ORIGINAL

VERNON KILLS ON TOP
DOC ID# 27177
Montana State Prison
400 Conley Lake Drive
Deer Lodge, MT 59722
In Propria Persona

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 18-0656

VERNON KILLS ON TOP Petitioner, v. WARDEN MICHAEL FLETCHER Respondent.	**PETITION FOR A WRIT OF HABEAS CORPUS**

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TO THIS HONORABLE COURT:

I, VERNON KILLS ON TOP, am representing myself, and I believe that I am entitled to a Writ of Habeas Corpus under §46-22-101, MCA, for the following reason: My sentence is illegal because my sentence violates my right to be free from double jeopardy.

I. JURISDICTION

This petition is properly presented to this Court pursuant to its original habeas corpus jurisdiction under Article VII, Section 2 of the Montana Constitution.

"Every person imprisoned or otherwise restrained of liberty within this state may prosecute a writ of habeas corpus to inquire into the cause of imprisonment or restraint, and if illegal, to be delivered from the imprisonment or restraint." 46–22–101, MCA.

II. PROCEDURAL HISTORY

A. Montana State Court Proceedings

On August 6, 1988, I was convicted of deliberate homicide, aggravated kidnapping, and robbery in violation of 45-5-102(1)(b), MCA, 45-5-303(1)(b), MCA, and 45-5-401(1)(a), MCA. *State v. Kills On Top,* 243 Mont. 56, 65 (1990) (*Kills On Top I*). On September 8, 1988, I was sentenced to death. *Id.* This Court

upheld the convictions and sentence on direct appeal. *Id.*

On February 19, 1992, I sought post-conviction relief under 46–21–101, MCA. *Kills On Top v. State*, 279 Mont. 384, 387 (1996) (*Kills On Top II*). On February 10, 1994, the district court dismissed the petition. *Id.* at 390. I appealed to this Court. *Id.*

On November 25, 1996, this Court reversed the district court's denial of the petition. *Id.* at 419. This Court vacated my death sentence:

> because Vernon Kills on Top was not present when John Etchemendy was killed, did not inflict the injuries which caused his death, and because there was no reliable evidence that he intended his death—but instead evidence that he sought to avoid it. [Thus,] the imposition of his death sentence was disproportionate to his actual conduct, cannot withstand individualized scrutiny, and must be set aside.

Id. at 423–24. This Court remanded the case to the district court for a hearing on the remaining guilt phase claims, a determination as to whether a guilt phase retrial was needed, and to hold a re-sentencing hearing if habeas relief was denied. *Id.* at 425.

On August 13, 1998, the district court dismissed my remaining claims and denied the petition. *Kills On Top v. State*, 303 Mont. 164, 168 (2000) (*Kills On Top III*).

On November 10, 1998, the district court held the re-sentencing hearing.

Montana v. Kills on Top, Custer County Criminal Cause No. 3221. At the conclusion of the hearing, the district court sentenced me to consecutive terms of forty years for robbery, life imprisonment for deliberate homicide, and life imprisonment without the possibility of parole for aggravated kidnapping. *Id.* The district court designated me a dangerous offender. *Id.*

On December 19, 2000, this Court affirmed my sentence. *Kills On Top III*, 303 Mont. at 190.

B. Montana Sentence Review Proceedings

In February 2012, I filed an application for review of my sentence with the Montana Sentence Review Division ("Division"). *Montana v. Kills on Top*, Sentence Review Division Cause No. 3221. On November 19, 2012, after hearing the application, the Division denied sentence review. *Id.* On February 26, 2013, the Division denied my application for rehearing. *Id.*

On July 29, 2013, I filed a petition for writ of supervisory control with this Court with respect to the Division's decision. *Kills On Top v. Sentence Review Division*, 373 Mont. 440 (2013). On October 22, 2013, this Court denied the petition for writ of supervisory control. *Id.* On November 26, 2013, the petition for rehearing was denied. *Id.*

III. FACTS OF THE CRIME

This Court in *Kills on Top II* described the facts of the crime as follows:

