April 16, 2008

Ms. Maureen Connor
Mr. Clifford Nelson
Ms. Suzanne Browning
Granite County Board of Commissioners
P.O. Box 925
Philipsburg, MT 59858-0925

Dear Commissioners:

You have requested an opinion of this office on a question arising from the following situation. Prior to September 11, 2007, the Granite County Justice of the Peace imposed sentences in some criminal cases that obliged the defendant to pay certain assessments to local service organizations or into the County Drug Forfeiture Fund. On that date, the Montana Supreme Court issued its decision in State v. Krum, 2007 MT 229, 339 Mont. 154, 168 P.3d 658, in which the Court held that similar assessments imposed by a district judge as part of a felony sentence were without legal authority. The Granite County Attorney has recommended that the County publish notice that the County will reimburse from its funds all defendants against whom the Justice of the Peace had imposed the assessments. You request an opinion as to whether reimbursement of the assessments would be a proper charge against the County.

It has been the policy of this office that the Attorney General will decline requests for an official opinion as to questions that either are in active litigation or as to which litigation seems imminent. The reason for this rule lies in the provision of Mont. Code Ann. § 2-15-501(7) that opinions of the Attorney General are binding on local and state government attorneys "unless overruled by a state district court or the supreme court." Issues presented in current or imminent litigation are inappropriate subjects for a formal opinion because a formal opinion will not resolve the question. We do, however, want to assist with this issue and for this reason it has been determined that an informal letter of advice is appropriate.

Krum involved a defendant convicted of felony sexual assault. As part of the sentence the district court imposed assessments under which it obligated Krum to make payments

to several community organizations. The Supreme Court held that the assessments could not be considered as proper under the authority to impose fines, because by statute fines are payments that are made to the clerk of the district court and deposited in the State general fund. Mont. Code Ann. § 46-18-235(1). Krum, ¶ 15.

The Court next held that the assessments were not within the general authority of the court to impose "any other limitation reasonably related to the objectives or rehabilitation and the protection of the victim and society." Mont. Code Ann. § 46-18-202(1)(f). The Court reasoned that the assessments were not a "limitation" but rather an affirmative duty, and could not be considered "restitution," which the statute clearly authorizes in some cases, because restitution must be paid to the victim, not to third parties. Krum, ¶ 20. As a remedy, the Court severed the illegal condition from the sentence, thereby relieving Krum from the obligation to pay, and affirmed the sentence in all other respects. Krum, ¶¶ 24-25.

The County Attorney has suggested that a federal civil rights claim could be brought under 42 U.S.C. § 1983. The discussion below analyzes that potential claim as well as other possible theories.[1]

In brief, my views on the question are as follows: First, the question of whether the charges are proper depends on whether there is a legal basis on which the County could be held liable to pay them. Second, the County should not be found liable on these claims under 42 U.S.C. § 1983, the federal civil rights statute referred to in the County Attorney's memorandum. The Justice of the Peace and the former County Attorney are both protected from liability on such claims by absolute immunity. The County itself cannot be held liable on the claims because the imposition of assessments by the Justice cannot be said to have been caused by some official policy of the County. Third, state law tort claims against the Justice, County Attorney, or the County would likely fail for similar reasons.

[1] For the purpose of this discussion, I assume, without expressing an opinion on the question, that the decision in Krum applies retroactively to sentences imposed before September 11, 2007. Should a Court hold that it does not apply retroactively, no further discussion would be required with respect to assessments paid prior to the date of the decision. I also do not discuss the question of whether persons under a sentence including an assessment who have not yet paid assessments might have recourse to some postconviction remedy to get the sentence changed.

Fourth, with respect to money paid by assessment into the county treasury, a claim by the defendant for equitable relief under a theory such as unjust enrichment could be well-founded. It would be up to the discretion of the Commissioners as to whether a timely claim based on such a theory should be paid. Any other claims for reimbursement would not be a proper charge against the County and should be denied.

