

---

STATE OF MONTANA,

Plaintiff and Appellee,

v.

RICHARD DENVER HINMAN,

Defendant and Appellant.

---

**BRIEF OF APPELLANT**

---

On Appeal from the Montana Second Judicial District Court,  
Silver Bow County, the Honorable Robert J. Whelan, Presiding

---

APPEARANCES:

CHAD WRIGHT  
Appellate Defender  
KRISTINA L. NEAL  
Assistant Appellate Defender  
Office of State Public Defender  
Appellate Defender Division  
P.O. Box 200147  
Helena, MT 59620-0147  
krneal@mt.gov  
(406) 444-9505

ATTORNEYS FOR DEFENDANT  
AND APPELLANT

AUSTIN KNUDSEN  
Montana Attorney General  
TAMMY K PLUBELL  
Bureau Chief  
Appellate Services Bureau  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401

EILEEN JOYCE  
Silver Bow County Attorney  
SAM T. COX  
Deputy County Attorney  
155 Granite  
Butte, MT 59701

ATTORNEYS FOR PLAINTIFF  
AND APPELLEE

**TABLE OF CONTENTS**

TABLE OF CONTENTS .....i

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE ISSUES..... 1

STATEMENT OF THE CASE ..... 1

STATEMENT OF THE FACTS .....2

STANDARD OF REVIEW..... 5

ARGUMENT ..... 6

I. Given the punitive effect of the amended Montana SORA, retroactive application of the SORA violates the Montana Constitution..... 6

    A. SORA history and analysis by this Court. .... 6

    B. Montana’s SORA, as amended over the last decade, does have a punitive effect upon those forced to register and violates the Montana Constitution..... 9

    C. This Court should also reconsider *Mount* as the lifetime registration requirement violates Mr. Hinman’s due process rights. .... 17

II. Since Mr. Hinman has discharged his sentence and has had his civil rights fully restored, retroactive application of SORA to Mr. Hinman violates the Montana Constitution..... 19

CONCLUSION..... 20

CERTIFICATE OF COMPLIANCE..... 22

APPENDIX..... 23

## TABLE OF AUTHORITIES

### Cases

<i>Anders v. California</i> , 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967) .....	11
<i>Doe v. Dept. of Public Safety and Correctional Services</i> , 61 A. 3d 123 (Md. 2013) .....	9, 12, 18
<i>Doe v. State</i> , 111 A. 3d 1077 (N.H. 2015).....	10
<i>Doe v. State</i> , 189 P. 3d 999 (Alaska 2008) .....	10
<i>Kennedy v. Mendoza–Martinez</i> , 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963) .....	8, 11
<i>People v. Betts</i> , ---N.W.2d ---, (*9) (July 27, 2021).....	16
<i>People in Interest of T.B.</i> , 489 P. 3d 752, 768 (Colo. 2021) .....	17
<i>Powell v. Keel</i> , 860 S.E. 2d 344 (S.C. 2021) .....	17, 18
<i>Smith v. Doe</i> , 538 U.S. 84, 123 S. Ct. 1140, 155 L. ed. 2d 164 (2003) .....	passim
<i>Starkey v. Oklahoma Dept. of Corrections</i> , 305 P. 3d 1004 (Oklahoma 2013).....	11, 12
<i>State v. Hamilton</i> , 2007 MT 167, 338 Mont. 142, 164 P. 3d 884 .....	5
<i>State v. Letalien</i> , 985 A. 2d 4 (Me. 2009) .....	10, 18

<i>State v. Mount</i> , 2003 MT 275, 317 Mont. 481, 78 P. 3d 829 .....	passim
<i>State v. Price</i> , MT 264, 312 Mont. 458, 59 P. 3d 1122 .....	5
<i>State v. Williams</i> , 952 N.E. 2d 1108 (Ohio 2011) .....	10, 11
<i>Tipton v. Montana Thirteenth Judicial District Court</i> , MT 164, 392 Mont. 59, 421 P. 3d 780 .....	5
<i>Wagner v. State</i> , 2004 MT 31, 319 Mont. 413, 85 P. 3d 750 .....	19, 20
<i>Wallace v. Indiana</i> , 905 N.E. 2d 371 (Ind. 2009) .....	10

