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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1148**

Nelkis Gutierrez-Gainza, petitioner,  
Appellant,

vs.

State of Minnesota,  
Respondent.

**Filed March 12, 2012  
Affirmed  
Schellhas, Judge**

Hennepin County District Court  
File No. 27-CR-02-747

David W. Merchant, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Schellhas, Judge; and Bjorkman, Judge.

**UNPUBLISHED OPINION**

**SCHELLHAS**, Judge

Appellant challenges the district court's order denying him postconviction relief to withdraw his guilty plea, arguing that (1) the two-year time-bar for postconviction-relief

petitions filed under Minn. Stat. § 590.01 does not apply to motions to withdraw guilty pleas filed under Minn. R. Crim. P. 15.05; (2) the two-year time-bar violates the Minnesota Constitution; (3) his plea was not accurate, voluntary, and intelligent; and (4) his trial counsel provided ineffective assistance. We affirm.

## **FACTS**

On January 4, 2002, respondent State of Minnesota charged appellant Nelkis Gutierrez-Gainza with aiding and abetting first-degree controlled-substance possession of 25 grams or more of cocaine in violation of Minn. Stat. §§ 152.021, subds. 2(1), 3(a), 609.101, subd. 3, 609.05 (2000). A jury trial began on October 6, 2003. After a city chemist testified that lab results did not show that more than 10 grams of cocaine were recovered from Gutierrez-Gainza when he was arrested, the parties reopened plea negotiations. Gutierrez-Gainza pleaded guilty to fifth-degree controlled-substance possession, he did not appeal, and his conviction became final on January 12, 2004.

On June 9, 2010, Gutierrez-Gainza moved the district court to withdraw his guilty plea because he was not advised of his constitutional rights, specifically, his right to appeal, and his plea was not voluntary. On July 14, 2010, Gutierrez-Gainza submitted a letter to the district court, requesting an evidentiary hearing because his trial counsel was ineffective and he was denied due process and equal protection. The district court construed Gutierrez-Gainza's motion as a postconviction petition and referred it to the state public defender's office, which assumed representation of Gutierrez-Gainza. The court later denied the petition without an evidentiary hearing, concluding that it was untimely because it was filed after the two-year time-bar in Minn. Stat. § 590.01, subd.

4(a) (2008), and that to allow the petition would prejudice the state because Gutierrez-Gainza had been sentenced almost eight years before he sought postconviction relief. The court also concluded that Gutierrez-Gainza failed to provide sufficient evidence that a manifest injustice required the withdrawal of his guilty plea because the plea was accurate, voluntary, and intelligent, and that his trial counsel was ineffective.

This appeal follows.

## **D E C I S I O N**

### ***Gutierrez-Gainza's Postconviction Petition***

The postconviction court concluded that Gutierrez-Gainza's postconviction petition was untimely. Gutierrez-Gainza argues that the postconviction petition deadline of July 31, 2007, in Minn. Stat. § 590.01 (2008) for convictions finalized before August 1, 2005, does not apply to his request for relief because he did not file a postconviction petition but rather a motion to withdraw his guilty plea under Minn. R. Crim. P. 15.05. *See Roby v. State*, \_\_\_ N.W.2d \_\_\_, \_\_\_, 2011 WL 6783876, at \*3 (Minn. Dec. 28, 2011) ("The legislation amending [Minn. Stat. § 590.01] is effective as of August 1, 2005, and any person whose conviction became final before August 1, 2005, shall have two years after the effective date of the amendments to file a petition for postconviction relief." (quotation omitted)). Gutierrez-Gainza is mistaken.

Postconviction petitions are the exclusive remedy for reviewing convictions, unless the petition is inadequate or ineffective. Minn. Stat. § 590.01, subd. 2. Consequently, "[a] defendant who seeks to withdraw his guilty plea under Rule 15.05 after sentencing must bring the motion to withdraw in a petition for postconviction

relief.” *State v. Hughes*, 758 N.W.2d 577, 582 (Minn. 2008). “The interpretation of a procedural rule is subject to de novo review.” *Johnson v. State*, 801 N.W.2d 173, 176 (Minn. 2011). Gutierrez-Gainza concedes that the postconviction court “correctly concluded Gutierrez did not meet [the July 31, 2007] deadline,” and he does not argue that a postconviction petition is inadequate or ineffective, besides the fact that the statutory deadline bars his petition.

We conclude that the postconviction court properly heard Gutierrez-Gainza’s motion to withdraw his guilty plea as a postconviction petition.