I.

Permissible financial charges against a county are governed by statute. Mont. Code Ann. § 7-6-2426 provides:

> (1) The following are county charges:
> (a) charges incurred against the county by virtue of any provision of this title;
> (b) one-half of the salary of the county attorney and all expenses necessarily incurred by the county attorney in criminal cases arising within the county, except as provided in subsection (2);
> (c) the salary and actual expenses for traveling, when on official duty, allowed by law to sheriffs and the compensation allowed by law to constables for executing process on persons charged with criminal offenses;
> (d) the board of prisoners confined in jail;
> (e) the accounts of the coroner of the county for services that are provided by law;
> (f) all charges and accounts for services rendered by any justice of the peace for services in the examination or trial of persons charged with crime as provided for by law;
> (g) the necessary expenses incurred in the support of county hospitals and poorfarms and in the support of the indigent sick and the otherwise dependent poor whose support is chargeable to the county;
> (h) the contingent expenses necessarily incurred for the use and benefit of the county;
> (i) every other sum directed by law to be raised for any county purpose under the direction of the board of county commissioners or declared to be a county charge.
> (2) The costs of subsection (1)(b) arising from the criminal prosecution of escape or of an offense committed in the state prison must be paid as provided in 53-30-110.

"What is not by law imposed as expenses upon the county is not a charge against it." Wade v. Lewis and Clark County, 24 Mont. 335, 340, 61 P. 879, 880 (1900). Nothing in subsection (1)(a)-(g) creates a statutory obligation on the county to reimburse defendants for assessments imposed by the Justice of the Peace. Subsection (1)(f) refers to "charges and accounts for services rendered by any justice of the peace," but this refers to payment for services performed by the Justice, not to claims that might be made against the County on account of an injury suffered by someone else.

Subsection (1)(i), authorizing payment of "every other sum directed by law to be raised for any county purpose," allows the county pay tort claims on which it is liable and also dovetails with the provisions of the Montana Tort Claims Act which require the County to provide indemnity for torts committed by county officers and employees under some circumstances. Although a county is liable for defense and indemnity of an officer for claims arising out of the course and scope of official duties, Mont. Code Ann. § 2-9-305, 37 Op. Att'y Gen. No. 171 (1978), a County could not, in my opinion, simply pay a group of claims predicated on liability complaints against an officer or against the County itself without some analysis of whether the officer or the County is in fact liable for the claim. The Board of County Commissioners has direction of all lawsuits against the County, Mont. Code Ann. § 7-5-2014, and it can make such decisions as are in its opinion justified under the facts presented, Weir v. Silver Bow County, 113 Mont. 237, 241-43, 124 P. 1003, 1005 (1942), but its discretion is subject to court review on petition of the claimant or a taxpayer under Mont. Code Ann. § 7-6-2424. If the County wrongly pays a claim, by statute it is the duty of the County Attorney to bring an action to recover the payment with 25% interest. Mont. Code Ann. § 7-4-2714.

II.

42 U.S.C. § 1983 creates a remedy under federal law against persons acting under color of state law who deprive others of civil rights in some cases. A claim against the County under § 1983 would lack a sound legal basis, whether analyzed on the basis of the specific actions of the Justice of the Peace or County Attorney personally or on the basis of the conduct of the County. The County would have no obligation to pay such claims under Mont. Code Ann. § 2-9-305 because the claims lack legal merit.

Judges are immune from suit under § 1983 for injuries resulting from their performance of judicial functions. Mireles v. Waco, 502 U.S. 9, 12-13 (1991). Imposition of sentence is a core judicial function, and judges cannot be sued under § 1983 for imposing an illegal sentence. Myers v. Vogal, 960 F.2d 750 (8th Cir. 1992) (per curiam); Freeman v.