**Statutes**

Mont. Code Ann. § 45-8-313 (2021) .....	15
Mont. Code Ann. § 46-8-103(2) .....	2
Mont. Code Ann. § 46-18-801(2) .....	19
Mont. Code Ann. § 46-23-504 (2003) .....	14
Mont. Code Ann. § 46-23-504 (2017) .....	14
Mont. Code Ann. § 46-23-506(1) .....	17
Mont. Code Ann. § 46-23-506(3)(b) .....	17
Mont. Code Ann. § 46-23-508 (2003) .....	13
Mont. Code Ann. § 46-23-508 (2017) .....	13

**Montana Constitution**

Art. II, § 28 .....	19
Art. II, § 28(2) .....	19

**Other Authorities**

Catherine L. Carpenter & Amy E. Beverlin,  
*The Evolution of Unconstitutionality in Sex Offender Registration  
Laws*, 63 *Hastings L. J.*, 101, 133 (2012) ..... 7, 20

Bob Edward Vasquez,  
*The Influence of Sex Offender Registration and Notification Laws in  
the United States: A Time-Series Analysis*, 54 *Crime & Delinq.* 175  
(2008) ..... 15

Molly J. Walker Wilson,  
*The Expansion of Criminal Registries and the Illusion of Control*, 73  
*La. L. Rev.* 509, 520 (2013)..... 15, 16

## **STATEMENT OF THE ISSUES**

- I. Given the punitive effect of the amended Montana Sexual Offender Registration Act (SORA), does retroactive application of the SORA violate the Montana Constitution?
  
- II. Since Mr. Hinman has discharged his sentence and has had his civil rights fully restored, does retroactive application of SORA to Mr. Hinman violate the Montana Constitution?

## **STATEMENT OF THE CASE**

On June 5, 2019, the State charged Mr. Hinman with Failure to Register as a sexual offender. (District Court Document (DC) 3.) The State alleged Mr. Hinman is required to register based on a felony sexual assault conviction from July 7, 1994. (DC 1.) Mr. Hinman pled guilty, reserving his right to appeal the district court's denial of his motion to dismiss. (10/2/19 Transcript (Tr.) pp. 4, 6, 8, 14.) (A copy of the 10/2/19 transcript is attached as Appendix (App.) A.) On February 12, 2020, the court sentenced Mr. Hinman to the Department of

Corrections for four years, with all four years suspended. (02/12/20 Tr. p. 7.) (A copy of his Judgment is attached as App. B<sup>1</sup>.)

On July 12, 2021, the undersigned counsel filed a Motion to Withdraw, pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967) and Mont. Code Ann. §46-8-103(2). This Court unanimously denied the motion and concluded “a nonfrivolous issue exists as to whether this Court should reconsider our determination in *State v. Mount*, 2003 MT 275, 317 Mont. 481, 78 P. 3d 829.”

### **STATEMENT OF THE FACTS**

Mr. Hinman is a hard-working individual, doing the best he can to survive. He worked for years in the mines in Butte, and now suffers from severe COPD from his work in the mines and railyards. (2/12/20 Tr. p. 7.) Still, even when he struggles because of homelessness, he

---

<sup>1</sup> The written judgment incorrectly states Mr. Hinman waived his right to appeal his conviction. (App. B., p. 2.) In his plea agreement, Mr. Hinman specifically reserved his right to appeal pre-trial motions. (DC 28.) Further, during Mr. Hinman’s Change of Plea Hearing, the district court specifically noted Mr. Hinman had reserved his right to appeal pre-trial motions. (10/2/19 Tr. pp. 4, 6, 8, 14.) During the oral pronouncement of sentence, the district court reiterated its recognition that Mr. Hinman reserved his right to appeal pre-trial issues. (2/12/20 Tr. pp. 8-9.)

always tries to maintain some form of employment. (2/12/20 Tr. p. 7.)

He is also a passionate inventor and is striving to promote his invention which will aid in recycling and global warming. (2/12/20 Tr. pp. 5-6.)