### ***Dismissal of Gutierrez-Gainza’s Petition Without an Evidentiary Hearing***

Gutierrez-Gainza challenges the district court’s dismissal of his postconviction petition without an evidentiary hearing, arguing that (1) his petition is not time-barred; (2) his plea was not accurate, voluntary, and intelligent; and (3) he received ineffective assistance from his trial counsel. Postconviction petitions must be dismissed if they are for convictions finalized before August 1, 2005; were not filed until after July 31, 2007; and no exception in section 590.01, subdivision 4(b), applies. *Moua v. State*, 778 N.W.2d 286, 288 (Minn. 2010).

Before we determine whether an exception applies under subdivision 4(b), we must determine whether Gutierrez-Gainza invoked a subdivision 4(b) exception and, if so, whether the petition was filed “within two years of the date the claim arises” under subdivision 4(c). Minn. Stat. § 590.01, subd. 4(b)–(c); see *Roby v. State*, 787 N.W.2d 186, 191 (Minn. 2010) (“Because we hold that [appellant] invoked two of the subdivision 4(b) exceptions, [we then determine first] . . . whether [appellant’s] claims were filed

within the time limit for the exceptions under Minn. Stat. § 590.01, subd. 4(c). If the claims are not time-barred by subdivision 4(c), the second issue is whether [appellant] actually established the newly discovered evidence exception or the interests-of-justice exception.”). “When reviewing a denial of relief by a postconviction court, we review questions of law de novo” and “[o]ur review of factual findings is limited to determining whether there is sufficient evidence in the record to support the findings of the postconviction court.” *Colbert v. State*, \_\_\_ N.W.2d \_\_\_, \_\_\_, 2012 WL 204532, at \*2 (Minn. Jan. 25, 2012) (quotation omitted). We will reverse the postconviction court’s denial of postconviction relief without a hearing only if the court abused its discretion. *Chambers v. State*, 769 N.W.2d 762, 764 (Minn. 2009).

#### *Time-Bar*

Because the district court sentenced Gutierrez-Gainza on October 14, 2003, and he did not appeal, his conviction became final on January 12, 2004. *See* Minn. R. Crim. P. 28.02, subds. 2(1), 4(3)(a) (stating that an appeal of a final judgment in felony cases “must be filed within 90 days after final judgment,” which occurs “when the district court enters a judgment of conviction and imposes . . . a sentence”); *Hughes*, 758 N.W.2d at 580 (“[I]f a defendant does not file a direct appeal, his conviction is ‘final’ for retroactivity purposes when the time to file a direct appeal has expired.”). Because his conviction became final before August 1, 2005, his deadline for filing a postconviction petition was July 31, 2007. *See Roby*, 2011 WL 6783876, at \*3 (“The legislation amending [Minn. Stat. § 590.01] is effective as of August 1, 2005, and any person whose conviction became final before August 1, 2005, shall have two years after the effective

date of the amendments to file a petition for postconviction relief.” (quotation omitted)). But Gutierrez-Gainza did not file a postconviction petition until June 9, 2010. His petition therefore must be dismissed as time-barred unless an exception applies under section 590.01, subdivision 4(b).

*Invoking the Interests-of-Justice Exception in Subdivision 4(b)*

A postconviction petition “must invoke an exception.” *Rickert v. State*, 795 N.W.2d 236, 241 (Minn. 2011). But a postconviction “petition need not include specific citation to a subdivision 4(b) exception to invoke it.” *Id.* (quotation omitted). “Rather, the postconviction court should look at the statement of facts and the grounds upon which the petition is based, waive any irregularities or defects in form, and liberally construe the petition to determine whether an exception has been invoked.” *Id.* (quotations omitted). Relying on *Rickert*, the state concedes that “[Gutierrez-Gainza] adequately invoked the interests of justice exception” because, even though he “did not invoke the ‘interests of justice’ exception in his initial petition or in his letter filed July 14, 2010,” he did so “in a Supplemental Memorandum Supporting Motion to Withdraw Guilty Plea.” We agree that Gutierrez-Gainza invoked the interests-of-justice exception. *See id.* (concluding that petitioner invoked the interests-of-justice exception, even though petition did not, because petitioner invoked the exception in a motion to extend the filing deadline for his petition and “the motion and memorandum were part of the petition”).