Fuller, 623 F. Supp. 1224, 1226 (S.D. Fla. 1985). This is true despite the fact that the sentence is illegal, as long as the Court was acting within its jurisdiction. As the Supreme Court explained in Mireles:

> [I]f only the particular act in question were to be scrutinized, then any mistake of a judge in excess of his authority would become a "nonjudicial" act, because an improper or erroneous act cannot be said to be normally performed by a judge. If judicial immunity means anything, it means that a judge "will not be deprived of immunity because the action he took was in error . . . or was in excess of his authority."

502 U.S. at 12-13, quoting Stump v. Sparkman, 435 U.S. 349, 356 (1978).

The Justice of the Peace clearly had jurisdiction over the cases in which the assessments were imposed, even if the assessments were subsequently adjudged to be without authority. Therefore a claim would not lie under § 1983 against the Justice of the Peace for damages arising from the imposition of sentences that included the assessments.

Likewise, prosecutors are immune from suit for actions taken in fulfillment of their prosecutorial roles. Imbler v. Pachtman, 424 U.S. 409, 422-23, (1976); see State ex rel. Department of Justice v. District Court, 172 Mont. 88, 90-91, 560 P.2d 1328, 1329 (1976) (discussing common law prosecutorial immunity). The conduct of a prosecutor in making sentencing recommendations is a prosecutorial function for which the prosecutor may not be sued under § 1983. Peace v. Baker, 697 F. Supp. 1145, 1147 (D. Nev. 1988) (§ 1983 claim based on allegedly false statements by prosecutor at sentencing barred by absolute immunity).

The prosecutorial immunity of the Justice and County Attorney does not protect the County itself from liability under § 1983. Miller v. City of Red Lodge, 2003 MT 44, ¶ 24, 314 Mont. 278, 65 P.3d 562. However, local government liability under § 1983 cannot be found solely on a theory that a county is legally responsible for all acts of its officers and employees. Id. Rather, to find liability against a local government under § 1983, the court must find that some custom or policy of the County caused the constitutional injury. Id., ¶¶ 20-21; City of St. Louis v. Praprotnik, 485 U.S. 112, 122 (1988); Dagel v. City of Great Falls, 250 Mont. 224, 229-31, 819 P.2d 186, 189-90(1991). The imposition of assessments as part of a criminal sentence cannot be considered a consequence of some policy decision by the County because, in their

respective judicial and prosecutorial roles, neither the County Attorney nor the Justice of the Peace are under the policy direction of Granite County.[2]

Justices of the Peace are constitutional judicial officers whose powers flow initially from Article VII, § 5 of the Montana Constitution and subsequently from provisions of State law. See, e.g., Mont. Code Ann. § 3-10-303 (establishing criminal jurisdiction of the Justice Court). It is the responsibility of the Supreme Court, not the County, to dictate training standards for justices and provide their training. Mont. Code Ann. § 3-10-203. The Supreme Court sets the ethical standards for Justices of the Peace, and the Judicial Standards Commission, not the County Commission, has responsibility for any disciplinary actions. Mont. Code Ann. § 3-1-1106; see Harris v. Smartt, 2002 MT 239, ¶¶ 71-78, 311 Mont. 507, 57 P.2d 58 (Supreme Court affirms ethical violation found by Judicial Standards Commission against Justice of the Peace). By virtue of the constitutional doctrine of separation of powers Justices are beyond the control of the county government with respect to the proper exercise of their judicial functions. See Fox v. Van Oosterum, 176 F.3d 342, 353-54 (6th Cir. 1999) (imposition of sentence by judge not the result of policy by county officials); cf. State ex rel. Wood v. Browman, (establishing judicial process for review of disputed justice court expense claims).

