IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0418

BILLY JOE ROGERS,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Mineral County, The Honorable John W. Larson, Presiding

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STATEMENT OF THE ISSUE

Whether the district court erred when it denied Rogers's untimely petition for postconviction relief in which he argued that he should not have been convicted of failure to register as a sexual offender in 2016 based on *State v. Hinman*, 2023 MT 116, 412 Mont. 434, 530 P.3d 1271.

STATEMENT OF THE CASE

Appellant Billy J. Rogers pleaded guilty to failure to register as a sexual offender, a felony, and partner or family member assault, a misdemeanor, in 2016. (DC-2016-1 Doc. 30.) In 2024, he filed a petition for postconviction relief arguing that he should not have been convicted of failure to register based on this Court's recent case law. The district court denied the petition as untimely. (DV-24-21 Doc. 3.)[1] Rogers challenges the denial of his petition for postconviction relief on appeal.

STATEMENT OF THE FACTS

Rogers was charged in DC-2016-1 with failure to register as a sexual offender, partner or family member assault, and criminal possession of drug paraphernalia. (DC-2016-1 Doc. 30.) Pursuant to a plea agreement, he pleaded

[1] The order is attached to Rogers's brief but is not listed in his appendix.

guilty to failure to register as a sexual offender and partner or family member assault, and he received a suspended sentence. (*Id*. at 2-3.) Rogers did not appeal his convictions.

The State subsequently moved to amend Rogers's probation conditions to add a requirement that he complete sexual offender treatment, to which he agreed. (DC-2016-1 Docs. 31, 32, Ex. A at 2.) The motion was based on evidence that Rogers had sent a video of his penis to females over social media. (DC-2016-1 Doc. 31.) Rogers's sentences were revoked twice based on his repeated use of methamphetamine and his failure to participate in sexual offender treatment. (DC-2016-1 Docs. 32, 41, 43, 48, 49, 62, 65.)

On May 1, 2024, Rogers filed a petition for postconviction relief challenging his 2016 conviction for failure to register as a sexual offender. (DV-24-21 Doc. 1, available at Appellant's App. A.) He raised three claims: (1) his conviction violated the *ex post facto* clause; (2) his counsel was ineffective for failing to argue that he met the statute of limitations for his registration; and (3) the prosecutor committed misconduct by not conducting a full investigation and learning that he was not required to register. (*Id*.) Rogers attached an affidavit in which he stated that he pleaded guilty pursuant to a plea agreement without knowledge of the 1995 version of the Sexual or Violent Offender Registration Act (SVORA). (DV-24-21

Doc. 2, available at Appellant's App. B.) He asserted that he should not have been charged or convicted of failing to register. (*Id*.)

The district court denied Rogers's petition without discussing the merits of the claims because a postconviction petition must be filed within one year of the date that the conviction becomes final, and the judgment in Rogers's case had issued on November 22, 2016. (DV-24-21 Doc. 3.)

SUMMARY OF THE ARGUMENT

The district court correctly dismissed Rogers's petition for postconviction relief because he filed it more than six years after his time to file a petition for postconviction relief expired. Further, Rogers did not establish that he had a ground for relief under Mont. Code Ann. § 46-21-102(2), which allows a petitioner to obtain relief if he provides newly discovered evidence demonstrating that he did not commit the offense for which he was convicted. Rogers could not prevail under Mont. Code Ann. § 46-21-102(2) for five reasons: (1) the claims he raised are not appropriate for relief under Mont. Code Ann. § 46-21-102(2); (2) he did not present any newly discovered evidence demonstrating his innocence; (3) he did not provide any documentation or evidence to support his claims; (4) he waived his *ex post facto* claim by pleading guilty; and (5) *Hinman* does not prohibit his conviction because he was still required to register under the 2005 version of the

SVORA. Accordingly, Rogers's 2016 conviction for failure to register should be affirmed.

