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IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 18-0656

VERNON KILLS ON TOP,

Petitioner,

v.

WARDEN LYNN GUYER,

Respondent.

ATTORNEY GENERAL'S RESPONSE TO PETITION FOR A WRIT OF HABEAS CORPUS

In compliance with this Court's November 26, 2018 Order, the Attorney General's Office responds to the Petition for Writ of Habeas Corpus (Petition) filed by Vernon Kills On Top (Petitioner), challenging his sentence in the Sixteenth Judicial District Court.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

I. State proceedings

A. Direct appeal from conviction and original sentence

Petitioner and his brother, Lester Kills On Top (Lester), were charged with three felonies after they kidnapped John Martin Etchemendy, Jr., in Miles City, Montana, beat him repeatedly, stole his money, pay checks, and credit cards, locked him in a trunk, and left him for dead outside an abandoned building in Wyoming.[1] *State v. Vernon Kills On Top,* 243 Mont. 56, 66-71, 793 P.2d 1273, 1280-83 (1990), *cert. denied* 501 U.S. 1259 (1991) (hereinafter, *Kills On Top I*) and *State v. Lester Kills On Top*, 241 Mont. 378, 787 P.2d 336 (1990) (hereinafter *Lester I*). The brothers were charged with robbery, aggravated kidnapping, and deliberate homicide pursuant to § 45-5-102(1)(b) (1987), MCA (*i.e.,* "felony murder rule"). *Id*. Petitioner and Lester were convicted of the three offenses in separate trials. Petitioner was sentenced to 40 years at the Montana State Prison (MSP) for robbery and given the death penalty for both aggravated kidnapping and deliberate homicide/felony murder. *Kills On Top I*, 243 Mont. at 65, 793 P.2d at 1279.

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[1] The facts describing the robbery, kidnapping, and brutal killing of Mr. Etchemendy have been set forth by this Court in multiple opinions (all cited herein). The State relies upon this Court's recitation of relevant facts and will not, therefore, repeat them in this response.

Both brothers appealed their convictions and sentences. *Kills On Top I, supra; Lester I, supra*. Lester asserted 9 claims of error and Petitioner asserted 15 claims of error. *Id*. Neither brother offered any argument that his sentence violated constitutional double jeopardy or Montana's double jeopardy statute, § 46-11-502 (1987), MCA. *Id*. Petitioner did challenge the district court's refusal to give lesser included jury instructions for all 3 offenses, including not giving an instruction for assault as a lesser included offense to deliberate homicide. *Kills On Top I*, 243 Mont. at 61, 793 P.2d at 1297. In rejecting this argument, this Court stated that "the underlying felony in a deliberate homicide pursuant to sec. 45-5-102(1)(b), MCA, is not a lesser included offense of felony murder." *Id*. (citing *State v. Close*, 191 Mont. 229, 245-49, 623 P.2d 940, 949-51 (1981)). This Court also affirmed imposition of the death penalty on the two counts. *Id*.

B. Postconviction

Petitioner initiated postconviction proceedings in 1992. *Vernon Kills On Top v. State*, 279 Mont. 384, 387, 928 P.2d 182, 184 (1996) (hereinafter, *Kills On Top II*). Petitioner initially asserted 15 claims and later sought to amend his petition to add ineffective assistance of counsel (IAC) claims, including a claim that his trial counsel failed to sufficiently argue the court's duty to instruct the jury on lesser included offenses. *Id*. Petitioner did not assert any double jeopardy claim (constitutional or statutory) related to his sentence for both aggravated

kidnapping and felony murder. *Id*. The district court denied Petitioner's request to amend his petition and dismissed all but one of the claims on summary judgment. *Id*. Following an evidentiary hearing the court denied Petitioner's final claim. *Id.*

This Court affirmed the lower court's denial of relief under the IAC allegation related to the lesser-included jury instruction. *Kills On Top II*, 279 Mont. at 399-401, 928 P.2d at 191-92 (doctrine of *res judicata* barred revisiting that claim). However, this Court concluded the district court erred by denying Petitioner's request to amend his petition, so the matter was remanded for an evidentiary hearing on two specific IAC claims (alleged conflict of interest and failure to investigate). *Kills On Top II*, 279 Mont. at 393-401, 928 P.2d at 187-93. This Court further ordered the district court to resentence Petitioner to any other penalty allowed under §§ 45-5-102(2) and -303(2), MCA, after reversing its previous conclusion that sufficient evidence supported imposition of the death penalty. *Kills On Top II*, 279 Mont. at 401-24, 928 P.2d at 193-207.

C. Resentencing and second postconviction appeal

Following the evidentiary hearing on remand, the district court denied Petitioner's remaining postconviction claims. *Vernon Kills On Top v. State*, 2000 MT 340, ¶ 12, 303 Mont. 164, 15 P.3d 422 (hereinafter, *Kills On Top III*). Next, and after denying the defense motions to change venue and exclude victim impact testimony, the district court conducted a resentencing hearing on

November 10, 1998. *Id.* The court sentenced Petitioner to the following consecutive sentences: 40 years at MSP for robbery; life imprisonment for deliberate homicide/felony murder; and life imprisonment for aggravated kidnapping with no eligibility for parole. *Kills On Top III*, ¶¶ 64, 69, 71. The court designated Petitioner as a dangerous offender for parole eligibility purposes after finding that he "represents a substantial danger to other persons or society by reason of his participation in this brutal criminal episode." *Id.*

In support of its order that Petitioner was not eligible for parole with respect to the aggravated kidnapping conviction, the court observed that Petitioner's "conduct in connection with such crime was an integral part of the events leading to the victim's death and because [he] had the opportunity to take action to terminate the kidnapping and thereby prevent the victim's brutal and needless death." *Kills On Top III*, ¶ 69 (quoting judgment and sentence). Petitioner appealed.