The State charged Mr. Hinman with Failure to Register as a sexual offender, based on a felony sexual assault conviction from twenty-five years earlier. (2/12/20 Tr. p. 5.) Mr. Hinman had already discharged from prison, in 2000, almost twenty years before this pending charge, and had his civil rights restored. (DC 21.)

Nonetheless, when he moved residences, to assist an elderly neighbor who was very ill, and did not follow up with his new address, the State charged him with Failure to Register. (2/12/20 Tr. p. 5.) Mr. Hinman has committed no criminal offenses since 1994, except another failure to register offense. (2/12/20 Tr. p. 5.)

Mr. Hinman moved to dismiss this charge. (DC 27.) He argued 1) the sexual or violent registration act is a violation of the *ex post facto* clause of the United States and Montana Constitutions; 2) the Montana Sexual Offender Registration Act (SORA) is punitive; and 3) the lifetime registration requirement for sexual offenders is punitive and cannot be applied retroactively to him. (DC 27.)



The State did not file a written response to Mr. Hinman’s motion to dismiss. (App. A., p. 5.) Rather, before the October 2, 2019 change of plea hearing, the State argued, “The matter of res judicata sufficiently addresses this. The failure to register statute has been upheld by the Montana Supreme Court in the past.” (App. A, pp. 5-6.) Defense counsel informed the district court he would rely on his filed brief. The court issued the following oral order:

And I am going to rule. I do believe that this is res judicata under the circumstances. I believe that the Supreme Court has already made clear on these matters. And I am going to deny it.

(App. A, p. 6.) The court provided no further factual or legal analysis.

The court also issued no written order.

The matter proceeded with a change of plea hearing. (App. A, pp. 8-12.) The court ultimately followed the plea agreement when it imposed its sentence. (*See*, App. B.)

### **SUMMARY OF THE ARGUMENT**

This Court must reconsider *Mount* given the amendments to the Montana SORA since this Court decided *Mount*, the growing social data regarding the lack of efficacy as to registrar requirements, and the

national recognition that SORA statutes violate state constitutions.

The Montana SORA is punitive and violates the *ex post facto* Clause of the Montana Constitution. *Mount* should further be reconsidered since the lifetime registration requirements violate individuals fundamental due process rights. Therefore, retroactive application of the SORA to Mr. Hinman was unconstitutional and his conviction must be vacated.

### **STANDARD OF REVIEW**

The grant or denial of a motion to dismiss in a criminal case is a question of law which this Court reviews *de novo*. *State v. Hamilton*, 2007 MT 167, ¶5, 338 Mont. 142, 164 P. 3d 884 *citing Mount*, ¶15. The *ex post facto* clause of the Montana Constitution is found in the Montana Constitution Bill of Rights. *State v. Price*, 2002 MT 264, ¶24, 312 Mont. 458, 59 P. 3d 1122. Therefore, an *ex post facto* application of the law, violates an individual's fundamental constitutional rights. *Price*, ¶24. Alleged violations of the Ex Post Facto Clauses of the United States and Montana Constitutions are constitutional questions over which this Court exercises plenary review. *Tipton v. Montana Thirteenth Judicial District Court*, 2018 MT 164, ¶9, 392 Mont. 59, 421 P. 3d 780.

## ARGUMENT

### **I. Given the punitive effect of the amended Montana SORA, retroactive application of the SORA violates the Montana Constitution.**

#### **A. SORA history and analysis by this Court.**

In 1989, Montana enacted the Sexual Offender Registration Act. SORA mandates that convicted sex offenders register as sex offenders in their communities, at which time their communities are notified of the offenders' presence. *Mount*, ¶ 5. In 1997, the Legislature amended the Act to make its registration and disclosure requirements retroactive to “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.” *Mount*, ¶ 7.

In *Mount*, the defendant was convicted of sexual intercourse without consent in 1994 and discharged his sentence in 1996. *Mount*, ¶¶9, 10. He was subsequently arrested for failing to register as a sexual offender. *Mount*, ¶ 11. *Mount* moved to dismiss the charge, and the district court held SORA, as applied to *Mount*, was in violation of the constitutional prohibition against *ex post facto* laws. *Mount*, ¶ 12. On appeal, this Court relied upon *Smith v. Doe*, 538 U.S. 84, 123 S. Ct.