ARGUMENT

I. Standard of review

This Court reviews a district court's denial of a petition for postconviction relief to determine whether the court's pertinent findings of fact were clearly erroneous, whether its conclusions of law were correct, and whether any exercise of discretion was an abuse of discretion. *Henderson v. State*, 2024 MT 253, ¶ 10, __ Mont. __, 558 P.3d 749. Findings of fact are clearly erroneous only if they are not supported by substantial evidence, the court misapprehended the effect of the evidence, or this Court is firmly convinced that the court is otherwise mistaken. *Id*.

II. The district court correctly denied Rogers's untimely petition.

A. The court correctly concluded that the petition was untimely.

A person seeking postconviction relief must file a petition within one year of the date that the conviction becomes final. Mont. Code Ann. § 46-21-102(1). If a petitioner does not appeal, the conviction becomes final when the time for appeal to the Montana Supreme Court expires. Mont. Code Ann. § 46-21-102(1)(a). In criminal cases, an appeal must be taken within 60 days after the entry of the final

judgment. M. R. App. P. 4(5)(i); *State v. Garner*, 2014 MT 312, ¶ 23, 377 Mont. 173, 339 P.3d 1. The time-bar established in Mont. Code Ann. § 46-21-102 "constitutes a rigid, categorical time prescription that governs post-conviction petitions." *Davis v. State*, 2008 MT 226, ¶ 23, 334 Mont. 300, 187 P.3d 654.

The judgment in Rogers's original case was issued November 22, 2016. (DC-2016-1 Doc. 30.) He did not file a direct appeal. (*See* DC-2016-1 ROA.) Pursuant to M. R. App. P. 4(5)(i), Rogers's convictions became final 60 days later on January 21, 2017. Rogers did not file a petition until May 1, 2024. That petition was more than seven years too late. As a result, it could not be reviewed under Mont. Code Ann. § 46-21-102(1).

B. Rogers did not establish a ground to have his untimely petition reviewed under Mont. Code Ann. § 46-21-102(2).

Rogers did not cite to Mont. Code Ann. § 46-21-102(2), but his assertion that he had "newly discovered evidence" suggests that he sought to obtain relief under Mont. Code Ann. § 46-21-102(2). Although the court did not discuss Mont. Code Ann. § 46-21-102(2), it correctly denied his petition because he did not demonstrate a ground for relief under that statute.

Montana Code Annotated § 46-21-102(2) provides that

> [a] claim that alleges the existence of newly discovered evidence that, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted, may be raised in a petition filed within 1 year of the date on which the conviction becomes final or the

> date on which the petitioner discovers, or reasonably should have discovered, the existence of the evidence, whichever is later.

This Court recently clarified that Mont. Code Ann. § 46-21-102(2) narrowly applies "*only to* postconviction claims for exonerative release based on newly discovered evidence of actual substantive innocence of guilt, i.e., claims 'alleg[ing] . . . newly discovered evidence that, if proved and viewed in light of the evidence as a whole[,] would establish that the petitioner *did not engage in* the criminal conduct' at issue." *Henderson*, ¶ 50 (emphasis in original).

Although Rogers asserted that he had newly discovered evidence (Appellant's App. A at 1, 7), none of the three claims he raised was a claim of actual innocence. (*See* DV-24-21 Doc. 1.) Instead, Rogers argued that his conviction violated the prohibition on the *ex post facto* application of laws, that his counsel was ineffective, and that the prosecution committed misconduct. (*See id*.) None of those claims could be reviewed in Rogers's untimely petition for postconviction relief because Mont. Code Ann. § 46-21-102(2) applies only to a claim of innocence based on newly discovered evidence demonstrating that the defendant did not commit the criminal offense.

C. Rogers did not provide newly discovered evidence demonstrating that he did not commit the offense of failure to register as a sexual offender.

Although Rogers did not directly raise a claim that he was actually innocent, he asserted that newly discovered evidence proved that he did not commit the

offense. If this is interpreted as a claim of actual innocence that can be reviewed under Mont. Code Ann. § 46-21-102(2), it was appropriate to deny the petition because Rogers failed to provide any newly discovered evidence demonstrating his actual innocence.