In December 2000, this Court rejected Petitioner's challenges to the order dismissing his postconviction petition and the resentencing hearing. *Kills On Top III*, *supra*. This Court affirmed the consecutive sentences imposed and rejected Petitioner's argument that the sentences "violated the principles of inter and intra case proportionality." *Id*., ¶ 73. This Court specifically affirmed the sentencing court's order designating Petitioner as a dangerous offender and denying Petitioner

parole eligibility for the aggravated kidnapping conviction. *Id*., ¶¶ 69-72. In affirming the district court's order this Court held:

> [T]he factual basis for the court's reason is not clearly erroneous. Petitioner's conduct in connection with the kidnaping was an integral part of the events leading up to the Etchemendy's death and he did have the opportunity to take action to terminate the kidnaping and prevent Etchemendy's death. As the [d]istrict [c]ourt noted in its findings of fact, Petitioner drove the car in which Etchemendy was held from Miles City, Montana, to Ashland, Montana; he heard Etchemendy pounding on the trunk of the car in Gillette, Wyoming, and instructed Lavonne Quiroz to move the vehicle to an alley where any noise made by Etchemendy would be less likely to be heard; and he took no action to stop Lester Kills On Top and Bull Coming after they left the bar in Gillette with the disclosed purpose of murdering Etchemendy.

Kills On Top III, ¶ 70.

II. Federal Habeas

In December 2001, Petitioner filed a petition for writ of habeas corpus in federal court. *See* V*ernon Kills On Top v. Mahoney*, 238 Fed. Appx. 240, 2007 U.S. App. LEXIS 15015 (9th Cir. June 20, 2007); *Vernon Kills On Top v. Kirkegard*, 2014 U.S. Dist. LEXIS 123969 (Mont. 2014) (hereinafter, *Kills On Top IV*). In May 2009, after the matter had been remanded for further development of specific claims, final judgment was entered against Petitioner and certificate of appealability was denied. *Kills On Top IV, supra*. The Ninth Circuit rejected

Petitioner's appeal and the United States Supreme Court denied Petitioner's writ of certiorari in May 2011. *Kills On Top v. Mahoney*, 131 S. Ct. 2463 (2011).

III. Sentence Review Division proceeding and appeals

In February 2012, Petitioner filed an application with the Sentence Review Division (SRD) for review of his sentence imposed over 13 years before (November 10, 1998) and affirmed by this Court over 11 years before (December 19, 2000). *Vernon Kills On Top v. Montana Sentence Review Div*., 2013 Mont. LEXIS 529 (2013) (hereinafter *Kills On Top V*); *Kills On Top IV*, at *5. Petitioner's delay in seeking SRD review was excused and after hearing his application in November 2012, the SRD denied his petition and affirmed his sentence. *Id.*

After the SRD denied Petitioner's request for rehearing, he petitioned this Court for a writ of supervisory control alleging SRD failed to follow its procedures in considering evidence and arguments during review. *Kills On Top V, supra*. In October 2013, this Court dismissed the petition concluding the standards for supervisory control were not met. *Id.* Moreover, this Court concluded that even if the merits of Petitioner's argument were considered, he failed to demonstrate a basis for relief and affirmed the SRD's decision. *Id.* In November 2013, this Court denied Petitioner's request for rehearing. *Id*.

In March 2014, Petitioner filed a motion under Fed. R. Civ. P. 60(b)(6) with the United States District Court, attempting to reopen his federal habeas case and argue the merits of his proportionality claim concerning his sentences. *Kills On Top IV, supra*. The federal district court denied the motion on several grounds, including Petitioner's failure to appeal dismissal of that claim as procedurally barred. *Kills On Top IV,* at *29-30. The court concluded that neither the SRD's "decision, nor anything the entire course of the nearly ten-year federal habeas proceedings constitutes an extraordinary circumstance that prevented Kills On Top from fully litigating" his proportionality claim. *Id*.

IV. Current State habeas petition

Now, 5 years after the United States District Court denied his motion to reopen his federal habeas proceeding, and 18 years after this Court affirmed Petitioner's conviction and judgment and sentence, Petitioner seeks relief under § 46-22-101, MCA. Petitioner asserts his 1998 judgment and sentence is facially invalid because his convictions for both aggravated kidnapping and deliberate homicide under the felony murder rule violate federal and state double jeopardy

constitutional protections and Montana's multiple charges provision at § 46-11-410, MCA.[2]

STANDARD OF REVIEW AND APPLICABLE LAW

Montana Code Annotated § 46-22-101(1) allows a person who is imprisoned for a "writ of habeas corpus to inquire into the cause of imprisonment or restraint and, if illegal, to be delivered therefrom." The fundamental purpose of habeas corpus is to remedy "illegal" restraints or imprisonments (*e.g.*, a sentence which exceeds statutory or constitutional limits). *Lott v. State*, 2006 MT 279, 334 Mont. 270, 150 P.3d 337; *Thorne v. Batista*, 376 Mont. 547, 347 P.3d 263 (2014), 2014 Mont. LEXIS 562, *3-4 ("purpose of the writ is to remedy gross wrongs or miscarriages of justice where legal avenues of relief are unavailable or inadequate").