1140, 155 L. ed. 2d 164 (2003) and held the SORA does not violate the *ex post facto* clauses of either the United States or Montana Constitutions. *Mount*, ¶90. *Smith* addressed Alaska’s sexual offender registration act, which this Court found similar to Montana’s SORA. *Mount*, ¶ 30.

The Court in *Mount* first held the intent to SORA was nonpunitive. *Mount*, ¶ 49. However, even if a legislature intends a statute to serve a purpose other than punishment, the statute may nonetheless be deemed to impose a criminal penalty if the statutory scheme is “so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty.”

Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 Hastings L. J., 101, 133 (2012) (citation omitted). Thus, the Montana Supreme Court then analyzed the effect of the law. Ultimately, the Court determined it was nonpunitive. *Mount*, ¶¶ 50, 89.

The Court in *Mount* analyzed the following factors to determine whether the effect of the law was punitive:

(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*, ¶ 50 citing *Smith*, 123 S. Ct. at 1149 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963)). Ultimately, applying the totality of these circumstances, the Court held the effect of the act was nonpunitive. *Mount*, ¶ 89.

Justice Leaphart filed a dissenting opinion in *Mount*. *Mount* ¶¶ 103-105. He concluded “although registration statutes are constitutionally imposed punishment as applied to postenactment offenses, they offend the constitutional prohibition on *ex post facto* laws when applied to preenactment offenses.” *Mount*, ¶ 105 (Leaphart, J. dissenting citing *Smith*, 123 S. Ct. at 1157-1158 (Stevens, J. dissenting.)

**B. Montana’s SORA, as amended over the last decade, does have a punitive effect upon those forced to register and violates the Montana Constitution.**

Subsequent to *Mount* and *Smith*, numerous states have considered the issue of whether their state SORA laws violate their state constitutional prohibitions against *ex post facto* laws. Notably, after *Smith*, the Supreme Court of Alaska, notwithstanding the *Smith* decision based on federal law, held Alaska’s SORA violated the *ex post facto* clause of the state constitution. *Doe v. State*, 189 P. 3d 999 (Alaska 2008). The Court applied the same factors used by the Court in *Smith*, and found, under the Alaska’s *ex post facto* clause, Alaska’s SORA was punitive. *Doe*, 189 P. 3d at 1007. The Court concluded “ASORA’s effects are punitive, and convincingly outweigh the statute’s non-punitive purposes and effects” and thus violate the protection against *ex post facto* laws under the Alaska Constitution as applied to defendants who committed their crimes before the legislature enacted ASORA. *Doe*, 189 P. 3d at 1018-1019.

This Court, in *Mount*, relied on the *Smith* Court’s determination that Alaska’s SORA law was regulatory and not punitive in nature.

The Alaska Supreme Court's holding in *Doe* (Alaska) significantly narrows and undercuts the *Smith* decision.

Multiple other states have followed *Doe* (Alaska) and have rejected *Smith* and have held retroactive application of the states' SORA laws violated the *ex post facto* laws of their state constitutions because the effects of the SORA acts were punitive. A year after the Alaska Supreme Court decided *Doe*, the Indiana Supreme Court unanimously found that its amended SORA was unconstitutional under the state constitution as applied to the defendant, even when using the federal test. *Wallace v. Indiana*, 905 N.E. 2d 371, 378 (Ind. 2009). \

Also, in 2009, the Maine Supreme Court found that its amended state law was punitive based on both the state and federal *ex post facto* clauses. *State v. Letalien*, 985 A. 2d 4 (Me. 2009). The Maine Court distinguished the Alaska law upheld in *Smith* because Maine's law required in-person information verification, the absence of which in the Alaska law the *Smith* majority explicitly noted. *Letalien*, 985 A. 2d at 18.

In 2011, the Ohio Supreme Court granted relief based in a challenge lodged against the state's amended SORN law. *State v.*

*Williams*, 952 N.E. 2d 1108 (Ohio 2011). Applying Ohio’s constitutional ban on non-remedial retroactive laws, the court found that “all doubt has been removed” over whether the state’s law was punitive in character. *Williams*, 952 N.E. 2d at 1112.