> On October 17, 1987, Vernon and Lester Kills On Top, Doretta Four Bear, and Diane Bull Coming were drinking at the Golden West Lounge in Miles City, Montana. After they left the bar, had gotten in their vehicle, and were about to leave, they were approached by John Martin Etchemendy, Jr., who stated that he had misplaced his vehicle and asked them for their help finding it. They agreed to help him and he got in the back seat of their vehicle.
>
> After a brief effort to locate Etchemendy's vehicle, Diane spoke to the Kills On Top brothers in the language of the Northern Cheyenne and Vernon, who was driving, reversed directions and headed out of town. When he asked where they were going, Etchemendy was told by Diane that they were headed to Broadus. According to Doretta, Etchemendy originally agreed, but subsequently changed his mind after being assaulted by Lester and Vernon.
>
> According to Doretta, several altercations occurred involving Lester, Vernon, and Etchemendy between Miles City and Broadus. During one fight involving Lester and Etchemendy in the back seat of the vehicle, Diane removed Etchemendy's wallet from his pocket. At that time, Lester was holding him and Vernon was driving the vehicle.
>
> Although Doretta testified that Vernon participated in beating Etchemendy during the trip, including the first altercation, she stated in her first written statement immediately following the incident that only Lester had initially fought with "the white guy." She testified at trial that at some point during the trip Etchemendy was told by Vernon to take his clothes off and, by someone she could not identify, to get in the trunk. However, prior to trial in her written statement she stated that it was Lester who told the victim to take his clothes off and get in the trunk.
>
> Doretta also told Vernon's attorney, in the presence of her attorney

and the Deputy County Attorney, that she did not actually see Vernon hit or strike Etchemendy and that during the second scuffle outside the vehicle after leaving Miles City she saw Vernon standing there while Etchemendy wrestled on the ground with Lester.

After Etchemendy entered the trunk, Doretta never saw him again. When the group arrived in Rabbit Town on the Northern Cheyenne Reservation, Doretta left the group and knew nothing more about what occurred later that day or the next day.

Flora Parker was a friend of Doretta. She testified that Doretta arrived at her house early in the morning on October 17 after she left the Kills On Top brothers and Diane Bull Coming. She related what Doretta told her at that time. Doretta's statements at that time apparently placed most responsibility for kidnapping and beating Etchemendy on Lester and Diane and attributed little culpability to Vernon.

While in Ashland, the group picked up LaVonne Quiroz. She testified that when they left Ashland she was driving; Vernon was in the front seat, and they were returning to Miles City until Lester awoke and told them to turn around and proceed in the other direction. She first learned that there was someone in the trunk after they had arrived in Broadus and Etchemendy informed them that he had to go to the bathroom. She stated that he was allowed to do so outside of Biddle and described several other stops between Broadus and Gillette. During these stops she described Lester and Diane as the principal actors and Vernon as a passive participant. She also indicated that Lester and Diane were principally responsible for cashing Etchemendy's checks on the way to Gillette and that some of the money they received was distributed to her and Vernon.

LaVonne testified that after they had arrived in Gillette, while Etchemendy was still in the trunk of their vehicle, Lester took the keys from her and left with Diane. Vernon was surprised and angry that they had left. She and Vernon were later called by Diane and told to meet them at another location in Gillette. However, when they did meet them it was apparent that Etchemendy was dead.

Before Lester and Diane left with the vehicle, Etchemendy was alive and sufficiently active that he was creating a disturbance in front of the bar where the group had stopped to drink. They were sufficiently concerned about the disturbance that LaVonne moved the vehicle around to the alley behind the building.

LaVonne testified that at no time during the entire trip did Vernon express any interest in hurting the victim and that at one point while in Gillette Lester had agreed with Vernon to take Etchemendy back to Miles City, but that at that point Diane got mad at both of them. LaVonne testified that it was originally Diane's idea to treat Etchemendy as a hostage and that when the brothers discussed returning him to Miles City, she stated: "Let's use him for all he's got."

LaVonne testified that Vernon was not present when Etchemendy was killed and had no idea that it was going to happen.

Lester Kills On Top also testified at his brother's trial. He stated that it was he, not Vernon, who fought with Etchemendy between Miles City and Ashland, that it was Diane who ordered Etchemendy into the trunk, and that it was Diane's idea to kill the victim. He testified that Vernon had never expressed any interest in hurting Etchemendy while in Gillette and had no knowledge of what he and Diane planned to do when they left the Lobby Bar with Etchemendy in the trunk of the vehicle.

Prior to testifying in this case, Diane Bull Coming, who by all other accounts was the principal actor, entered into a plea agreement with the State pursuant to which she pled guilty to the offense of robbery and the State agreed to recommend a maximum penalty of forty years. As part of the plea agreement, she agreed to testify in the two Kills On Top trials.

