noted, limiting the fees to only the costs of the program. In the end, the "reasonable" standard for running the program should be enough to not constitute an arbitrary delegation. If one were to examine the program and find, for example, costs for things not needed to administer the program, then it would not be reasonable. One could also examine the aspects of the program and determine if some parts being charged for were or were not reasonable. The Court will likely find there is enough guidance present for the 24/7 Sobriety Program to not constitute an improper legislative delegation.

3. Pretrial Punishment & Due Process

The district court concluded that $2 fee per breath test constituted a pretrial punishment of an arrestee who is presumed innocent until proven guilty.

Arguments

The State counters that while it is a violation of due process to punish a person before they are convicted, not all restrictions on liberty or deprivations of liberty are punitive. Citing *Bell v. Wolfish*,[20] the State argues the presumption of innocence doctrine does not apply to a determination of the due process rights of a pretrial detainee.[21] As such, conditions on an arrestee's bond are valid if they serve to protect the victim or community, or prevent recidivism.[22] The State may charge a reasonable fee for administering the bail system and it is not considered punitive to have probationers pay the costs of the programs the court deems they should participate in. The $2 fee for the 24/7 Sobriety Program tests are in the same vein: they are not imposed for punishment and are applied in a nondiscriminatory manner. Further, the program ensures the community is kept safe and is a minimal cost for ensuring such safety. [23]

Spady counters that when a statute has been historically used as a punishment or when its costs are excessive compared to its non-punitive purposes, then it is penal, not regulatory. Since its inception, the 24/7 Sobriety Program has been applied to both pretrial defendants and those convicted of a second or subsequent DUI. The program has been considered a punishment since its inception and therefore is a pretrial punishment. Further, the $2 fees charged while a defendant is awaiting

[20] Bell v. Wolfish, 441 U.S. 520 (1979).
[21] Appellant's Supp. Br. 13.
[22] *Id.* at 12–13.
[23] *Id.* at 14–15.

trial are not refundable—even if the detainee is deemed innocent—and is therefore excessive.[24]

Analysis

As enacted, the 24/7 Sobriety Program applied to both pretrial defendants charged with a second or subsequent DUI and those who have been convicted of the same offense. It is difficult to classify the program as "historically" punitive since it applies to pretrial detainees as well as convicted offenders and both were enacted simultaneously. The Legislature was quite clear: "[t]he Legislature further declares that the purpose of this part is: (a) to protect the public health and welfare by reducing the number of people on Montana's highways who drive under the influence of alcohol or dangerous drugs."[25] While it is used as a punishment after conviction, it still serves the primary purpose of preventing drunk driving and protecting the public welfare in both situations. The real question is whether the $2 fee per test, not the test itself as a condition of bail, is a pretrial punishment and therefore a violation of the Due Process Clause. Citing *Bell v. Wolfish*, the State argues if a "condition or restriction" of pretrial detention is reasonably related to a legitimate government interest, it passes constitutional muster.[26] Necessarily, if the 24/7 Sobriety Program is 1) a "condition" of bail; 2) the associated fees are included as part of that condition; and 3) the government interest of preventing drunk driving is legitimate, the 24/7 Sobriety Program is not "punishment". Spady argues that *Bell* does not support this conclusion, and, instead, that the accumulation of fees over time constitutes a punishment (the fees are non-refundable; excessive; and non-regulatory). As *Bell* noted, "in evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is *whether those conditions amount* to punishment of the detainee."[27] Both arguments are legitimate readings of *Bell* and it is in the Court's hands to determine whether the fees actually do constitute a punishment.

B. Search & Seizure

The district court found that the 24/7 Sobriety Program testing requirements were an unreasonable warrantless, suspicionless search and

[24] *Id.* at 14–16.
[25] MONT. CODE ANN. § 44–4–1202(2013) (The quoted provision was present in the 2011 version as well.).
[26] *Bell*, 441 U.S. at 539.
[27] *Id.* at 535 (emphasis added).

therefore a violation of the Fourth Amendment of the U.S. Constitution and Article II, Section 11 of the Montana Constitution.