Similarly, the policies of the County cannot constrain the prosecutorial discretion of the County Attorney. The County Attorney's prosecutorial powers are delegated by the State, not by the County. The County Attorney is subject to the direct supervision of the Attorney General, Mont. Code Ann. § 2-15-501(5), and in some instances under the direction of the Governor, Mont. Code Ann. § 2-15-201(5), (6), but no provision of law similarly subjects the County Attorney to the supervision of the County government with respect to litigation decisions. Cf. 17 Op. Att'y Gen. No. 196 (1937) ("The county attorney is primarily an officer of the state, he must prosecute in the name of the state ***and on its behalf***, and he is, in this respect, an assistant to the Attorney General and under his supervision."); 36 Op. Att'y Gen. No. 32 (1975) (same). The Attorney General has the power to direct the exercise of the county attorney's prosecutorial discretion, see

[2] Other than with respect to the attempts to collect on the judgments including the assessments, discussed below, your letter and the accompanying materials provide no information from which it could be concluded that the County, acting through its commissioners or some other non-judicial or non-prosecutorial officer, enforced any official policy with regard to the assessments. I accept the facts you provided as true, but express no opinion with respect to factual situations that differ from the one you described.

State ex rel. Fletcher v. District Court, 260 Mont. 410, 416, 859 P.2d 992, 996 (1993), but no principle of law allows the County government to establish prosecutorial policy for the prosecutor.

Local government liability under § 1983 depends on proof that the local government caused the deprivation through the adoption or enforcement of local government policy. Pembaur v. City of Cincinnati, 475 U.S. 469, 477 (1986) (plurality opinion), citing Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 691 (1978) ("Our analysis must begin with the proposition that 'Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.'"); Miller, 2003 MT 44, ¶ 21. Such proof would fail as a matter of law in this instance because the County, acting through its Board of County Commissioners, neither adopted a policy that led to the imposition of the assessments nor delegated to the Justice and County Attorney the authority to recommend or impose them.

III.

Department of Justice involved a claim for malicious prosecution. The Court held that the State could not be held liable for torts committed by a special prosecutor employed by the Attorney General. The Court reached the same holding with respect to counties in Ronek v. Gallatin County, 227 Mont. 514, 517, 740 P.2d 1115, 1117 (1987). Miller held to the contrary with respect to a claim based on § 1983, but left the holdings in Department of Justice and Ronek with respect to torts undisturbed. Moreover, Mont. Code Ann. § 2-9-112 provides:

> (1) The state and other governmental units are immune from suit for acts or omissions of the judiciary.
>
> (2) A member, officer, or agent of the judiciary is immune from suit for damages arising from the lawful discharge of an official duty associated with judicial actions of the court.
>
> (3) The judiciary includes those courts established in accordance with Article VII of The Constitution of the State of Montana.

There is therefore no governmental common law liability for the actions of the County Attorney and Justice of the Peace in the imposition of an illegal sentence.[3]

It has also been suggested that some liability may attach on the theory that the County pursued collection of the assessments later held illegal. No facts are presented to show that the County undertook to enforce judgments while the judgments were on appeal or in disregard of a stay of judgment entered by any Court, so I assume that the County at most simply attempted to collect on a facially valid provision in the criminal judgment that has never been set aside in the case in which it was imposed, for example by its being reversed on appeal, but whose validity is drawn into question by a subsequent court decision.

As I discuss below, to the extent the County retains possession of any funds collected as assessments, it may be under a duty to disgorge the funds upon submission of a valid claim. However, I am aware of no rule of law that would obligate the County to pay any additional consequential damages based on its efforts to enforce a facially valid judgment. Cf. Reisdorff v. County of Yellowstone, 1999 MT 280, ¶ 35, 296 Mont. 525, 534, 989 P.2d 850, 856, overruled on other grounds, Miller, 2003 MT 44, ¶ 26 (quasi-judicial immunity protects officers sued for enforcing facially valid court order).