At the time she entered into the seven or eight page plea bargain agreement, she had been charged with robbery and aggravated kidnapping and she knew the possible penalty was death or a life sentence. Pursuant to the plea agreement, she was classified a

nondangerous offender for purposes of parole, which meant that she was eligible for parole in eight years. She had also been advised that with good time she may serve less than that.

Another part of the plea agreement provided that if she changed her testimony from what she had indicated it would be prior to entering into the plea agreement, the agreement would be revoked and the prior charges reinstated.

Diane's description of the chronology of events was generally consistent with what has already been described, except that she minimized her own culpability and placed greater blame for harm to the victim on the Kills On Top brothers. Diane was also the only witness who was present at the time when Etchemendy was killed and described how his life was ended.

Several of the facts related by Diane were relied on by this Court in its prior opinion. For example, she stated that it was Vernon, not her, who went through Etchemendy's wallet in search of credit cards and money; that Vernon participated in at least one of Etchemendy's beatings and in another altercation with Etchemendy on the way to Ashland; and that Vernon agreed with Lester at some point when Lester exclaimed that because Etchemendy could identify them, "we're going to have to kill him."

However, Diane's testimony was riddled with inconsistencies. She also testified that it was Lester, not Vernon, who forced Etchemendy into the trunk of the vehicle; she testified that Vernon, on occasion, inquired of Etchemendy about his well-being; and that when Etchemendy's checks were forged and used to purchase drinks and groceries, Vernon remained in the vehicle.

Most significantly, Diane testified that when Lester told Vernon, while in the bar in Gillette, that they had to get rid of Etchemendy, Vernon asked him to wait. She testified that when Lester brought it up again, Vernon again asked him to wait but that Lester accused him of stalling and demanded the keys to the vehicle. She testified that when Vernon produced the keys she and Lester left the bar,

headed to a rural gravel road, and at that location Lester severely beat the victim and caused the injuries which ultimately led to his death. However, when they returned to Gillette Etchemendy was apparently still alive. It was at that point that Diane, according to her testimony, called Vernon and requested that he rejoin them. He asked whether Etchemendy was still alive and was told that he was. Only after getting off the phone was she advised by Lester that Etchemendy was now dead.

According to Diane she passed out a short time later and the next thing she remembers was when she awoke and was in the vehicle on the interstate highway heading back to Montana.

Based on even Diane's testimony, Vernon Kills On Top was not present when Etchemendy was killed, and he did not participate in any act which caused Etchemendy's death. While she did testify that on two separate occasions he agreed that something would have to be done with the victim, she also testified that he sought to postpone any further harm to the victim and that after his expression of reluctance, she and Lester took the victim to another location where Lester performed the murderous act himself.

Even that part of Diane's testimony which suggested Vernon's acquiescence in Etchemendy's murder is questionable in light of her affidavit filed in this proceeding in which she states:

In regard to the time when the victim's blindfold was removed, Lester was hollering at everyone and Lester was giving everybody orders. When Vern took the blindfold off the victim, Lester got mad and said now he knows what we look like so we have to kill him.

Vern grunted and I, at the time, interpreted this as agreement. In response to a question by Mr. Ranney, I agree that it is possible that my interpretation could have been wrong.

On cross-examination, Diane stated that at no time while Etchemendy was in the trunk of the group's vehicle did Vernon ever strike him, injure him, or take anything of monetary value from him.

> She agreed that he never initiated talk of murder other than in response to Lester and then he said "later." She stated that during conversations with Lester after Etchemendy's death, Lester took credit for the beatings and the killing of Etchemendy.

Kills on Top II, 279 Mont. at 402–406.

This Court concluded: "From this Court's thorough review of the record in this case, it is undisputed that Vernon Kills On Top was not present at and did not participate in the infliction of injuries which caused the death of John Martin Etchemendy, Jr. Furthermore, any evidence that Vernon had any intent to kill Etchemendy is at best equivocal and unpersuasive. The only credible evidence is to the contrary." *Id.* at 406.

IV. ARGUMENT

A. My Dual Convictions and Sentences for Both Aggravated Kidnapping and Deliberate Homicide under a Felony-Murder Theory Violate Statutory and Constitutional Double Jeopardy Provisions.

I was convicted of deliberate homicide under the felony-murder rule in 45-5-102(1)(b), MCA. *Kills on Top III*, 303 Mont. at 171. The jury found the underlying felony to be aggravated kidnapping. *Kills On Top I*, 243 Mont. at 74. I was also convicted of the stand-alone offense of aggravated kidnapping under 45-5-303(1)(b), MCA. *Id.*

I was sentenced to consecutive sentences of life without parole for the

aggravated kidnapping and life with the possibility of parole for the deliberate homicide. *Kills on Top III*, 303 Mont. at 168.