[2] At the time of Petitioner's crime, 1987, Montana's double jeopardy statute was found at § 46-11-502 (1987). In 1991, this provision was recodified at § 46-11-410, MCA. Since Petitioner's crime occurred in 1987, unless otherwise noted, citations and references to the double jeopardy statute herein will be to the 1987 version. *Dexter v. Shields*, 2004 MT 159, ¶ 13, 322 Mont. 6, 92 P.3d 1208 (held, statutes in effect at the time of the offense control at sentencing); *State v. Tracy*, 2005 MT 128, ¶ 16, 327 Mont. 220, 113 P.3d 297 (Court has "consistently held that a person has the right to be sentenced under the statutes which are in effect at the time of the offense").

The writ of habeas corpus is not a substitute for appeal. *Thorne*, at *3 (citing *Morrison v. Mahoney*, 2002 MT 21, ¶ 9, 308 Mont. 196, 41 P.3d 320; *Rudolph v. Day*, 273 Mont. 309, 311, 902 P.2d 1007, 1008 (1995); *Duncan v. State*, 243 Mont. 232, 233, 794 P.2d 331, 332 (1990).) The writ of habeas corpus is "not available to attack the validity of the conviction or sentence of a person who has been adjudged guilty in a court of record and has exhausted his remedy of appeal." § 46-22-101(2), MCA (1987).

Petitioner bears the burden of demonstrating sufficient legal cause to persuade the Court to grant the writ of habeas corpus. *Miller v. District Court*, 2007 MT 58, ¶ 14, 336 Mont. 207, 154 P.3d 1186; *Thorne, at* *3-4.

ARGUMENT

I. Even if Petitioner's claim is well-taken, this Court cannot grant effective relief because Petitioner is serving three consecutive sentences, including a life sentence with no eligibility for parole.

The existence of a justiciable controversy is a prerequisite to adjudication of a dispute. *Seubert v. Seubert*, 2000 MT 241, ¶¶ 17-20, 301 Mont. 382, 13 P.3d 365 (citation omitted). "A question is moot when the court cannot grant effective relief." *Sebastian v. Mahoney*, 2001 MT 88, ¶ 7, 305 Mont. 158, 25 P.3d 163 (citing *Shamrock Motors, Inc. v. Ford Motor Co.*, 1999 MT 21, ¶ 19, 293 Mont. 188, 974 P.2d 1150).

Even if this Court does not find Petitioner's claim procedurally barred and deems his argument well-taken, any relief this Court might fashion would have no present effect upon Petitioner. Assuming, for the sake of argument, that Petitioner should not have been sentenced for both aggravated kidnapping and deliberate homicide/felony murder and this Court vacated his sentence for felony murder, Petitioner's incarcerated status would remain unchanged.

Petitioner was sentenced to MSP for 40 years, followed by a life sentence, followed by a second life sentence for which he is not eligible for parole. Therefore, even if this Court vacates his felony murder sentence, Petitioner is still subject to the life sentence with no eligibility for parole.

Petitioner asserts that, if this Court agrees his double jeopardy rights have been infringed, the "lesser offense" conviction should be vacated. (Pet. at 20 (citing *State v. Becker*, 2005 MT 75, ¶ 25, 326 Mont. 364, 110 P.3d 1).) However, the remedy from *Becker* does not control here as that case is procedurally and factually distinguishable.

First, this Court's holding vacating Becker's lesser included *conviction* was part of its analysis of an IAC claim and whether Becker was improperly convicted of two offenses arising from the same transaction (*i.e.*, whether he was prejudiced by counsel's deficient performance for not filing a motion to dismiss pursuant to

Montana's double jeopardy statute). *Becker* did not determine if the defendant was incarcerated under an illegal sentence as Petitioner argues here.

Second, the case cited by this Court in *Becker* to support the decision to reverse for resentencing on the lesser included offense based on IAC actually held that:

> It appears that the *general* rule is that if a defendant is convicted of two crimes, one of which is a lesser-included offense of the other, the proper remedy is to remand the case to the trial court with instructions to vacate the conviction of the lesser charge *where the sentence for the lesser-included offense does not exceed that for the main offense*.

Becker, ¶ 25 *(*citing *State v. Peterson*, 227 Mont. 511, 512, 744 P.2d 870, 870 (1987) (emphasis added). Here, Petitioner's life sentence for aggravated kidnapping included a parole restriction and, thus, "exceeded" his life sentence for homicide/felony murder. Nothing in *Becker* or *Peterson* mandates this Court to vacate the aggravated kidnapping sentence even if it agrees it is a lesser-included offense under § 46-11-502, MCA. Under the unique facts and procedural posture of Petitioner's habeas claim, there is no reason to impose the "*general* rule" here. Petitioner offers no authority mandating this Court to vacate his sentence for the allegedly "lesser offense." Nor would this Court be mandated to remand for resentencing even if it considered Petitioner's claim and found it meritorious.