The Maryland’s Court of Appeals, in 2012, invalidated its amended state law. *Doe v. Dept. of Public Safety and Correctional Services*, 61 A. 3d 123, 132, 143 (Md. 2013). The Court rejected *Smith* and held retroactive application of the Maryland SORA had essentially the same effect upon Petitioner’s life as placing him on probation and imposing the punishment of shaming for life, thus tantamount to imposing an additional sanction for Petitioner’s crime, and therefore, in violation of the ex post facto prohibition contained in the Maryland Declaration of Rights. *Doe (Maryland)*, 61 A. 3d at 132.

The Oklahoma Supreme Court did likewise in 2013, when it applied the *Mendoza–Martinez* factors evaluated in *Smith* and concluded the retroactive application of the SORA’s registration is punitive and outweighs its non-punitive purpose and, therefore, is inconsistent with the ex post facto clause in the Oklahoma Constitution. *Starkey v. Oklahoma Dept. of Corrections*, 305 P. 3d 1004 (Oklahoma



2013). The Oklahoma Court found the law violated the state constitution by “mov[ing] the finish line.” *Starkey*, 305 P. 3d at 1030.

In 2015, the Supreme Court of New Hampshire found that successive amendments to its law over a twenty-year period, including increasingly onerous notification requirements, made its lifetime-registration-without-review requirement punitive as applied to Tier 2 and 3 offenders. *Doe v. State*, 111 A. 3d 1077, 1101 (N.H. 2015).

Contrary to *Mount*, these cases have all held, pursuant to their state constitutions, that their state registration acts have a punitive effect. Therefore, retroactive application is unconstitutional on ex post facto grounds.

Changes in Montana’s SORA, and changes in our society, further support revisitation of *Mount* and its conclusion the SORA effect is non-punitive. For example, *Mount* argued SORA violated his fundamental privacy interests. The Court in *Mount* essentially held the collected data was disseminated in a controlled manner and contained no more information than what was otherwise disseminated by the fact of a conviction. *Mount*, ¶63. For example, in 2003, at the time *Mount* was decided, SOR allowed for the dissemination of an offender’s address,

type of victim targeted by the offense, photograph and physical description of the offender, offenses for which the offender is required to register, and court ordered conditions. Mont. Code Ann. §46-23-508 (2003). However, at the time of Mr. Hinman's conviction, the SORA had increased the information to be disseminated to also include his date of birth and an offender's license plate number and a description of any motor vehicle owned or operated by the offender. Mont. Code Ann. §46-23-508 (2017).

Further, the information compiled about an offender's private affairs has dramatically increased. When this Court decided *Mount*, during the initial registration, an offender had to provide local law enforcement with his or her address, a photograph and fingerprints. *Mount*, ¶28. At the time of Mr. Hinman's recent failure to register conviction, besides the photograph and fingerprinting, a DNA sample must gathered as well as the following personal information: the name of the offender and any aliases, the offender's social security number, the offender's residence information, the name and address of any business or other place where the offender is or will be an employee, the name and address of any school where the offender will be a student,

the offender's driver's license number, the description and license number of any motor vehicle owned and or operated by the offender, and all of the offender's e-mail addressed and social medial screen names. Mont. Code. Ann. §46-23-504 (2017). These enhanced requirements seem to go beyond general notification to the public and now incorporate law enforcement surveillance goals.

Additionally, the 2003 Montana SORA did not require the level of in-person registration, or the frequency of registration required under the updated SORA. In 2003, a level one or two designated offender merely had to fill out and return a registration verification form to the department of justice on a yearly basis. Mont. Code. Ann. §46-23-504 (2003) Conversely, at the time of Mr. Hinman's conviction, a level two offender must appear in person and be photographed on a yearly basis. Mont. Code Ann. §46-23-504 (2017). Therefore, in the last decade, the

collection and dissemination of an offender's private information and intrusion into an offender's life has morphed under Montana's SORA <sup>2</sup>.