The same evidence was used to prove both the stand-alone aggravated kidnapping and the predicate felony of aggravated kidnapping as to the deliberate homicide. The assault and killing took place on a continuous basis, involved the same victim, and were part of the same transaction. *See Kills on Top II*, 279 Mont. at 402–406 (summarizing evidence). As such, my joint convictions and sentences for both aggravated kidnapping and deliberate homicide predicated on the same aggravated kidnapping violated my protections against double jeopardy.

1. Montana Statutory Double Jeopardy Right

Under Montana law, a defendant cannot be convicted of more than one offense in the same transaction if "one offense is included in the other." 46–11–410, MCA. An included offense can mean that the offense is "established by proof of the same or less than all the facts required to establish the commission of the offense charged." 46–1–202(9), MCA.

In *State v. Russell*, this Court reversed the defendant's conviction for aggravated assault because the defendant was also charged with deliberate homicide based on a felony-murder theory with aggravated assault as the underlying felony. *State v. Russell*, 347 Mont. 301, 307 (2008); *see also*

45–5–102(1)(b), MCA (felony-murder statute).

At Russell's trial, the same evidence was used to prove both the aggravated assault charge and the predicate felony as to the felony-homicide charge, and "[t]he [trial] court defined the felony homicide charge to include aggravated assault in its instructions to the jury." *Id.* at 305. As a result, aggravated assault was "an included offense, as well as an element of the felony homicide itself." *Id.* at 306.

The assault and homicide in *Russell* took place on the same night with the same group of boys, although the victim of the assault and the victim of the homicide were two different people. *Russell*, 347 Mont. at 303–304. Ultimately, this Court found that the assault and killing were a part of the same transaction. *Id.* at 306. Thus, this Court held that the defendant's conviction for felony homicide precluded a simultaneous conviction for aggravated assault: "[W]hen the State uses an offense (such as kidnapping . . .) as a predicate offense in its charge of felony homicide, the accused cannot be found guilty of felony homicide without having committed the predicate offense of kidnapping . . . . When the State chooses to charge the offenses in that fashion, the offenses merge." *Id.*

The facts in my case parallel the facts in *Russell.* I was convicted of felony murder, predicated upon an offense for which I received a second, distinct

conviction and sentence. As in *Russell*, the court at my trial defined deliberate homicide to include aggravated kidnapping in its jury instructions. RT 1573. And the same evidence was used to prove both the free-standing aggravated kidnapping and the predicate-felony aggravated kidnapping underlying my conviction for deliberate homicide. Under *Russell*, my joint convictions and sentences for aggravated kidnapping and for deliberate homicide are improper.

2. Montana Constitutional Double Jeopardy Right

Article II, Section 25 of the Montana Constitution states that "[n]o person shall be again put in jeopardy for the same offense previously tried in any jurisdiction." This clause "prohibits the legislature from imposing on criminal defendants multiple punishments for the same offense." *State v. Guillaume*, 293 Mont. 224, 233 (1999). The Montana Constitution "affords greater protection against multiple punishments for the same offense than does the Fifth Amendment to the United States Constitution. *Id.* at 230-31. Thus, because the Fifth Amendment protects against multiple punishments for the same offense, "the double jeopardy clause of the Montana Constitution provides at least the same protection." *Id.* at 232.

In *Guillaume*, this Court held that application of a weapon enhancement statute to felony convictions, for which the underlying offense requires proof of

use of a weapon, violates the double-jeopardy provision in the Montana Constitution. *Guillaume*, 293 Mont. at 231. The Court was "guided by the fundamental principle embodied in double jeopardy" that "double jeopardy exemplifies the legal and moral concept that no person should suffer twice for a single act." *Id.* Because the defendant was being punished twice for his use of a weapon in the assault, the Court reversed the lower court's sentencing order and remanded for rehearing and re-sentencing. *Id.* at 233.

My convictions violate the double jeopardy provisions of the Montana Constitution as interpreted in *Guillaume*. My conviction and sentence for deliberate homicide is explicitly predicated on the jury's finding that I committed aggravated kidnapping. *State v. Weinberger*, 206 Mont. 110, 114 (1983) (defining felony-murder as "deliberate homicide which is committed while the offender is engaged in the commission of an enumerated felony") ("if the proof of the commission of the underlying felony fails, the purported offender is not guilty of felony murder."). As such, my additional conviction and sentence of life without the possibility of parole based on the same aggravating kidnapping effectively causes me to "suffer twice for a single act" as contemplated in *Guillaume*.

