

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. OP-20-_____

LANCE GERALD DEINES,

Petitioner,

-vs-

LYNN GUYER,
Warden of the Montana State Prison,Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

PETITION

Petitioner Lance Gerald Deines, through counsel, Colin M. Stephens, hereby respectfully requests this court grant his Petition for a Writ of Habeas Corpus, vacate the sentence originally imposed by the Montana Seventh Judicial District Court, Dawson County, and remand to that court directing it to strike an illegal sentence. Specifically, Lance requests this Court, pursuant to *Kills On Top v. Guyer*, 2019 Mont. LEXIS 292, 2019 WL 3451280 (MT. Supreme Court No. OP-18-0656), and *State v. Russell*, 2008 MT 417, 347 Mont. 301, 198 P.3d 271,

vacate his multiplicitous conviction for Aggravated Kidnapping (Count II) and strike the illegal sentence of twenty-five years imposed for that conviction.

ARGUMENT

I. Preliminary Legal Matters and Criteria

This Court has jurisdiction over this matter pursuant to *Mont. Code Ann. § 46-22-202*, and *Article II, § 19* of the Montana Constitution.

Pursuant to *Mont. Code Ann. § 46-22-201*, the undersigned verifies and affirms the following facts and legal argument.

First, Lance is in custody at the Montana State Prison. Lance's Department of Corrections identification number is 2035630.

Second, Lance is currently serving a total sentence of 150 years, the last 30 of which are suspended. The total sentence is an aggregate of consecutive individual sentences imposed as follows: Count I, Aggravated Kidnapping, twenty-five (25) years; Count II, Aggravated Kidnapping, twenty-five (25) years; Count IV, Accountability for Deliberate Homicide, one hundred (100) years. (Ex. A). There is no restriction on Lance's eligibility for parole. Lance's conviction was the

result of a plea agreement. The sentence was pronounced on October 23, 2002. (Id.)

Third, Lance's conviction and sentence is illegal in light of Montana's constitutional guarantee against double jeopardy, Montana's statutory prohibition against convictions for certain "same transactions,"¹ *Mont. Code Ann. § 46-11-410*, and the United States Constitution's prohibition against double jeopardy under the *Fifth Amendment*. The illegality of Lance's conviction was recently highlighted by this Court's July 31, 2019 Order in *Kills on Top v. Guyer*, and its earlier decision in *Russell*.

II. Facts & Prior Procedure

The complex facts and circumstances giving rise to Lance's conviction and this Petition illustrate the destruction wrought by methamphetamine in the state of Montana. The facts set forth below are sufficient to address the legal arguments raised by this Petition.²

¹Essentially a statutory prohibition against double jeopardy.

²For an additional summary of the facts leading to the death of Steven Berry, see *State v. McDonald*, 2004 MT 167, ¶¶ 6-8, 322 Mont. 31, 97 P.3d 1076.

In a Second Amended Information, the State alleged that on or about November 30, 2000, Lance committed the offense of aggravated kidnapping by “using and threatening to use physical force or by holding” an individual named Steve Berry “in a place of isolation, with the purpose to inflict bodily injury on or to terrorize” Berry. (Ex. B; State’s Second Amended Information, Jan. 31, 2002) (Count I).

The State went on to allege in the Second Amended Information that on or about December 30, 2000, Lance again committed the offense of aggravated kidnapping, (Count II) and, in the course of doing so, committed “the offense of Deliberate Homicide when he attempted to commit, committed or was legally accountable for the commission of the offense of aggravated kidnapping as described in Count II, during the course of the attempted commission or commission of said offense, he or any other person legally accountable for said offense caused the death of Steve Berry, a human being.” (Id.) (Counts II & IV).

The Second Amended Information also set forth the possible penalties for the relevant counts.

Count I: Aggravated Kidnapping: Imprisonment in the state prison for not less than 2 years or more than 100 years, a

fine in an amount not to exceed \$50,000, or both.

Count II: Aggravated Kidnapping: Punishable by death or life imprisonment or to be imprisoned in the state prison for a term of not less than 2 years or more than 100 years, a fine in an amount not to exceed \$50,000, or both. Pursuant to Mont. Code Ann. § 46-1-401, the enhancing facts or acts that the State of Montana will rely upon for the imposition of the death penalty are that the offense is an Aggravated Kidnapping that resulted in the death of the victim as set out in Montana Code Annotated § 46-18-303(2).