Arguments

The State argues that the 24/7 Sobriety Program is not an impermissible search. The touchstone of the Fourth Amendment is "reasonableness."[28] Where an individual is already on release from a government body, "some reasonable police intrusion on his privacy is to be expected" and any intrusion must be reasonable when balancing privacy interests and law-enforcement concerns.[29] Under Montana law, to determine the reasonableness of a search, one must 1) determine if there is a subjective expectation of privacy; and 2) ask whether society is willing to find it reasonable.[30] If both are met, no search has occurred. If not met, the third step is to examine whether the state was justified by a compelling state interest or justified on other grounds.[31] Preventing crime by arrestees is a legitimate and compelling government interest.[32] In *Bell*, the Supreme Court held that the presumption of innocence doctrine does not govern the rights of a pretrial detainee: the doctrine applies at trial itself and does not govern rights pretrial.[33] In *Samson v. California*,[34] the United States Supreme Court held that, because a parolee has diminished privacy expectations due to their status, a condition of release which allowed police to could conduct warrantless, suspicionless searches was valid. Further, the parolee signed the order granting his release from prison on these grounds and was unambiguously aware of it.[35] In *Maryland v. King*, the Supreme Court upheld DNA swabs of an arrestee, arrested on probable cause, because confirming identity, and therefore prior crime history, were legitimate and compelling government interests. The DNA swab from inside the cheek was associated with no pain, trauma, and only determined identity.[36] Like *Samson*, Spady was properly arrested and as a condition of his bail required to participate in the 24/7 Sobriety Program. His expectation of privacy was diminished. Further, like *King*, preventing repeat DUIs is a compelling government interest.[37]

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[28] Reply Br. of Appellant 5, Dec. 3, 2014, No. DA 14–0089.
[29] *Id.* at 6 (citing Maryland v. King, 133 S. Ct. 1958, 1969–70 (2013)).
[30] Reply Br. of Appellant 6–7 (citing State v. Allen, 241 P.3d 1045, 1057 (Mont. 2010)).
[31] *Id.* at 6–7.
[32] *Id.* at 9.
[33] Reply Br. of Appellant, 14 (citing *Bell*, 441 U.S. at 533).
[34] Samson v. California, 547 U.S. 843 (2006).
[35] *Id.* at 852.
[36] *King*, 133 S. Ct. at 1979.
[37] Reply Br. of Appellant 7–12; Appellant's Supp. Br. 16–17 (citing Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 451 (1990)).

Spady agrees with the State's general conclusion that any search must be considered "reasonable."[38] However, Spady largely disagrees with the State's interpretation of case law and cites *United States v. Scott*[39] to speak to this. In *Scott*, the pretrial defendant signed a condition of his release on bail which allowed police to conduct warrantless drug tests and home searches. The 9th Circuit upheld the suppression of evidence discovered during searches of Scott's home, because the searches fell short of "reasonable."[40] The "special needs" doctrine may constitutionally justify warrantless searches, however, the needs must be separate from a general interest in crime control. While Montana recognizes the "special needs" doctrine, the Court has not extended this exception beyond probation and parole contexts.[41] The primary purpose of the 24/7 Sobriety Program might be to reduce drunk driving, but the immediate effect is to gain evidence of alcohol consumption so the State can impose sanctions. Spady argues this is a general "crime control" measure. Further, Spady argues that the State miscites *Bell*, *Samson*, *and King*. First, *Bell* doesn't hold that pretrial detainees have a reduced expectation of privacy, and instead only applies to those confined pretrial and therefore only applies to the jail context. Second, *King* is not a pretrial case, it is a booking/arrest case and therefore only applies when an individual is being arrested for a felony offense and does not apply to the entire pretrial period. In *King*, the Supreme Court analogized fingerprints and DNA and upheld DNA swabs as a legitimate means of identification, which is distinguishable from a pretrial alcohol breath testing program. Finally, *Samson* is not a pretrial case, it concerns parolees, individuals already convicted of a crime and serving their sentence. Therefore, *Scott* ought to control and the 24/7 Sobriety Program for pretrial arrestees should be considered an impermissible search.