Aside from the increased requirements individuals on the registration face, social data supports that the registration requirements are not as protective for the community as hoped. *People in Interest of T.B.*, 489 P. 3d 752, 768 (Colo. 2021) (citation omitted). Studies show that sex offenders are not more likely to recidivate than other criminals. Rather, sex offenders have a very low rate of recidivating compared to other offenders. Molly J. Walker Wilson, *The Expansion of Criminal Registries and the Illusion of Control*, 73 La. L. Rev. 509, 520 (2013) citing Bob Edward Vasquez, *The Influence of Sex Offender Registration and Notification Laws in the United States: A*

---

<sup>2</sup> For further example of the expanding punitive nature of Montana's SORA, in 2021, the legislature passed legislation which makes it a state offense for a person on the sexual or violent offender registry to possess a firearm. See, Mont. Code Ann. §45-8-313 (2021). Although it is already a federal offense for a felon to possess a firearm, proponents of the legislation argued this statute would make it easier for local law enforcement to arrest these individuals. See, March 19, 2021, Senate Judiciary hearing testimony of Matthew Saylor from the Montana Police Protective Association. Other proponents of this legislation candidly admitted, when questioned regarding the potential infringement upon an individual's privacy rights, that the Montana SORA already infringes upon the privacy rights of individuals on the registry. See, March 19, 2021, Senate Judiciary hearing testimony of Shelby DeMars from the Montana Police Protective Association (8:11:30 – 8:15:46).

*Time-Series Analysis*, 54 *Crime & Delinq.* 175 (2008). Further, the registration and notification laws make it difficult for offenders to reintegrate into society. Wilson, 73 *La. L. Rev.* at 525.

Recently the Supreme Court of Michigan chose to reconsider the retroactive application of Michigan's SORA. *People v. Betts*, ---N.W.2d ---, (\*9) (July 27, 2021). The Court explained, "although Michigan's SORA as initially enacted was similar to Alaska's sex-offender registry at issue in *Smith*, subsequent amendments have imposed additional requirements and prohibitions on registrants, warranting a fresh look at how the 2011 SORA fares under the constitutional ex post facto protections." *Betts*, \*9. In concluding the amended SORA was punitive in its effect, the Court considered that the amended SORA gathered more personal information from offenders, impacted offenders' work and residence choices, and offenders were required to report in person. *Betts*, \*11-13. The Court further recognized the growing body of research which supports that sex offender registries do not actually achieve the purported goal of decreasing recidivism. *Betts*, \*15.

Thus, given the amendments to the Montana SORA which have made the SORA more intrusive into an offender's private affairs, and

given the trend of states applying their state constitutions to find the SORA punitive, this Court should overrule *Mount* and its progeny, and hold, pursuant to the Montana Constitution, the retroactive application of the SORA is unconstitutional.

**C. This Court should also reconsider *Mount* as the lifetime registration requirement violates Mr. Hinman’s due process rights.**

This Court in *Mount*, in reaching its conclusion that the effect of the act was nonpunitive, repeatedly found it important that *Mount* could eventually petition a court for an order relieving him of the registration requirement. *Mount*, ¶¶ 56, 74, 87. Pursuant to the revised SORA, Mr. Hinman must register his entire lifetime. Mont. Code Ann. § 46-23-506(1) (2017). Since he has been designated a level two sexual offender, he cannot even petition to be relieved of the duty to register until after twenty-five years of registration. Mont. Code Ann. § 46-23-506(3)(b) (2017).

The Supreme Court of South Carolina held South Carolina’s SORA’s lifetime registration requirement, without judicial review, violates due process. *Powell v. Keel*, 860 S.E. 2d 344 (S.C. 2021). The Court concluded, although the State has a legitimate interest in

requiring sex offender registration, the lifetime registration requirement, without judicial review, violates due process because it is arbitrary and cannot be deemed rationally related to the purpose of protecting the public from those with a high risk of re-offending.

*Powell*, 860 S. E. 2d at 347-348. *See also, Letalien*, 985 A. 2d at 21 (retroactive application of the Maine SORA unconstitutional without, at a minimum, affording those offenders any opportunity to petition to be relieved of the duty); *Doe (New Hampshire)*, 111 A. 3d at 1101 (lifetime registration, without review, provision of New Hampshire's SORA makes the Act sufficiently punitive to overcome the presumption of its constitutionality.)