Counts III and IV: Deliberate Homicide: Punishable by death or life imprisonment or to be imprisoned in the state prison for a term of not less than 10 years or more than 100 years, and a fine in an amount not to exceed \$50,000, or both. Pursuant to Mont. Code Ann. § 46-1-401, the enhancing facts or acts that the state of Montana will rely upon for the imposition of the death penalty are that the offense is a Deliberate Homicide that was committed by means of torture and that the offense is Deliberate Homicide committed by an offender lying in wait or ambush as set out in Mont. Code Ann., § 46-18-303(1)(a)(iii) and (iv), respectively.

(Ex. B).

The facts giving rise to the charges were that Berry and some cohorts had burgled Lance's house while Lance was out of town. Berry and the others stole a number of valuable items as well as narcotics from Lance's house. Upon his return home, Lance discovered the burglary and was able to ascertain that Berry was the ring leader of the

burglary crew.

The State alleged that in late November 2000, Lance located and kidnapped Berry with a group of friends. During the course of the kidnapping, Lance and his friends threatened, used physical force, and inflicted bodily injury on Berry to convince him to return the items he had stolen from Lance. Berry was then released to recover the purloined goods.

Approximately one-month later, Lance and his friends again kidnapped Berry. On this occasion, Berry was killed during the course of the kidnapping. Lance and his friends subsequently attempted to dispose of Berry's body but were unsuccessful.

After a thorough investigation, the State eventually levied a seven-count Second Amended Information against Lance. (Ex. B). The Second Amended Information charged Lance with two counts of Aggravated Kidnapping, one for the first kidnapping in November, and one for the second fatal kidnapping in December. The State also charged two counts of deliberate homicide. These counts, Counts III and IV, were charged in the alternative. Count III alleged, pursuant to

Mont. Code Ann. § 45-5-102(1)(a), that Lance purposely or knowingly caused Berry's death. Count IV alleged, pursuant to *Mont. Code Ann. § 45-5-102(1)(b)*, that Lance attempted to commit, committed, or was legally accountable for the attempt or commission of aggravated kidnapping and, in the course of the forcible felony of flight thereafter, Lance or any of his friends, accountable for the aggravated kidnapping, caused the death of Berry.

The State provided notice of its intent to seek the death penalty specifying the necessary statutory predicates justifying imposition of the death penalty. Lance's defense team filed a "Motion to Preclude Imposition of Death Penalty as to Count II, and Incorporated Brief in Support." (Ex. C). They moved for an order "ruling that the death penalty cannot be imposed as to Count II of the amended information." (Ex. C. at 1). Part of the argument was that the statutory aggravator warranting the death penalty simply duplicated the count of conviction. (Ex. C at 3). This argument contained echos of more nuanced arguments brought in later years. *E.g., State v. Russell*, 2008 MT 417, 347 Mont. 301, 198 P.3d 271; *Kills On Top v. Guyer*, 2019 Mont.

LEXIS 292, 2019 WL 3451280 (MT. Supreme Court No. OP-18-0656).

Eventually, Lance and the State reached a plea agreement. (Ex. D). In exchange for Lance's plea of guilty to Counts I, II, and IV, the State would agree to dismiss the remaining counts, not seek the death penalty, and make a joint recommendation of 25 years to the Montana State Prison for Count I (November Aggravated Kidnaping), 25 years at the Montana State Prison for Count II (December Aggravated Kidnapping), and 100 years at the Montana State Prison for Count IV (felony murder for death resulting from the aggravated kidnapping in Count II). The parties further recommended that the sentences for each count would run consecutively and the last 30 years would be suspended. (Ex. D). Lance also filed an affidavit with the court attesting to the factual basis for his guilty plea. Relating to Count IV, Lance attested that "On December 30, 2000, in Dawson County, Montana, I participated in conduct, along with others, that lead to the death of Steve Berry. Specifically, during the continuing commission of the aggravated kidnapping described in Court II and to which I am pleading guilty, I, along with others, caused the death of Steve Berry

who died as a result of multiple gunshot wounds to the head.”

Also relevant to this issue, and discussed further below, the plea agreement contained a waiver of Lance’s “right to appeal or otherwise challenge his conviction on direct appeal, habeas corpus, or postconviction relief, except for the direct appeal of the imposition of an illegal sentence. . . .” (Ex. D at 4). Notwithstanding the apparent habeas waiver, this Petition is appropriate because subsequent rulings highlight the illegal nature of Lance’s current sentence and the time to challenge the illegal sentence has long passed. *State v. Jackson*, 2007 MT 186, 338 Mont. 344, 165 P.3d 321.