Analysis

The search and seizure question is the fundamental inquiry in this case and the question will come down to which case law is controlling. *Scott* was decided with a scathing dissent by Judge Bybee, with seven additional judges dissenting on the denial to hear the case en banc by the Ninth Circuit.[42] Judge Bybee noted in his dissent that the majority's "conclusion is contrary to history, practice and commonsense; it carries monumental implications for the pretrial procedures employed

[38] Appellee's Reply Br., 2.
[39] United States v. Scott, 450 F.3d 863, 889 (2006).
[40] Br. of Appellee, 16.
[41] Br. of Appellee, 17–18.
[42] *Scott*, 450 F.3d at 889 (Callahan, J., O'Scannlain, J., Kleinfeld, J., Gould, J., Tallman, J., Bybee, J., and Bea, J. dissenting).

by every state in our circuit, as well as the United States."[43] And, the Sixth Circuit opted to distinguish from *Scott* in finding that a pretrial detainee has a reduced expectation of privacy and the procedure of the urine test was reasonable.[44] Further, *Scott* dicta noted the balancing test might come out differently if the testing was outside the arrestee's home.[45] And, as the State points out, there are many other jurisdictions that have allowed pretrial drug testing like the 24/7 Sobriety Program.[46]

Scott is distinguishable for several reasons: 1) the searches were random, and 2) conducted in the arrestee's home.[47] The 24/7 Sobriety Program requires the individual to come to the DOJ and the tests are conducted on a regular schedule. Whether the 24/7 Sobriety Program is reasonable turns on the Court's reading of *Scott*. If *Scott* is read broadly regarding pretrial rights as a general concept and drug testing as a whole, the 24/7 Sobriety Program is not permissible. However, if read narrowly, the 24/7 Sobriety Program and *Scott* are factually different.

Similarly, *Bell* is also distinguishable depending on the reading. Bell was in confinement awaiting trial, not out on bail.[48] The State and Spady read the case in two different ways: 1) *Bell* applies to all pretrial actions, and therefore all pretrial arrestees, confined or not, are not protected by the Fourth Amendment from warrantless, suspicionless searches; or 2) *Bell* only applies to those actually *in* confinement awaiting trial. Once again, depending on the construction given to *Bell*, the outcome could change dramatically. Only the Court can decide if *Scott* is controlling and if *Bell* applies broadly or not. As such, the Court could go either direction.

IV. CONCLUSION

The Court will likely base its decision off of either 1) the pretrial punishment or 2) the search and seizure implications of the 24/7 Sobriety Program. There is no directly controlling case law for either issue. The 24/7 Sobriety Program is a successful program for deterring drunk driving.[49] Although not a justification, it is also very popular and was passed by large margins in the Montana Legislature.[50] With no clear outcome or leaning for either of the decisive issues, and arguably legitimate case law to support the 24/7 Sobriety Program, the Court will likely choose to keep the program in place.

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[43] *Scott*, 450 F.3d at 875 (Bybee, J. dissenting).
[44] Norris v. Premier Integrity Solutions, 641 F.3d 695 (6th Cir. 2011).
[45] Br. of Appellee, 16.
[46] Appellant's Supp. Br. 18.
[47] *Scott*, 450 F.3d at 865.
[48] *Bell*, 441 U.S. at 524.
[49] Appellant's Supp. Br. 1.
[50] Br. of Amicus Curiae Assoc. of Mont. Troopers 5, June 19, 2014, No. DA 14–0089.

RECAP: Beach v. State (Beach III); Another Bite at the Apple, but Not Quite as Filling

E. Lars Phillips

No. DC11-0723, OP 14-0685
Montana Supreme Court

I. INTRODUCTION

On February 4th, 2015, the Montana Supreme Court heard oral arguments in *Beach v. State* (*Beach III*). Mr. Beach, charged with committing a crime that occurred while he was a juvenile, was convicted of deliberate homicide and sentenced to 100 years in prison without the possibility of parole.[1] The question before the Court was whether Beach's continued incarceration violates the Constitutions of the United States or the State of Montana.

II. PETER CAMILLE FOR PETITIONER, BARRY BEACH

Mr. Camille began by characterizing the judicial philosophy at the time Beach was sentenced as sentencing judges doling out "adult time for adult crime." He argued that this judicial philosophy was inconsistent with the U.S. Supreme Court's decision in *Miller v. Alabama*,[2] which requires a court to consider a defendant's minority status at sentencing. He conceded that the Court had not yet held explicitly that *Miller* was retroactive, but argued that the Court's treatment of *Jackson v. Hobbs*,[3] *Miller*'s companion case that was dismissed on the same day the *Miller* decision was handed down, had implicitly made the *Miller* rule retroactive.

Mr. Camille noted that *Miller* had banned mandatory sentences of life without parole for juvenile defendants and issued a mandate to courts requiring on-the-record consideration of mitigating factors (such as age) when sentencing juvenile defendants. In light of *Miller*, he argued, a sentence of one hundred years without parole was invalid because the record did not reflect the sentencing court's consideration of Beach's age (17) at the time of the crime. Further, Mr. Camille argued that, functionally, the sentence at issue amounted to life without parole and was therefore invalid under *Graham v. Florida*[4] because the sentence left no meaningful opportunity for release as Beach would either die or be near the end of his life when released.