In *Jones v. Thomas*, 491 U.S. 376 (1989), the United States Supreme Court addressed this type of scenario and the appropriate remedy "to cure [an] admitted [double jeopardy] violation."[3] In *Thomas*, the Court explained the purpose of double jeopardy protections "is to ensure that sentencing courts do not *exceed*, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments." *Id*., 491 U.S. at 381 (emphasis added). As the Court noted, "neither the Double Jeopardy Clause nor any other constitutional provision exists to provide unjustified windfalls." *Id*., 491 U.S. at 387.

The Court concluded that a "valid remedy for improper 'cumulative sentences imposed in a single trial'" was affirming the greater sentence as long as the defendant was granted credit towards that sentence for time served on the lesser sentence. *Thomas*, 491 U.S. at 386 (citing *Missouri v. Hunter*, 459 U.S. 359, 366 (1983).) As the Court noted in *Thomas*, the sentencing court believed it could impose separate sentences for separately punishable offenses, one far more serious than the other. *Id*., 491 U.S. at 384. The same is true here when the sentencing court believed it could impose both sentences when it issued two life sentences but

[3] By referencing this case, the State does not concede Petitioner's sentence is facially invalid under either constitutional or statutory double jeopardy provisions.

restricted parole on the aggravated kidnapping, which the court explained was the more egregious offense committed by Petitioner.

When the district court sentenced Petitioner to 40 years followed by two consecutive life sentences and restricted parole eligibility on one, the sentencing court clearly meant for Petitioner to spend his life in prison for his involvement in the aggravated kidnapping and brutal assault Mr. Etchemendy suffered. This Court has already affirmed all three of Petitioner's sentences as legal and within the court's authority. *Kills On Top III, supra*.

As this Court has held, resentencing may be necessary only when the illegal portion of the sentence "affected the entire sentence, or where we were unable to determine what sentence the district court would have adopted had it correctly followed the law." *State v. Heafner*, 2010 MT 87, ¶ 11, 356 Mont. 128, 231 P.3d 1087 (citing *State v. Heath*, 2004 MT 58, ¶ 49, 320 Mont. 211, 89 P. 3d 947). Here, it is clear what "sentence the trial court would have imposed" if it only sentenced Petitioner for robbery and aggravated kidnapping. Therefore, even if Petitioner's double jeopardy rights were infringed, which the State does not concede, it would be unnecessary for this Court to remand for resentencing. *See, e.g., State v. Williams*, 2003 MT 136, ¶ 15, 316 Mont. 140, 69 P.3d 222; and *Stanton v. Kirkegard*, 385 Mont. 541, 382 P.3d 869 (Mont. 2016).

In *Stanton*, this Court agreed that there was no need to remand Stanton's case for resentencing since striking the improper 100-year persistent felony offender (PFO) sentence would not affect the integrity of Stanton's sentence. *Stanton, supra*. Relevant to the situation presented here, this Court noted the unique circumstances of Stanton's case, including the fact that the sentence was 34-years old, marshalling evidence for resentencing would have been burdensome, and even after the PFO sentence was struck, Stanton would still be serving a 290-year sentence with no possibility of parole. *Id*.

Therefore, even if this Court reaches the merits of Petitioner's claim and concurs in his position, the proper remedy would be to vacate the homicide/felony murder sentence and allow his sentence for aggravated kidnapping to stand. Such a remedy would be appropriate and just, especially when considering this Court's observations about Petitioner's involvement in the two offenses and his direct culpability in the aggravated assault. *Kills On Top III, supra*.

Petitioner was sentenced over 20 years ago for a crime that occurred over 30 years ago. Given the unique circumstances here, particularly the sentencing court's clear basis for imposing a life sentence without parole for the offense Petitioner played a crucial role in (which this Court affirmed), Petitioner's sentence for aggravated kidnapping should remain undisturbed even if this Court presumes, for the sake of argument, that his sentence violated double jeopardy.

This Court cannot grant the relief sought by Petitioner. Petitioner has failed to establish the threshold issue of presenting a justiciable controversy which is a prerequisite to adjudication of a dispute. *Seubert*, ¶¶ 17-20; *Strizich v. Kirkegard*, 2016 LEXIS 834 (state habeas petition denied when no justiciable controversy exists to give effective relief). Accordingly, Petitioner's state habeas petition should be dismissed.

II. Petitioner is precluded from attacking the validity of his conviction through a writ of habeas corpus because he has exhausted his appeal remedies.

The writ of habeas corpus is not available to attack the validity of the conviction or sentence of a person who has been adjudged guilty of an offense in a court of record and has exhausted the remedy of appeal. § 46-22-101(2), MCA; *Thorne*, at *3 (writ of habeas corpus is not a substitute for appeal). As this Court recently explained,

> While [the petitioner] is correct that habeas corpus may be invoked to challenge a facially invalid sentence, this does not abrogate the procedural bar in § 46-22-101(2), MCA. Section 46-22-101(2), MCA, provides that "[t]he writ of habeas corpus is not available to attack the validity of the conviction or sentence of a person who has been adjudged guilty of an offense in a court of record and has exhausted the remedy of appeal." [Petitioner] could have raised the double jeopardy argument at trial and in his appeal, but failed to do so. This procedural bar therefore precludes [p]etitioner's present claim.