III. Lance Qualifies for Relief under Kills on Top and Russell

Lance’s conviction for deliberate homicide arises from the “unique context of felony homicide [when], the predicate offense is, of necessity, an included offense, as well as an element of the felony homicide itself.” *State v. Russell*, 2008 MT 417, ¶ 24, 347 Mont. 301, 198 P.3d 271. Here, the predicate offense for the felony homicide is Lance’s commission and conviction of the December 30 aggravated kidnapping of Berry. Montana’s statutory prohibition against double jeopardy, *Mont. Code*

Ann. § 46-11-410(2)(a), prohibits conviction of felony deliberate homicide and aggravated kidnapping because the offense of aggravated kidnapping in Count II is both an included offense and an element of the deliberate homicide conviction in Count IV.

On July 31, 2019, this Court applied the statutory double jeopardy bar to felony homicide and aggravated kidnapping in *Kills on Top*. *Kills on Top v. Guyer*, 2019 Mont. LEXIS 292. Like Lance, *Kills on Top* had been convicted of deliberate homicide under Montana’s felony homicide rule, *Mont. Code Ann. § 45-5-102(1)(b)* (1987). *Kills on Top* was also convicted “of the separate offense of aggravated kidnapping under § 45-5-0303(1)(b), MCA (1987), which served as the underlying or predicate offense of deliberate homicide for the purposes of the felony murder rule.” *Kills on Top*, *4. Like Lance, *Kills on Top* “received separate, consecutive sentences for these two crimes: a sentence of life without parole for aggravated kidnapping, and a sentence of life for deliberate homicide, which did not contain a parole restriction.” *Id.* Although Lance received a lesser sentence on the predicate felony, it does not make either the sentence or the conviction any less unconstitutional.

Using this Court's ruling in *Russell*, Kills on Top argued

that his separate sentences for aggravated kidnapping and for deliberate homicide under the felony murder rule, based upon aggravated kidnapping, are improper under § 46-11-410, MCA (1987), which prohibits multiple convictions in certain situations, and is commonly known as Montana's 'double jeopardy statute.' He also argues that these sentences violated his right against double jeopardy under the United States and Montana Constitution.

Id. In response, the State made a number of arguments asserting Kills on Top was not entitled to relief. *Id.*, at **4-8. This Court found all of the State's arguments "unavailing." *Id.*, at * 8. This Court held, "Kills on Top's aggravated kidnapping conviction, which the jury found was the predicate offense of felony homicide, is a lesser included offense of deliberate homicide. The offenses merged, and he cannot be convicted of both charges under § 46-11-410, MCA." *Id.*, at *9 (citing *Russell*, ¶¶ 25 & 26).

Although *Russell* was decided over ten-years prior to Kills on Top's petition, this Court did not conclude Kills on Top was time-barred because he had not brought his double jeopardy claim within a year of the *Russell* decision. Notably, this was specifically one of the State's arguments the Court found unavailing. In addressing that particular

argument, this Court, relying on *State v. Guillaume*, 1999 MT 29, 293 Mont. 224, 975 P.2d 312 and *State v. Whithorn*, 2002 MT 54, 309 Mont. 63, 50 P.3d 121, noted that “substantive rules should be given retroactive effect.” *Kills on Top*, * 10 (citing and quoting *Whitehorn*, ¶ 37). Therefore, the Court ruled it “must likewise be given retroactive effect” because *Russell* was also “substantive in nature.” *Kills on Top*, at * 10.

...[G]iven our decision in *Russell*, *Kills on Top*’s sentence is now facially invalid. Given our decision in *Whitehorn*, *Russell* is retroactive to *Kills on Top*’s sentence. Given this application of the substantive law to *Kills on Top*, [*Lott v. State*, 2006 MT 279 MT 279, 334 Mont. 270, 150 P.3d 337] requires habeas corpus relief.

Kills on Top, * 11-12.

Lance stands convicted of both Aggravated Kidnapping and Deliberate Homicide via the felony murder rule from the same series of circumstances that occurred on December 30, 2000. Lance now requests the same relief afforded to *Kills on Top* using the same procedural mechanism, habeas corpus, within a year of when this Court decided *Russell* to be retroactive.