Although Montana's SORA is not as restrictive as South Carolina's act, for Mr. Hinman, it is just as punitive. Mr. Hinman will be sixty-one years old with no new offenses (other than failure to register) by the time he is even able to petition the court to be relieved of the duty to register. Montana's SORA, which imposes a duty to register for twenty-five years before a level two offender can even have an opportunity to petition for judicial review, is excessive and violates the due process rights of citizens such as Mr. Hinman.

**II. Since Mr. Hinman has discharged his sentence and has had his civil rights fully restored, retroactive application of SORA to Mr. Hinman violates the Montana Constitution.**

The State also violated Mr. Hinman's constitutional rights when the State forced him to register for an offense for which the State has fully restored his civil rights. Mr. Hinman fully discharged his prison sentence for his sexual assault conviction on July 14, 2000. (DC 21.) At the time of his discharge, the State fully restored his rights. Article II, Section 28(2), of the Montana Constitution provides: "Full rights are restored by termination of state supervision for any offense against the state." Additionally, Mont. Code Ann. § 46-18-801(2), provides:

[I]f a person has been deprived of a civil or constitutional right by reason of conviction for an offense and the person's sentence has expired or the person has been pardoned, the person is restored to all civil rights and full citizenship, the same as if the conviction had not occurred.

"Full rights," as provided in the Constitution, includes all civil and political rights. *Mount*, ¶95.

In *Mount*, this Court held the SORA did not deprive *Mount* of any rights under Article II, Section 28 of the Montana Constitution. *Mount*, ¶100. (See also, *Wagner v. State*, 2004 MT 31, 319 Mont. 413, 85 P. 3d 750 (sex offender registration did not violate parolee's right to full



restoration of rights under Montana Constitution). Notwithstanding this Court's ruling in *Mount*, SORA continues to punish people who have paid their debt to society by subjecting them, for the rest of their lives, to relentless government involvement and surveillance. Without question, lifetime monitoring by the State is a substantial and onerous restrictions on individual liberty. This Court should overrule *Mount* and *Wagner* and determine that the SORA, imposed on individuals who already have completed their sentences, violates the Montana Constitution's guarantee of restoration of "all civil rights and full citizenship, the same as if the conviction had not occurred."

### **CONCLUSION**

Registration burdens should not be viewed as an isolated inconvenience. Rather, they impact every aspect of an individual's life—where they live, where to work, where to travel, and with who to associate. Essentially every aspect of Mr. Hinman's life has been affected by the registration requirement. This registration information on the internet is now forever "etched in cyberspace<sup>3</sup>." The State has

---

<sup>3</sup> See, Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 *Hastings L. J.* at 125.

unconstitutionally punished Mr. Hinman, in violation of the ex post facto clause of the Montana Constitution, with its retroactive application of SORA. This Court should dismiss Mr. Hinman's failure to register conviction and issue an Order that he is no longer required to register as a sexual offender.

Respectfully submitted this 15th day of September, 2021.

OFFICE OF STATE PUBLIC DEFENDER  
APPELLATE DEFENDER DIVISION  
P.O. Box 200147  
Helena, MT 59620-0147

By: /s/ Kristina L. Neal  
KRISTINA L. NEAL  
Assistant Appellate Defender

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Century Schoolbook 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 3,986 words, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Kristina L. Neal  
KRISTINA L. NEAL

**APPENDIX**

10/2/19 Change of Plea Hearing Transcript .....App. A  
Judgment.....App. B

## **CERTIFICATE OF SERVICE**

I, Kristina L. Neal, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 09-15-2021:

Eileen Joyce (Govt Attorney)  
155 W. Granite Street  
Butte MT 59701  
Representing: State of Montana  
Service Method: eService

Austin Miles Knudsen (Govt Attorney)  
215 N. Sanders  
Helena MT 59620  
Representing: State of Montana  
Service Method: eService

Electronically signed by Kim Harrison on behalf of Kristina L. Neal  
Dated: 09-15-2021