To prevail under Mont. Code Ann. § 46-21-102(2), a petitioner must provide "reliable 'newly discovered evidence that, if proved and viewed in the light of the evidence as a whole[,] would' be sufficient to *affirmatively and unquestionably* 'establish that the petitioner did not engage in the criminal conduct' at issue." *Henderson*, ¶ 50 (emphasis in original; citation omitted). The statute requires new factual evidence of innocence, rather than a new legal argument.

Rogers has not provided any "newly discovered evidence" about his registration. Instead, he raises a new legal argument asserting that he was not required to register. That legal argument is not appropriate for review because it is not based on factual evidence that is newly discovered.

D. Rogers also failed to meet the pleading requirements.

In addition to the grounds raised above, it was appropriate to deny Rogers's petition because he failed to meet the pleading requirements. A petition for postconviction relief must "identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts." Mont. Code Ann. § 46-21-104(1)(c).

The petition must also "be accompanied by a supporting memorandum, including appropriate arguments and citations and discussion of authorities." Mont. Code Ann. § 46-21-104(2).

Rogers did not provide any records or evidence to support his claim. In fact, he did not even provide records pertaining to the basis for his duty to register. It is impossible based on the lack of record provided by Rogers to determine with certainty what the basis is for his duty to register in 2016. Accordingly, it would have been appropriate to dismiss his petition based on his failure to meet the pleading standards.

E. Rogers waived his *ex post facto* claim when he pleaded guilty.

Rogers's argument that he is innocent is really an argument that applying the 2016 SVORA to him violated the prohibition on the *ex post facto* application of laws. Rogers waived that legal argument by pleading guilty because a guilty plea waives all nonjurisdictional defects. *State v. Pavey*, 2010 MT 104, ¶ 11, 356 Mont. 248, 231 P.3d 1104. Rogers's waiver of his *ex post facto* claim provides an additional reason why Rogers's petition was properly dismissed.

F. *Hinman* does not establish that Rogers was not required to register in 2016.

For all of the reasons provided above, it is unnecessary to review the merits of Rogers's claim that he should not have been required to register in 2016 under

Hinman. But, if this Court reviews that claim, it should be denied because even if *Hinman* applies retroactively to Rogers's 2016 conviction, it does not establish that he was not required to register in 2016.

As noted above, Rogers failed to provide any record of his underlying conviction that was the basis for his failure to register. He asserts that he was convicted of sexual abuse of a minor under the age of 16 in Idaho in 1991, and that he was incarcerated in Idaho for that conviction until December 27, 2005. (Appellant's App. A at 2.) Assuming those facts are accurate, Rogers was correctly required to register in Montana when he resided in the state, as demonstrated below.

1. Enactment of the SVORA

Montana enacted the SVORA in 1989. 1989 Mont. Laws, ch. 293. The 1997 amendments to the SVORA made the act apply retroactively to all "sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989." 1997 Mont. Laws, ch. 375, § 18. This Court has interpreted changes to the Act to apply retroactively to offenders. *State v. Mount*, 2003 MT 275, ¶ 29, 317 Mont. 481, 78 P.3d 829. The SVORA applies to Rogers because, according to his facts, he was convicted of a sexual offense and was in custody after July 1, 1989.

2. This Court held in *Mount* that the retroactive application of the SVORA did not violate *ex post facto* principles.

The retroactive application of a civil sanction does not violate the prohibition on the *ex post facto* application of a law if the law is not punitive. *Mount*, ¶¶ 33-36; *Frazier v. Montana State Dep't of Corr.*, 277 Mont. 82, 85, 920 P.2d 93, 95 (1996) ("A civil sanction will implicate ex post facto concerns only if it can be fairly characterized as punishment."). In *Mount*, this Court concluded that the 2001 SVORA was a nonpunitive, civil regulatory scheme, so the retroactive application of the law to Mount did not violate the prohibition on *ex post facto* laws in the United States and Montana Constitutions. *Mount*, ¶¶ 38-90.