Gause v. Kirkegard, 2013 Mont. LEXIS 301.

It is undisputed that Petitioner exhausted his remedies of appeal in all respects. Nothing precluded Petitioner from raising this issue in his direct appeal, postconviction proceedings,[4] or federal habeas petition. Petitioner was also granted sentence review despite the extreme delinquency in submitting his application. "When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence." *Fitzpatrick v. State*, 206 Mont. 205, 211, 671 P.2d 1, 4 (1983) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)). Finality has attached to Petitioner's conviction and sentence.

Relief pursuant to § 46-22-101, MCA, is unavailable to Petitioner because he has been adjudged guilty of robbery, aggravated kidnapping, and homicide/felony murder and exhausted all remedies of appeal. Petitioner effectively concedes this point when he implores this Court to apply the exception to this procedural bar pursuant to *Lott* and allow his claim to proceed. (Pet. at 19-20.)

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[4] Notably, this Court concluded that Lester's failure to raise a double jeopardy claim related to convictions based on aggravated kidnapping and felony murder on direct appeal procedurally barred Lester from asserting such a claim in postconviction. *Lester Kills On Top v. State*, 273 Mont. 32, 901 P.2d 1368 (1995), *cert denied* 516 U.S. 1177 (1996) (affirmed order denying petition for postconviction relief).

III. The exception to the procedural bar to state habeas claims under *Lott* does not apply.

A. Petitioner's sentence was not "enhanced beyond constitutional limits."

In *Lott*, this Court was "troubled" by Lott's sentence because it "was clearly enhanced beyond constitutional limitations." *Lott*, ¶ 20. That is not the case here. This Court has already determined that Petitioner's sentences "all fall within the applicable statutory parameters." *Kills On Top III*, ¶ 74. This Court has also affirmed the sentencing court's order to run the sentences consecutively, designate Petitioner as a dangerous offender, and determination that he shall be ineligible for parole on his aggravated kidnapping life sentence. *Id*., ¶¶ 69-72.

Even if his life sentence for homicide/felony murder is vacated, Petitioner will remain lawfully incarcerated under the life sentence for aggravated kidnapping with no eligibility for parole. Petitioner's sentence is not facially invalid. *See Kinlock v. Mahoney*, 2008 Mont. LEXIS 240 (Jan. 23, 2008).

In *Kinlock*, this Court, concluded that because the weapons enhancement properly applied to two other felonies, even if, for the sake of argument, it vacated the enhancement as to the felony assault charge, Kinlock's sentence remained valid. *Kinlock*, ¶ 5. This Court observed that since such a sentence was lawfully entered it did not constitute "a 'grievous wrong' or a 'miscarriage of justice' within the meaning of [*Lott*] because Kinlock is not incarcerated 'pursuant to a facially

invalid sentence.'" *Id*. (citing *Lott*, ¶ 22). Just like Kinlock's sentence, if one of Petitioner's life sentences is not considered, he would remain incarcerated on a facially valid sentence and the exception to procedural bar under *Lott* does not apply. Moreover, Petitioner's sentence is not a "facially invalid" sentence as defined by this Court.

B. Petitioner is not incarcerated under a facially invalid sentence.

In *Lott*, this Court held that the procedural bar found at § 46-22-101(2), MCA, was unconstitutional when applied to a sentence that is "facially invalid." *Lott*, ¶¶ 20-22. This Court explained that "incarceration of an individual pursuant to a facially invalid sentence represents a 'grievous wrong,' and a 'miscarriage of justice'" that warrants relief even if the defendant is otherwise procedurally barred. *Lott*, ¶ 22 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). This Court defined a "facially invalid" sentence as "a sentence which either exceeds the statutory maximum for the crime charged or which violated the constitutional right to be free from double jeopardy . . . ." *Lott*, ¶ 22.

Petitioner's sentence does not meet either of these criteria. Petitioner's sentences did not exceed the statutory maximum for the crimes for which he is convicted. *See Kills On Top III*, ¶ 74 (the sentences "all fall within the applicable statutory parameters"). Nor does Petitioner's sentence violate his constitutional right to be free from double jeopardy.

"The Fifth Amendment to the United States Constitution and Article II, § 25 of the Montana Constitution prohibit placing a person in jeopardy more than once for the same offense." *State v. Wardell*, 2005 MT 252, ¶ 17, 329 Mont. 9, 122 P.3d 443 (citation omitted). The double jeopardy clause of the Fifth Amendment, made applicable to the states by the Fourteenth Amendment, *Benton v. Maryland*, 395 U.S. 784 (1969), prohibits a government from twice putting a defendant in jeopardy for the "same offense." The United States Supreme Court has interpreted this clause to embody two different protections for criminal defendants. *Thomas*, 491 U.S. at 380-81 (protection against successive or multiple prosecutions/ convictions; and multiple punishments).

Relevant here, the clause contains a protection against double punishment by prohibiting the government from sentencing a defendant twice for what amounts to the same offense, even though that single offense might be divided into ostensibly separate offenses in the charging document and in the court's judgment of conviction. *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969), *modified on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 (1989).

