



**Montana Legislative Services Division**  
**Legal Services Office**

PO BOX 201706  
Helena, MT 59620-1706  
(406) 444-3064  
FAX (406) 444-3036

LEGAL MEMORANDUM

TO: Members, Law and Justice Interim Committee

FROM: David S. Niss, Staff Attorney

RE: Responses to Research Requests From LJIC Members Regarding Sexual Offenses

DATE: March 19, 2012

I  
INTRODUCTION

At the February, 2012, meeting of the Law and Justice Interim Committee (LJIC), several members posed questions to the staff. This memorandum responds to three of those requests that dealt with sex offenders. The issue of the Montana Supreme Court's opinion in *State v. Cook*<sup>1</sup>, wherein the Montana Supreme Court affirmed an opinion of a District Court revoking the suspended sentence of an inmate only 2 days before the inmate's scheduled release from confinement, is dealt with in a separate memorandum.

II  
DISCUSSION

A. How long do sex offenders have to register for and what is the process by which a sex offender can be restored or taken off the registry (Menahan and MacDonald)?

Under section 46-23-506(1), MCA, all sex offenders<sup>2</sup> must register for life. However, subsection (3)(b) of that section provides a procedure by which Level 1 offenders (low probability for repeat offenses) and Level 2 offenders (moderate probability for repeat offenses) can be taken off the registry.

The procedure for Level 1 and 2 offenders to be taken off the registry is by a petition, to either the sentencing court or the District Court for the judicial district in

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<sup>1</sup>2012 MT 34, \_\_Mont.\_\_, \_\_P.3d\_\_.

<sup>2</sup>The definition of a "sexual offense" in section 46-23-502(9), MCA, determines whether an offense is a sexual offense such that its commission will require registration. Generally, the definition depends upon the specific MCA section violated and sometimes the age of the victim, the age of the offender, or both.

which the offender resides, requesting relief from registration. In the case of a Level 1 offender, the petition may be submitted after 10 years of registration, but only after 25 years of registration in the case of a Level 2 offender. The petition must be served on the County Attorney, who, before any hearing on the petition, must send a copy to the petitioner's latest victim, whose testimony must be considered by the court in acting on the petition. The court may grant the petition if (1) the petitioner has been a law-abiding citizen, and (2) the court determines that continued registration is unnecessary to protect the public and relief from registration is in the best interests of society. The petition provisions do not apply to any level sexual offender in certain circumstances, usually involving a victim who was less than 12 years old.

B. Is possession of a nude picture by an underage child a child pornography crime (Murphy)?

A "child pornography crime" is usually considered to be the possession of child pornography material by an adult, which constitutes felony sexual abuse of children under section 45-5-625, MCA.<sup>3</sup> However, there are no criminal statutes prohibiting possession of pornographic material that is not child pornography by an adult or a minor. In the case of possession of child pornography material by a minor, whether that possession constitutes a criminal offense in Montana depends upon the application of the Youth Court statutes. Under section 41-5-106, MCA, part of the Youth Court Act, a determination by a Youth Court that a minor was in possession of pornographic material such that the child could be convicted of violating section 45-5-625, MCA, if an adult, is termed an "adjudication", as opposed to a conviction, and the adjudication may not be considered a criminal conviction.

### III CONCLUSION

All sexual offenders must register for life, but state statutes provide a mechanism whereby, after differing periods of time in the registry, Level 1 and 2 offenders may petition the District Court for removal from the registry. Removal by the court is not required by law. There are no statutes prohibiting possession of pornographic material that does not constitute child pornography by either an adult or a minor. Possession of child pornography by a minor is not technically a criminal offense under Montana law but may be the basis for an adjudication involving that minor in Youth Court, potentially resulting in commitment to the Department of Corrections and placement in a youth correctional facility.

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<sup>3</sup>The material covered under that section is any visual or print medium, including an electronic medium, that portrays a child engaged in actual or simulated sexual conduct.