IV. Lance’s Count II is a Lesser Included Offense of Count IV

In evaluating whether one offense is a lesser included offense of another, this Court looks to whether the included offense “is established by proof of the same or less than all the facts required to establish the commission of the offense charged.” *Mont. Code Ann. § 46-1-202(9)*. “As in § 46-1-202(9)(a), MCA, the term ‘facts’ refers to the statutory elements of the offense, not the individual facts of the case.” *Russell*, ¶ 22 (citing *State v. Beavers*, 1999 MT 260, ¶ 30, 296 Mont. 340, 987 P.2d 371). In *Kills on Top*, this Court held that aggravated kidnapping is an included offense of deliberate homicide charged under the felony murder rule when the aggravated kidnapping forms the predicate offense for the felony homicide. *Kills on Top*, *9.

The only difference between *Kills on Top* and Lance’s case is that the factual predicate was found pursuant to a plea agreement, the factual basis for which was established by an affidavit filed in support of the plea agreement. (Ex. E). Both the plea agreement and the court’s judgment demonstrate that Lance’s conviction was a conviction under *Mont. Code Ann. § 45-5-102(b)*, i.e., the felony murder rule. Lance’s affidavit in support of the plea and his conviction also parallel

the statutory language and the charging language in the Second Amended Information for a conviction under the felony murder rule.

On or about December 30, 2000, in Dawson County, Montana, I participated in conduct, along with others, that caused and led to the death of Steve Berry. Specifically, during the continuing commission of the aggravated kidnapping, I, along with others, caused the death of Steve Berry who died as a result of multiple gunshot wounds to the head.

(Ex. E at 2). Under both the elements of the offenses and the specific facts of this case, Lance's conviction for Aggravated Kidnapping violates the statutory double jeopardy protections of *Mont. Code Ann. § 46-11-410*. Like Kills on Top, Lance qualifies for habeas relief in the form of an order from this Court remanding his case to the Seventh Judicial Court, Dawson County, to strike his 25-year consecutive sentence on Count II.

V. Waiver

The right to habeas corpus is a fundamental right that, in Montana, can "never be suspended." *Mont. Con., Art. II, § 19*. It can be waived, however. Due to the importance of the right, any individual seeking to waive his right to habeas corpus must be "knowing,

voluntary, and intelligent.” *City of Kalispell v. Salsgiver*, 2019 MT 126, ¶ 17-18, 396 Mont. 57, 443 P.3d 504. Additionally, “[t]his Court indulges in every reasonable presumption against a waiver of a constitutional right.” *Id.* at ¶ 18.

This Court holds that jurisdictional defects cannot be waived. *State v. Cech*, 2007 MT 184, ¶ 9, 338 Mont. 330, 167 P.3d 389 (finding conviction in violation of Montana’s statutory double jeopardy guarantee is a jurisdictional claim that cannot be waived). Further, the statutory deadlines for filing a habeas corpus petition do not apply. “The exception for filing habeas petitions to challenge a facially invalid sentence is generally limited to invalidity that stems from a rule created after time limits for directly appealing or petitioning for postconviction relief have expired.” *Steilman v. Michael*, 2017 MT 310, ¶ 10, 389 Mont. 512, 407 P.3d 313 (internal citations and quotations omitted).

Lance has not waived his habeas right to challenge his facially invalid sentence on Count II because this Court recognized the retroactive application of *Russell* in *Kills on Top*. Lance’s ability to

appeal directly to this Court or to petition for postconviction have long-since passed. As in *Kills on Top*, habeas is the appropriate remedy here and because the conviction and sentence on Count II are facially invalid and jurisdictional, the habeas waiver in Lance's plea agreement does not apply to this situation.

CONCLUSION

Because Lance's conviction and sentence on Count II is facially invalid, this petition should be granted. As this Court did in *Kills on Top*, Lance requests this Court remand to the district court to strike the illegal portion of the judgment.

Respectfully submitted this 18th day of June, 2020

/s/ Colin M. Stephens
Colin M. Stephens
SMITH & STEPHENS, P.C.
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

I, Colin M. Stephens, do hereby certify that this Petition for Writ of Habeas Corpus complies with the requirement set forth in Mont. R. App. P. 11(4)(c), in that it:

1. Does not exceed 4,000 words. Exact words are 2,955 excluding captions and certificates, as calculated by my WordPerfect X8 software;
2. Is in a proportionally spaced 14 font;
3. Has appropriate margins and is double-spaced except for lengthy quotations;

Dated this 18th day of June, 2020.

/s/ Colin M. Stephens
Colin M. Stephens
SMITH & STEPHENS, P.C.
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Colin M. Stephens, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 06-18-2020:

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Dated: 06-18-2020