In *Blockburger v. United States*, 284 U.S. 299, 304 (1932), the United States Supreme Court developed a test for determining whether two offenses are the "same offense" for double jeopardy purposes. Under the *Blockburger* test, the elements of the two offenses are compared and if each offense requires proof of an

element that the other does not, then the offenses are separate. *Blockburger*, 284 U.S. at 304. However, in subsequent cases, the Court further explained application of *Blockburger* when applied to *multiple punishments*; the issue Petitioner presents here.

The Supreme Court clarified that when evaluating whether multiple punishments violated double jeopardy, at least in instances when all the charges against a criminal defendant are combined at a single trial (so that the protection against successive prosecutions is not involved), the role of the double jeopardy clause is limited to protecting a defendant against receiving more punishment than the legislature intended. *See e.g.*, *Brown v. Ohio*, 432 U.S. 161, 165-66 (1977) ("The role of the constitutional guarantee is limited to assuring that the [sentencing] court does not exceed its legislative authorization."); *Whalen v. United States*, 445 U.S. 684, 688 (1980) ("The question whether punishments . . . are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized."); *Hunter*, 459 U.S. at 366 ("With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."); *United States v. Halper*, 490 U.S. 435, 450 (1989) (double jeopardy clause only "ensures that the [defendant's] total punishment did not exceed that authorized by the legislature").

The Supreme Court did not wholly abandon the *Blockburger* test when considering multiple punishments as double jeopardy violations, but instead focused on its function as a statutory interpretation screening tool to educe the intent of the legislature. *See Hunter*, 459 U.S. at 366-67; *Whalen*, 445 U.S. at 691, 693-95. If the statutes pass muster under the *Blockburger* test, cumulative punishment is presumptively allowable. *See Hunter*, 459 U.S. at 367 ("Cumulative punishment can presumptively be assessed after conviction for two offenses that are not the 'same' under *Blockburger*."). However, if the statutes do not pass *Blockburger*, the Court concluded there is a *rebuttable* presumption that double jeopardy protects from multiple punishments. *See Whalen*, 445 U.S. at 691-92 ("The assumption underlying the rule [of statutory construction from Blockburger] is that Congress ordinarily does not intend to punish the same offense under two different statutes.").

Thus, the analysis continues as to the rebuttable presumption with determination of whether the legislature intended to allow multiple punishments for offenses that "failed" the *Blockburger* test. *See e.g.*, *Garrett v. United States*, 471 U.S. 773, 779 (1985) ("We have recently indicated that the *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history."); *Whalen*, 445 U.S. at 692 ("Where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative

punishments in the absence of a clear indication of contrary legislative intent."). The fact that two criminal prohibitions promote different interests may be indicative of legislative intent and, to that extent, important in deciding whether cumulative punishments imposed in a single prosecution violate double jeopardy. *See Hunter*, 459 U.S. at 366-368.

This Court applied these very principles in several cases. *See e.g.*, *Close*, 191 Mont. at 245-46, 623 P.2d at 949 ("*Blockburger* test is merely one rule of statutory construction to aid in the determination of legislative intent"); *State v. Wells*, 202 Mont 337, 351, 658 P.2d 381, 388 (1983) (when determining if multiple punishments are allowed for offenses arising out of the same transaction, dispositive question is whether legislature intended to provide for multiple punishments); *State v. Palmer*, 207 Mont. 152, 158-59, 673 P.2d 1234, 1238-39 (1983). *See also Brimmage v. Sumner*, 793 F.2d 1014 (9th Cir. 1986) (even if underlying forcible felony is a lesser included offense of felony murder, "double jeopardy does not prevent the imposition of cumulative punishments if the state legislature clearly intends to impose them") (citing *Hunter*, 459 U.S. at 368-69; *Whalen*, 445 U.S. at 690-92).

In *Close*, this Court concluded that under *Blockburger*, felony homicide could be committed without committing robbery/aggravated kidnapping and vice versa. *Close*, 191 Mont. at 247-48, 623 P.2d at 950. This Court then explained

that the "second basis for finding no merger" between the felony murder and underlying felonies "is the history and purpose of the felony homicide provision." *Id*. Historically, laws intended to prevent the underlying felony (*i.e*., robbery or aggravated kidnapping) are intended to "protect a wholly different societal interest from the felony murder statute, which is intended to protect against homicide." *Id*. Next, this Court cited to Montana's commission comments when the original felony murder provision was enacted, including its explanation for expanding the list of applicable underlying felonies because those types of "offenses are usually coincident with an extremely high homicidal risk, a homicide which occurs during their commission can be considered a deliberate homicide." *Close*, 191 Mont. at 248, 623 P.2d at 950.

Applying these principles, this Court concluded

> Clearly, the legislature properly allowed and broadened the law relating to cumulative sentencing in felony murder cases. The enactment of the felony murder rule is supported by appropriate references to legislative history, the trend to encompass the felony murder rule and the desire of the legislature to prevent the commission of these types of dangerous crimes. The legislature allowed it, and the court imposed it. There are no issues other than those.

Close, 191 Mont. at 249, 623 P.2d at 951. This rationale from *Close* remains undisturbed and, thus, confirms that Petitioner's sentence is not facially invalid as contrary to constitutional principles of double jeopardy.