*When the Interests-of-Justice Claim Arose*

Subdivision 4(c) requires that the petition be filed “within two years of the date the claim arises.” Minn. Stat. § 590.01, subd. 4(c). In *Bee Yang v. State*, this court held that the date the claim arises in interests-of-justice cases is “the date of an event that establishes a right to relief in the interests of justice.” 805 N.W.2d 921, 925 (Minn. App. 2011), *review granted* (Minn. Jan. 17, 2012). In *Roby*, the supreme court noted that “[f]or purposes of this case we assume, without deciding, that a claim arises when a petitioner subjectively becomes aware of the basis for the claim.” 2011 WL 6783876, at \*3 n.2, \*4, \*8 (holding that petitioner’s claims were untimely under subdivision 4(c) because he “filed his petition more than 2 years after he *learned* of these claims” (emphasis added)). And, in *Colbert*, the supreme court recently held that petitioner’s interests-of-justice claim arose more than two years before petitioner filed his petition because petitioner “knew at trial” about the basis for three of the issues in his petition and the basis of a fourth issue was “part of the trial record.” 2012 WL 204532, at \*3.

Gutierrez-Gainza argues that his petition is in the interests of justice because “it would be fundamentally unfair to deny review of claims never reviewed earlier due to counsel’s failure [to inform him of his right to appeal and to appeal].” Under *Bee Yang*, the latest date that Gutierrez-Gainza’s claim could have arisen is January 12, 2004, because that is when his conviction became final because his right to appeal expired. But even if a subdivision 4(b) claim does not arise until a petitioner “subjectively becomes aware of the basis for the claim,” *see Roby*, 2011 WL 6783876, at \*3 n.2, Gutierrez-Gainza’s claim arose no later than January 12, 2004, the date on which his conviction

became final, because the record reveals that Gutierrez-Gainza knew that he had a right to appeal before he signed his plea petition, which reads: “My attorney has told me and I understand that if my plea of guilty is accepted by the judge, I have the right to appeal . . . .” During the plea hearing, Gutierrez-Gainza affirmed that he reviewed the petition with his attorney and that an interpreter read it to him verbatim. And, before receiving Gutierrez-Gainza’s guilty plea, the postconviction judge informed Gutierrez-Gainza that he “would certainly have appeal rights if [he] were convicted.”

We conclude that Gutierrez-Gainza’s petition is time-barred under subdivision 4(c), and we need not address whether the subdivision 4(b) interests-of-justice exception applies. *See Colbert*, 2012 WL 204532, at \*3 n.2 (“Because we hold that review of [appellant’s] petition is barred by subdivision 4(c), we do not decide the merits of [appellant’s] argument that his petition is ‘not frivolous and in the interests of justice.’”).

### ***Constitutionality of the Time-Bar***

Gutierrez-Gainza argues that his “motion is not time barred because the Minnesota Constitution guaranteed him one right to review of his conviction.”<sup>1</sup> But “[a] review by an appellate court of the final judgment in a criminal case, however grave the offense of

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<sup>1</sup> Gutierrez-Gainza failed to raise any arguments regarding the constitutionality of section 590.01 in his initial brief, raising them only in his reply brief, which typically results in waiver of an argument. *See State v. Yang*, 774 N.W.2d 539, 558 (Minn. 2009) (stating that issues raised “for the first time in [an appellant’s reply brief in a criminal appeal],” having not been raised in the state’s brief, are “not proper subject matter for [the] appellant’s reply brief,” and they may be deemed “waived” and be “stricken” by an appellate court). But the state argued in its brief that the two-year time-bar is constitutional because Gutierrez-Gainza does not have a constitutional right to appellate review. Gutierrez-Gainza avoided waiver of this argument by raising it in his reply brief in response to the state.

which the accused is convicted . . . is not . . . a necessary element of due process of law.”  
*Larson v. State*, 801 N.W.2d 222, 226 (Minn. App. 2011), *review granted* (Minn. Oct. 18, 2011) (quotation omitted).

Because a convicted defendant does not have a constitutional right to appeal under either the United States or the Minnesota Constitution, Minnesota’s two-year time limitation to petition for postconviction relief is not unconstitutional, even if it precludes criminal defendants from raising constitutional-violation claims that have not been reviewed on direct appeal or in a postconviction proceeding.

*Id.* at 229. We therefore conclude that Gutierrez-Gainza’s constitutional argument has no merit.

***Merits of Gutierrez-Gainza’s Motion to Withdraw his Guilty Plea***

Gutierrez-Gainza argues that his plea was not accurate, voluntary, and intelligent and that his trial counsel provided ineffective assistance. But his postconviction petition is time-barred because he did not file it until after the July 31, 2007 deadline and his interests-of-justice claim arose no later than January 12, 2004. We therefore will not consider the merits of Gutierrez-Gainza’s petition. *See Johnson*, 801 N.W.2d at 177 (concluding “[appellant’s] petition . . . should not be considered on the merits” because “his claims do not satisfy any of the statutory exceptions to the time bar provided in Minn. Stat. § 590.01, subd. 4(b)”).

**Affirmed.**