[3] In Dorwart v. Caraway, 2002 MT 240, 312 Mont. 1, 58 P.3d 128, overruled in part on other grounds, Trustees of Indiana University v. Buxbaum, 2003 MT 97, ¶ 46, 315 Mont. 210, 228, 69 P.3d 663, 674, the Court held that a civil cause of action lies for actions by governmental officials who violate rights found in the Montana Constitution's Declaration of Rights. The Court's opinion suggests in dicta that qualified immunity as applied under § 1983 does not apply in a Dorwart style claim, id., ¶ 69, but that conclusion was unnecessary to the Court's holding, id., ¶ 115 (Leaphart, J., concurring). Given the Court's strong adherence to judicial and prosecutorial immunity in Department of Justice and Ronek, Justice Leaphart's concurring opinion in Dorwart emphasizing the continued existence of quasi-judicial immunity, and the Court's holding in Reisdorff v. Yellowstone County, 1999 MT 280, ¶ 35, 296 Mont. 525, 534, 989 P.2d 850, 856, overruled on other grounds, Miller, 2003 MT 44, ¶ 26 , that quasi-judicial immunity applies to state law claims, it seems likely the Court would extend such immunities in a case such as this one involving conduct that clearly fits within judicial and prosecutorial functions.

Under these authorities, it is my opinion that the County cannot be liable under common law tort theories for conduct of the County Attorney or for the imposition by the Justice Court of, or collection by the County under, a sentence later held to be illegal.

IV.

At least one other plausible theory exists under which the County could be liable for at least some of the assessments. Mont. Code Ann. § 72-33-219 provides:

> A constructive trust arises when a person holding title to property is subject to an equitable duty to convey it to another on the ground that the person holding title would be unjustly enriched if he were permitted to retain it.

Prior to the adoption of the Uniform Trust Code in 1989, Montana law required some showing of fraud or other wrongful conduct before property could be impressed with a constructive trust. It is now clear that such a showing is no longer required, and that the issue has been simplified to whether the putative trustee would be unjustly enriched if it were allowed to retain the property. In re Marriage of Moss, 1999 MT 62, ¶¶ 29-30, 293 Mont. 500, 977 P.2d 322.

The County obviously cannot be deemed a constructive trustee of property it does not possess, and there is therefore no viable claim against the County for assessments paid to local non-profits or other agencies that are not part of the County government. I express no opinion as to whether any defendant might have a claim against the organizations that were the ultimate recipients of the assessments under a theory that the trust should follow those funds into the hands of the ultimate recipient. See D. Dobbs, Law of Remedies, § 6.1(4) (2d ed. 1993).

However, the material included with your letter indicates that some of the assessments were, at least as of January 31, 2008, being held in a county account. In my view a plausible argument could be made under Mont. Code Ann. § 72-33-219 that the retention of these funds by the County would result in its unjust enrichment, and therefore that a constructive trust has arisen requiring that the funds be returned to the persons who paid the assessments.

Based on the discussion in Part I above, I believe the County would be liable only with respect to funds for which it receives a valid and timely claim. A claim based on a constructive trust is not subject to the five-year statute of limitations for a claim based on

an obligation not in writing found in Mont. Code Ann. § 27-2-202(2). Moss, ¶ 34. Beyond that the Montana Supreme Court has provided no guidance as to the applicable statute of limitations for a claim based on a constructive trust. Possible limitations periods might be the two year limitation for claims based on the detaining or injuring of goods or chattels, Mont. Code Ann. § 27-2-207(2), the two year limitation on actions based on a statutory liability, Mont. Code Ann. § 27-2-211, or the catchall five year limitation period for actions for which no other limitation is provided, Mont. Code Ann. § 27-2-217. It would be within the commissioners' discretion to apply any of these periods. I note that the attorney for the MACO insurance trust has suggested two years as the appropriate limit.

In sum, then it is my opinion (1) that the County cannot pay claims for which there is no valid legal basis, (2) that no claim lies against the County for the assessments under either 42 U.S.C. § 1983 or common law tort, and (3) a claim could conceivably lie on a theory of constructive trust with respect to funds paid as assessments that are presently held by the County. I hope you find this discussion helpful in sorting out this complex problem. This letter may not be cited as an official opinion of the Attorney General.

Sincerely,

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Chief Civil Counsel

cdt/jym