Finally, it is significant to note that this Court has already held in an appeal *filed by Petitioner* that "the underlying felony in a deliberate homicide pursuant to sec. 45-5-102(1)(b), MCA, is not a lesser included offense of felony murder." *See Kills On Top I,* 243 Mont. at 61, 793 P.2d at 1297 (citing *Close*, 191 Mont. at 245-49, 623 P.2d at 949-51). This Court's own precedence and the intent of the legislature to create separate penalties for felony murder and the underlying forcible felony establish Petitioner's November 1998 sentence was a facially valid sentence.

Petitioner has not established how he is incarcerated under a facially invalid sentence. *Lott* requires more than calling into question the facial validity of a sentence—it requires that an "individual [be] incarcerated pursuant to a facially invalid sentence"—a sentence which the court had no authority to impose as a matter of law. *Lott*, ¶ 22. The *Lott* exception to the procedural bar at § 46-22-101(1), MCA, is unavailable to Petitioner because his sentence neither "exceeds the statutory maximum for the crime charged" nor violates his "constitutional right to be free from double jeopardy." Finally, and contrary to Petitioner's argument to this Court, § 46-11-502, MCA, does not override the procedural mandates from § 46-22-101(1), MCA or establish that his sentence was "beyond constitutional limits."

IV. Petitioner's sentence did not violate Montana's "same transaction" statute.

Separate from constitutional double jeopardy protections, Montana enacted statutory protections against multiple prosecutions in certain instances. *See* §§ 46-11-502 to 505, MCA; *State v. Glass*, 2017 MT 128, ¶ 9, 387 Mont. 471, 395 P.3d 469 (commonly referred to as "statutory double jeopardy" provisions). This Court has described those provisions as codification of the *Blockburger* test. *See Kills On Top I*, 243 Mont. at 60, 793 P.2d at 1297. However, these distinct statutory protections are nonetheless treated differently than constitutional protections. *See State v. Burton*, 2017 MT 306, ¶ 20, 389 Mont. 499, 407 P.3d 280 (citing *State v. Cech*, 2007 MT 184, ¶ 10, 338 Mont. 330, 167 P.3d 389) (noting "important distinctions between the statutes and constitutional double jeopardy jurisprudence").

In *Burton*, this Court considered whether an "interim" appeal (*i.e.*, following conviction but before judgment) should be allowed to raise statutory double jeopardy claims. *Burton, supra*. In so doing, this Court reiterated that "[u]nlike these very unique and specific constitutional double jeopardy cases, claims of statutory violations like Burton's are different and should be treated differently." *Burton*, ¶ 21 (noting statutory-based double jeopardy claims are almost exclusively

considered on direct appeal). Petitioner did not raise any statutory-based double jeopardy claims on direct appeal or in his two postconviction proceedings.

Claims stemming from alleged statutory violations can be waived. *See e.g.*, *Becker*, ¶ 17 (explicitly declining to exercise plain error review of statute-based double jeopardy claim since claim was not raised below; claim considered on appeal only under IAC); *State v. LeDeau*, 2009 MT 276, ¶ 18, 352 Mont. 140, 215 P.3d 672 (declining to review statute-based double jeopardy claim) (overruled in part on other grounds); *State v. Minez*, 2004 MT 115, ¶ 30, 321 Mont. 148, 89 P.3d 966 (same); *City of Red Lodge v. Pepper*, 2016 MT 317, ¶ 12, 385 Mont. 465, 385 P.3d 547 (defendant waived his right to the six-month speedy trial requirement of § 46-13-401(2), MCA).

As established, Petitioner exhausted all avenues of appeal. Despite filing two direct appeals and multiple collateral appeals, Petitioner did not assert that his statutory double jeopardy rights were infringed until 2018. This Court has consistently explained that the writ of habeas corpus is not a substitute for appeal. *Thorne*, at *3; *Morrison*, ¶ 9, *Rudolph*, 273 Mont. at 311, 902 P.2d at 1008; and *Duncan*, 243 Mont. at 233, 794 P.2d at 332. Petitioner's opportunity to assert a statutory-based double jeopardy claim has long passed and he should not be allowed to bring such a claim now. The statute relied upon by Petitioner, § 46-11-502, MCA, prohibits multiple *convictions* under certain circumstances.

Petitioner's convictions were affirmed, along with his sentences, in 2000. the "presumption of finality and legality" has attached to his conviction and sentence. *Fitzpatrick*, 206 Mont. at 211, 671 P.2d at 4.

Petitioner relies only upon *State v. Russell*, 2008 MT 417, 347 Mont. 301, 198 P.3d 271, to support his statutory-based double jeopardy claim. (Pet. at 14-16.) However, the procedural posture and issue presented in *Russell* distinguishes it from the state habeas presented here.

Russell was convicted of aggravated assault by accountability, robbery by accountability, aggravated assault, and deliberate homicide/felony murder. *Russell, supra*. Prior to sentencing, Russell filed a motion to dismiss his aggravated assault conviction (which was the predicate forcible felony for the homicide) arguing it violated Montana's constitutional double jeopardy protection. *Id*. The district court denied Russell's motion and he was sentenced on all four felonies. *Id*.

Even though Russell framed the issue as a violation of Montana's constitution, a majority of this Court, *sua sponte*, applied § 46-11-410, MCA (double jeopardy statute) instead of applying a constitutional analysis. *See Russell*, ¶ 19 (noting that constitutional issues should be avoided whenever possible) and ¶ 63 (Rice and Gray dissenting) (disagreed with deciding case on an issue not raised or argued).