This Court's analysis in *Mount* relied heavily on *Smith v. Doe*, 538 U.S. 84 (2003), in which the Supreme Court applied the intents-effects test and held that Alaska's registration act, which was similar to Montana's, did not violate the *ex post facto* clause of the United States Constitution. *Mount*, ¶¶ 30-86. Under that test, a court looks at whether the intent of a law is punitive by analyzing the declared purpose of the law and the structure of the law. *Mount*, ¶ 42. If the intent of the law is punitive, the law is deemed punitive and cannot be applied retroactively. *Mount*, ¶ 33. If the declared purpose of the law and the structure of the law are nonpunitive, then the intent of the law is to enact a civil regulatory scheme. *Mount*, ¶ 34.

A court must then determine whether the effect of the law is punitive by applying the factors from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). The seven nonexhaustive factors include: (1) whether the law imposes an affirmative restraint or disability; (2) the historical treatment of the law; (3) a finding of scienter; (4) whether the law was traditionally aimed at punishment; (5) whether the law applies to criminal behavior; (6) whether the law has a nonpunitive purpose; and (7) the excessiveness of the law in application. *Mount*, ¶ 35 (citing *Mendoza-Martinez*, 372 U.S. at 168-69). If these factors demonstrate, in totality, that the effect of the law is nonpunitive, the law will not be held to violate the *ex post facto* clause. *Mount*, ¶ 36.

Applying that test, this Court concluded that the 2001 SVORA was not punitive. This Court examined the preamble of the SVORA, which discussed the danger of recidivism and the goal of protecting the public. Based on the language of the preamble, this Court determined that the declared purpose of the SVORA was nonpunitive. *Mount*, ¶¶ 44-45. Because the declared purpose was clearly nonpunitive, this Court concluded that the intent of the SVORA was nonpunitive. *Mount*, ¶¶ 48-49.

Examining the *Mendoza-Martinez* factors, this Court concluded that the effects of the SVORA were also nonpunitive. Because Mount was only required to register in person once and could later renew by mail, he was not restricted on

where he could live, and he could eventually petition for removal, this Court concluded that the registration requirement was an indirect restraint consistent with a regulatory scheme. *Mount*, ¶¶ 55-56. This Court concluded that the purpose of the registration and disclosure requirements was "not to shame and embarrass the registrant, but rather, to provide parents with information necessary to protect themselves and their vulnerable children and to provide law enforcement with information necessary to track a class of offenders who have a high propensity for recidivism." *Mount*, ¶ 60. This Court further explained that the registration and disclosure requirements established a regulatory scheme that had the "purpose of (1) protecting the public from the recidivism of sex offenders; (2) assisting law enforcement efforts in gathering information; and (3) preventing victimization and resolving sexual offenses." *Mount*, ¶ 74. The Court concluded that the requirements were "reasonably related to the Act's purposes[,]" and they were "tailored to disclose only necessary information." *Mount*, ¶¶ 75, 84. After balancing all of the factors in the *Smith* intents-effects test, this Court concluded that the SVORA did not violate the *ex post facto* clauses of the United States or Montana Constitutions. *Mount*, ¶ 89.

3. In *Hinman*, this Court held that the amendments to the SVORA passed in 2007 and thereafter could not be applied retroactively, but the Court did not overrule *Mount*.

Beginning in 2007, the Legislature made significant changes to the SVORA that significantly increased the burdens on and impacts to registrants. *See Hinman*, ¶¶ 10 (citing 2007 Mont. Laws, ch. 483, §§ 20-23; 2013 Mont. Laws, ch. 101, § 2; 2015 Mont. Laws, ch. 110, § 4), 18-24. This Court concluded in *Hinman* that the 2007 and subsequent amendments to the SVORA rendered it punitive. *Hinman*, ¶ 24. The Court explained that the regular in-person contact required by the amendments created a system similar to permanent probation. *Hinman*, ¶ 19. The Court further explained that the increased publication of information about offenders exacerbated the stigma created by registration. *Hinman*, ¶ 21.