In sum, my dual convictions and sentences for both aggravated kidnapping and deliberate homicide violate the double jeopardy provision of the Montana

Constitution.

3. United States Constitutional Double Jeopardy Right

The federal Double Jeopardy Clause set forth in the Fifth Amendment to the United States Constitution—which applies to the states through the Fourteenth Amendment—precludes my consecutive sentences for aggravated kidnapping and deliberate homicide.

The United States Supreme Court has held that "a defendant's conviction for felony murder based on a killing in the course of an armed robbery barred a subsequent prosecution against the same defendant for the robbery." *Illinois v. Vitale*, 447 U.S. 410, 420 (1980) (citing *Harris v. Oklahoma*, 433 U.S. 682 (1977)). Although my case is not a subsequent prosecution case, the Supreme Court has also held that it is a violation of double jeopardy for the courts to impose "consecutive sentences" for the same offense unless explicitly authorized to do so by the legislature. *See Whalen v. United States*, 445 U.S. 684, 689 (1980).

Here, the legislature has not authorized multiple punishment. To the contrary, the legislature has prohibited multiple convictions and punishment where "one offense is included in the other." 46-11-410, MCA. Thus, under *Vitale* and *Whalen*, because my conviction for deliberate homicide requires a finding that I

also committed aggravated kidnapping, the Fifth Amendment prohibits the State from further convicting and sentencing me for the underlying aggravated kidnapping.

B. Habeas Corpus Review Is Available to Analyze the Double Jeopardy Violations in My Sentence Because The Sentence Is Facially Invalid.

Article II, Section 19 of the Montana State Constitution states that "[t]he privilege of the writ of habeas corpus shall never be suspended." While 46–22–101(2), MCA normally bars relief from a sentence for a person who has exhausted the remedy of appeal, this Court has held that this provision does not apply to a facially invalid sentence because to do so would unconstitutionally suspend the writ and result in a "grievous wrong and a miscarriage of justice." *Lott v. State*, 334 Mont. 270, 279 (2006). Thus, an individual like myself, who is incarcerated pursuant to a facially invalid sentence, has the ability to challenge its legality. *Id.*; *accord Gratzer v. Mahoney*, 334 Mont. 297, 298–299 (2006) ("Since Gratzer's challenges draw into question the facial validity of his sentence, we conclude that the procedural bar to his habeas corpus petition is not applicable, and we address the merits of his claims.").

A sentence that violates the constitutional right to be free from double jeopardy is considered facially invalid and can be challenged regardless of the

procedural bar contained in 46–22–101(2), MCA. *Lott*, 334 Mont. at 279 This exception to the procedural bar applies when a petitioner merely draws into question the facial validity of his sentence, even if a petitioner is ultimately unsuccessful on the merits. *See Gratzer*, 334 Mont. at 298–299.

The writ of habeas corpus is designed to correct flaws in the pursuit of justice and "to remedy extreme malfunctions in the state criminal justice systems." *Lott*, 334 Mont. at 278 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 (1979) (Stevens, J., concurring)). I am incarcerated pursuant to a facially invalid conviction and sentence that violates my right to be free from double jeopardy; thus, habeas corpus relief is warranted.

V. CONCLUSION

The Fifth Amendment to the U.S. Constitution, Article II, Section 25 of the Montana Constitution, and 46–11–410, MCA prohibit my conviction and sentence for aggravated kidnapping in light of my conviction and sentence for deliberate homicide predicated on the same aggravated kidnapping. "When a criminal defendant is improperly convicted of two offenses arising out of the same transaction, the remedy for the ensuing violation of double jeopardy is to reverse the conviction for the lesser-included offense only and to remand for re-sentencing." *State v. Becker,* 326 Mont. 364, 372 (2005).

Accordingly, as relief, I request the following:

Reduction of my sentence to life with the possibility of parole or that this Court remand this cause to the district court directing the court to re-sentence me to a lesser sentence.

DATED: November 5, 2018

Respectfully Submitted,

Vernon Kills on Top

VERNON KILLS ON TOP

VERIFICATION

STATE OF MONTANA)
) ss.
County of Powell)

I believe I am being incarcerated illegally. I certify that the contents of this petition are true and accurate to the best of my knowledge.

Dated this 5 day November, 2018.

Vernon Kills on Top
VERNON KILLS ON TOP