The Majority reasoned that while the felony homicide statute allowed the State to charge Russell in a way that avoided the multiple charge problem, the way the State framed the charges and instructed the jury identified aggravated assault as a predicate offense to felony homicide. *Russell,* ¶ 23 (observing that when the trial court instructed the jury, it "defined the felony homicide charge to include aggravated assault") and ¶¶ 26-29. Accordingly, four of the seven justices held that aggravated assault was necessarily included in the greater offense, felony homicide. *Russell,* ¶¶ 23-25. The Majority observed, however, that since felony murder is punishable up to death or life in prison, "any additional punishment for the underlying felony would have no practical effect." *Russell,* ¶ 29.

Justice Jim Rice, joined by Chief Justice Karla Gray, dissented. *Russell,* ¶¶ 62-78. The Dissent recognized that the issue presented was one of multiple punishments and reiterated the applicable holding and rationale from *Close*, observing that "[i]t is clear that the Legislature did not intend" for a predicate felony to be considered a lesser included offense to felony murder. *Russell*, ¶ 65 (Rice and Gray dissenting). The Dissent reiterated that in *Close*, this Court held "that the felony murder statute thus contemplates multiple sentences, one for the murder and one for the underlying felony." *Russell*, ¶ 66 (Rice and Gray dissenting). Moreover, in *State v. Burkhart*, 2004 MT 372, 325 Mont. 27, 103 P.3d 1037, this Court reaffirmed *Close* and its reliance on legislative intent to

conclude the underlying forcible felony does not merge with felony murder even if the victim is the same in both counts. *Id.*

In response to Justice Rice's dissent, the majority asserted that the basic premise rationale in *Close* was "false" because it relied upon *Blockburger*. *Russell*, ¶ 26. However, the Majority did not discuss or recognize that in *Close*, this Court's reference to *Blockburger* was specifically part of the tiered multiple punishment analysis (not alleged multiple prosecutions under statutory double jeopardy). Not only did the Majority not declare *Close* or *Burkhart* as overruled, but as Justice Rice pointed out, the issue decided in *Close* was application of a test to determine what constitutes the same offense for the purpose of multiple punishments under constitutional double jeopardy, while *Russell* addressed a motion to dimiss prior to sentencing and *sua sponte* considered Montana's statutory-based double jeopardy. *Russell*, ¶ 72 (Rice and Gray dissenting).

As explained above, this Court's rationale from *Close* and the United States Supreme Court's rationale from *Brown, supra, Whalen, supra*, and *Hunter, supra*, establish that Petitioner's sentence does not violate constitutional double jeopardy protections. The decision in *Russell* did not alter those holdings.

In *Close*, this Court adopted the United State Supreme Court's rationale that the *Blockburger* test is "one rule of statutory construction to aid in the determination of legislative intent." *Close*, 191 Mont. at 246, 623 P.2d at 949

(citing *Whalen, supra*). As this Court observed, "the test for determining what constitutes the same offense differs depending on whether the case involves multiple prosecutions or multiple punishments imposed at a single prosecution. The standard is broader in cases involving multiple prosecutions." *Close*, 191 Mont. at 245, 623 P.2d at 949.

Petitioner's reliance upon *Russell* for his statutory double jeopardy claim is unavailing given his failure to assert a statute-based claim in his direct appeal. Conversely, Russell directly appealed the district court's order denying a motion to dismiss a conviction prior to sentencing. Here, petitioner is asserting a collateral challenge to the validity of his sentencing after all other appeal options have been exhausted and his sentence was final.

Finally, Petitioner has not established how this Court's interpretation of Montana's double jeopardy statute from *Russell*—which was issued nearly 10 years after Petitioner was sentenced—should apply retroactively on collateral review. At the time Petitioner was resentenced, his sentence was facially valid under both constitutional and statutory double jeopardy principles. *See e.g., Gratzer v. Mahoney*, 2006 MT 282, ¶ 14, 334 Mont. 297, 150 P.3d 343 (sentence facially valid; rule from *Apprendi v New Jersey*, 530 U.S. 466 (2000), was not retroactive on collateral review); *Fitzgerald v. Mahoney*, 2007 Mont. LEXIS 101 (Mont. Jan. 31, 2007).

Habeas relief is an extraordinary remedy, for which the petitioner bears the burden of proof. *Miller v. Eleventh Judicial Dist.*, 2007 MT 58, ¶ 14, 336 Mont. 207, 154 P.3d 1186. Petitioner has failed to meet his burden and cannot establish how he would still suffer a "gross wrong or miscarriage of justice" if this Court affirmed his life sentence without eligibility for parole for his involvement in the aggravated kidnapping and eventual death of Mr. Etchemendy. *See Thorne*, at *3-4 ("purpose of the writ is to remedy gross wrongs or miscarriages of justice where legal avenues of relief are unavailable or inadequate").

CONCLUSION

This Court should dismiss Petitioner's state habeas petition.

Respectfully submitted this 28th day of May, 2019.

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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 7,024 words, excluding certificate of service and certificate of compliance.

/s/ Katie F. Schulz
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CERTIFICATE OF SERVICE

I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Petition for Writ to the following on 05-28-2019:

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