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[1] *State v. Beach*, 705 P.2d 94, 97, 100 (Mont. 1985).
[2] 132 S. Ct. 2455 (2012).
[3] 132 S. Ct. 548 (2011).
[4] 560 U.S. 48 (2010).

Allowed the opportunity to address the possibility of re-sentencing, Mr. Camille argued that, while the court could consider Beach's behavior during his brief episode of freedom following a district court's ruling in 2011, the court should look to all mitigating factors in making an individualized determination regarding the appropriate sentence. Further, he argued that the Montana Supreme Court's finding of one hundred years without parole to be unconstitutional would provide more than enough "new evidence" necessary for the lower court to review the sentence. Mr. Camille concluded by noting that it was the appellate court's job to lay out the criteria on which the sentencing court should rely and that *Miller* required, rather than allowed, courts to consider mitigating factors before sentencing juvenile defendants.

III. TAMMY PLUBELL FOR RESPONDENT, STATE OF MONTANA

Ms. Plubell began argument by pointing out that the Petition should be dismissed outright as it was procedurally barred by Montana Code Annotated § 46–22–101(2). Drawn straight to the heart of Petitioner's argument by Justice Shea, Ms. Plubell conceded there was no other reference to Beach's age at the time of the crime, besides his date of birth, in the record.

Pressed about whether the sentencing court had taken into account mitigating factors or whether Beach should be allowed to take advantage of the new science surrounding juvenile defendants, Ms. Plubell argued that the sentencing judge had taken all of these issues into account because of the very nature of a discretionary sentencing act. Further, she noted that the prohibition on mandatory life sentences from *Graham* only applied in non-homicide cases. Ms. Plubell continued by arguing that *Miller* was neither explicitly, nor implicitly, retroactive, and Beach should not be allowed to seek relief under those avenues of law.

Ms. Plubell concluded the State's argument by noting the toll the post-conviction process was taking on the family of the victim in the case, and the need for finality in determinations of guilt and innocence.

IV. TERRANCE TOAVS FOR PETITIONER, BARRY BEACH

Mr. Toavs argued briefly and reiterated the two tenets of the Petitioner's argument. First, that the sentence was invalid under *Miller* as the sentencing court had failed to take into account mitigating factors, such as the defendant's age, at the time of sentencing. And second, the sentence was invalid as it was the functional equivalent of a life sentence and left no meaningful opportunity for relief as required by *Graham*.

V. PREDICTION

Throughout the morning, both Petitioner and Respondent faced vigorous questioning from the Court. When the dust settled, there appeared to be, at the very least, a question of whether Beach was going to receive the relief he seeks. The Court's decision in *Beach III* will likely hinge on how far the Court is willing to expand the doctrines relied upon by the Petitioner. Simply put, in order for Beach to attain relief, the Court must promulgate a new rule, providing protections to the juvenile defendant above and beyond the existing federal rules in *Miller* and *Graham*.

At a minimum, the Court may issue a mandate requiring trial courts to note, explicitly, the mitigating factors (e.g. age of the defendant) considered when sentencing a juvenile defendant. These mitigating factors would, most likely, be extrapolated from the factors described in *Miller*. At maximum, this may expand the application of the *Miller* factors to juvenile defendants in two different ways. First, the U.S. Supreme Court only required that the *Miller* factors be applied to mandatory sentencing schemes;[5] finding relief under *Miller* in *Beach III* would expand that mandate to sentences issued under discretionary schemes. And second, as the U.S. Supreme Court limited the application of *Miller* to sentences of life without parole,[6] applying this rule in *Beach III* would require trial courts to consider the *Miller* factors for every sentence that resulted in a "functional" life sentence (here, one-hundred years) without the possibility of parole.

Finally, it should be noted that Beach might simply be exhausting his claim in state court before seeking federal habeas relief. He has based his claims on federal law, and a decision by the Montana Supreme Court in *Beach III* would leave him free to take his claim to the federal district courts. Regardless of the final disposition of this case, it is safe to say that a few bites of the apple remain for this persistent petitioner.

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[5] *Miller*, 132 S. Ct. at 2460.
[6] *Id.*