This Court "conclude[d] that the SVORA structure in place since 2007 is punitive and therefore cannot apply retroactively under the *ex post facto* clause." *Hinman*, ¶ 24. The Court explained that it was holding "only that SVORA since its amendments in 2007, and thereafter, effectively functions as additional punishment for crimes." *Hinman*, ¶ 25. The Court thus "h[e]ld that the present SVORA scheme that includes the amendments from 2007 and thereafter cannot constitutionally be applied retroactively." *Hinman*, ¶ 26.

This Court declined to apply the severability clause in the 2007 SVORA to strike portions of the 2007 amendments. The Court explained that because its

analysis concerned the punitive nature of the law in totality, it could not pick and choose exactly which of the post-2007 amendments tipped the SVORA into punitive territory. *Hinman*, ¶ 26. But, significant to this case, the Court stated that it would "respect the precedent set by our conclusion about the SVORA in effect at the time of *Mount* and respect our typical practice of applying severability clauses when they apply to rescue the constitutionality of a law." *Id*.

4. Under *Hinman*, Rogers is still required to register as a sexual offender.

Under *Hinman*, the 2005 version of the SVORA is nonpunitive and still applies retroactively to offenders who committed their offense before 2005. As noted above, the 1997 version of the SVORA contained a retroactivity clause, and the Act has been interpreted to apply retroactively except where retroactive application violates the *ex post facto* clause. *Hinman*, ¶ 26; *Mount*, ¶ 29.

When Rogers committed his offense in 1991, the SVORA provided that an offender who commits an offense in another state is required to register while residing in Montana if the person committed "any violation of a law of another state or the federal government reasonably equivalent to" an offense defined as a sexual offense under Montana law. Mont. Code Ann. § 46-23-502(3)(b) (1991). A sexual assault committed against a victim who is less than 16 years old was defined as a sexual offense in 1991. Mont. Code Ann. § 46-23-502(3)(a) (1991) (including Mont. Code Ann. § 45-5-502(3), which criminalizes sexual assault

committed against a person who is under 16 years old, in the definition of a sexual offense). The SVORA was amended in 2005 to also require any person to register who was required to register in another state. Mont. Code Ann. § 46-23-502(6) (2005); 2005 Mont. Laws, ch. 313, § 1. Rogers did not provide any information about his Idaho conviction with his petition for postconviction relief, but it appears that Rogers was required to register at any time he resided in Montana because his offense was reasonably equivalent to an offense defined as a sexual offense in Montana and/or because he was required to register in Idaho.

Under the 2005 version of the SVORA, which applied to Rogers at the time of his release and continues to apply to him under *Hinman*, Rogers's Idaho conviction required him to register for the remainder of his life unless he was relieved of his duty to register. Mont. Code Ann. § 46-23-506(1) (2005). The 2005 version of the SVORA provided that a level 1 sexual offender could petition for removal from the registry after 10 years and a court could grant the petition if the offender maintained a clean record and the court determined that continued registration was not necessary for the protection of the public. Mont. Code Ann. § 46-23-506(3) (2005). The same ability to petition for removal from the registry exists in the current version of the SVORA. Mont. Code Ann. § 46-23-506(3) (2023). Although Rogers has not provided any information about his underlying cases, and therefore has not provided information about his tier designation level,

the State believes that as an out-of-state offender, Rogers would be treated as a level 1 offender unless he was given a different designation.

Although Rogers could have petitioned for removal from the registry, there is no indication that he ever did so. The record also does not demonstrate whether he would have qualified for removal from the registry had he petitioned for it before he committed new offenses in 2016. As a result, nothing in the record demonstrates that Rogers was not legally required to register as a sexual offender in 2016. And his guilty plea provides evidence that he was legally required to register as a sexual offender in 2016. Rogers has therefore failed to provide evidence that he did not commit the offense for which he was convicted, which provides an additional ground for the district court to have denied his petition for postconviction relief.

CONCLUSION

The district court's denial of Rogers's untimely petition for postconviction relief should be affirmed.

Respectfully submitted this 21st day of January, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,696 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

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CERTIFICATE OF SERVICE

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 01-21-2025:

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